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ARBITRAGE, BIOETHICS, AND CLONING: THE ABCS OF GESTATING A UNITED NATIONS CLONING CONVENTION*

Rosario M. Isasi[†] and George J. Annas^{††}

America's inability to craft a regulatory ethics of abortion has led to a wild west of unregulated research with human embryos and pregnant women by our private infertility industry. Because of an "all or nothing" research mentality, it is becoming increasingly impossible to suggest outlandish and reckless reproductive research possibilities without seeing them actually pursued. And if even the wild west seems a bit inhospitable to particular research goals, such as cloning to produce the genetic duplicate of an existing person, media darlings like Severino Antinori and Zavos Panos, and even members of the Raelian cult, clone press conferences (since they haven't been able to clone babies) to announce that they will "go offshore" if cloning is outlawed in the U.S.¹

But it is not just the lunatic fringe of cloning that sees regulatory arbitrage—seeking overseas venues to avoid local research regulations—as reasonable. Frontline American researchers have joined the exodus. Perhaps the most bizarre example is from a prominent American researcher and infertility expert, Jamie Grifo, who at the 2003 annual meeting of the American Society of Reproductive Medicine, announced an experiment he

* Adapted from a presentation at the Frederick Cox International Center on March 4, 2003.

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¹ In 2002, Severino Antinori, Panos Zavos, and Brigitte Boisselier all separately announced that they had successfully cloned a human being, or were just about to do so. None of these announcements turned out to be true. Nonetheless, the international press still gives some credence to the serial announcements of these "mad scientists" who have so far only succeeded in cloning press conferences. See, e.g., Robyn Riley, *Frankenstein Unleashed*, SUNDAY HERALD SUN (Melbourne, Australia), Oct. 19, 2003, at 14 (Zavos claims to have a "secret team" helping him at a laboratory in the Middle East). *Italian Doctor Says Three Cloned Babies Born*, REUTERS, May 5, 2004 (Antinori claims that at least three babies had been borne from cloned embryos in reproduction experiments he had collaborated on), available at <http://www.reuters.com/newsArticle.jhtml?type=healthNews&storyID=5049474§ion=news> (last visited May 25, 2004).

sponsored in China because the research could not legally or ethically be conducted in the United States. The Chinese researchers and their American collaborator took the nucleus from a dozen human oocytes (donated by a young fertile woman) and replaced them with the nucleus of early embryos created by using the oocytes of an infertile "patient." The five 'reconstituted' zygotes which developed to the four cell stage were transferred to the patient's uterus. The five embryos produced three pregnancies. The researchers continue the story:

Fetal reduction to a twin pregnancy was performed transvaginally at thirty-three days post-transfer. At twenty-four weeks Fetus B delivered due to premature rupture of membranes and died of respiratory distress. At twenty-nine weeks Fetus C delivered after intrauterine fetal demise due to cord prolapse . . . Conclusion: Viable human pregnancies with normal karyotype can be achieved through nuclear transfer . . . This finding suggests a unique approach to correct mitochondrial genetic disorders of maternal inheritance. Ongoing work to establish the efficacy and safety of nuclear transfer will result in its use as an aid for human reproduction.²

To label this a success and to state that it proves that this technique will be established as an "aid for human reproduction" based on the serial destruction of three viable fetuses is ghoulish. It is easy to see why this type of premature "trial and error" research on fetuses is outlawed even in the U.S. With the resulting publicity, it did not take China long to outlaw it as well.³ What remains inexplicable is the inability of the infertility industry itself to set any limits to the lengths American physicians can go, including going to other countries to evade our almost nonexistent legal and ethical constraints. As one observer also noted, "At the very least, it must strike us as strange that a tyrannical regime like China is seen by some researchers as a haven for free science."⁴

² John Zhang *et al.*, *Pregnancy Derived from Human Nuclear Transfer*, 80 FERTILITY & STERILITY S56 (2003).

³ "Guidelines on Assisted Reproductive Technologies for Human Beings, issued by the Ministry of Public Health (October 2003) and "Ethical Principles on Assisted Reproductive Technologies for Human Beings and Human Sperm Bank", issued by Ministry of Health (Aug. 2003). See also, Karby Leggett, *China has Tightened Genetics Regulation: Rules Ban Human Cloning; Move Could Quiet Critics of Freewheeling Research*, ASIAN WALL ST. J., Oct. 13, 2003, at A1, available at 2003 WL-WSLA 65015315 (last visited Feb. 25, 2004).

⁴ Eric Cohen, *Bioethics in Wartime*, 8 NEW ATLANTIS 23, 28 (2003), available at <http://www.thenewatlantis.com/archive/3/cohenprint.htm>.

Cloning Around the World

In commenting on the Grifo China experiment, the *Wall Street Journal*, in a front page article, described it as a type of “cloning.”⁵ Although no cloning was involved in the experiment (each of the embryos created was genetically distinct from each other and from the woman), cloning seems to be about the only reproductive technology people consistently worry about around the globe. Even the American Society of Reproductive Medicine believes reproductive cloning, cloning to make a baby, should be outlawed.⁶ And this is what makes cloning such an important bioethics issue on the international scene: it provides the world with an opportunity to come to agreement on a bioethical issue, and by adopting a treaty outlawing cloning, to set a precedent that the world can build on to develop universal principles of bioethics, especially in the area of human reproduction and human experimentation. It is not that reproductive cloning per se is the most important or pressing bioethics issue internationally – the “right to health” itself is more critical. Nonetheless, because of what cloning will do to children, and because of what it will likely lead to, such as experimentation with germ line alterations, cloning is a critical issue to every member of the human species. As we have argued previously, it makes perfect sense to begin international bioethics regulation with a cloning treaty: we believe it should outlaw any attempt to make either a child who is a genetic duplicate, or a child whose genetic code has been purposely modified so as to make a “better baby.”⁷ The United Nations’ baby steps toward an international convention to ban human reproductive cloning are important primarily because they mark the first attempt to develop an international framework for responsible social governance of a human genetic technology.⁸

That the stakes are high is well illustrated by the February 2004 announcement of a South Korean team that they had derived an embryonic stem cell from a human embryo created by somatic cell nuclear transfer—a

⁵ See Antonio Regalado & Karby Leggett, *Fertility Breakthrough Raises Questions about Link to Cloning*, WALL ST. J., Oct. 13, 2003, at A1.

⁶ *ASRM Position on Cloning and Related Issues*, American Society of Reproductive Medicine, at http://www.asrm.org/media/misc_announcements/cloning/asrmpositioncloning.html (last visited Jan 28, 2004).

⁷ George J. Annas, Lori B. Andrews & Rosario M. Isasi, *Protecting the Endangered Human: Toward an International Treaty Prohibiting Cloning and Inheritable Alterations*, 28 AM. J. LAW & MED. 151, 154-157 (2002).

⁸ There have, of course, been treaty provisions related to other things scientists and physicians do, such as human experimentation and torture, but nothing this specific and nothing that could be termed a “bioethics treaty.”

first in the world.⁹ The announcement almost immediately led the South Korean government to suspend further cloning research until national regulations had been decided upon. The lead researcher, veterinarian Woo Suk Hwang, initially threatened to exercise the regulatory arbitrage option, saying, "If Korea were to prohibit therapeutic cloning, we would go to other countries where it is permitted—Singapore, mainland China, maybe Great Britain. But my hope is that the Korean government will give us the license to do this kind of research. If they don't, we will move."¹⁰ Two weeks later, however, Hwang suspended his work and was waiting for the government to determine if he could continue it, saying that he wanted ethical guidelines and that he and his team had agreed that they would not transfer the cloning technology overseas without the government's permission.¹¹ Three months later, in May 2004, serious questions were raised about the ethics of the cloning experiment itself, including the sufficiency of IRB ("institutional review board") ethical review, and the quality of consent given by the women who donated their ova to the project.¹² The Korean researchers have denied any wrong doing – but both they and leading scientists understand that if research cloning has any future anywhere in the world, the researchers will have to follow what are already generally accepted ethical guidelines.¹³ Unlike economic arbitrage, which depends for its success almost exclusively on the possibility of profit, ethical arbitrage, at least in cloning, may be much more complex.

What is it about cloning that has aroused worldwide condemnation and simultaneous media fascination? It is not just that it seems to be science fiction and horror movies come to life as modern day Franksteins strive to create new life forms, although this is part of it. More importantly, we think, is the control proponents of this technology seek over children, a control that is absolute in its genetic form, and which threatens to treat children not as humans with rights, but as products with design characteristics. In addition, by making sexual reproduction optional, cloning actually changes the very definition of what it means to be human. This is why we have previously described cloning as an "offense against humanity" itself, something that attempts to change the nature of what it is to be human. Cloning is asexual reproduction, which is something no human being has ever done. Likewise, genetic engineering could add

⁹ W.S. Hwang, et al., *Evidence of a Pluripotent Human Embryonic Stem Cell Line Derived from a Cloned Blastocyst*, 303 SCIENCE 1669 (2004).

¹⁰ C. Dreifus, *2 Friends, 242 Eggs and a Breakthrough*, N.Y. TIMES, Feb. 17, 2004, at D1.

¹¹ A. Faiola, *Dr. Clone: Creating Life or Trying to Save It?*, WASH. POST, Feb. 29, 2004, at A1.

¹² Editorial, *Ethics of Therapeutic Cloning*, 429 NATURE 1 (2004); David Cyranoski, *Crunch Time for Korea's Cloners*, 429 NATURE 12 (2004).

¹³ Dennis Normile, *South Korean Cloning Team Denies Improprieties*, 304 SCIENCE 945 (2004)

different characteristics to humans that they have never had before, changing, again, the definition of what it means to be human. Do these things matter?

Human rights derive from our view of what it means to be human and universal characteristics of humanity. Thus, if reproductive cloning (making a human being through asexual reproduction) and genetic engineering change in nature what it means to be human, these technologies have the potential to undercut those rights internationally agreed upon and documented in international covenants and conventions.

For those who are unsure of the human rights arguments, and this includes many scientists, agreement to ban cloning can nonetheless come from its inherent dangerousness to resulting children. Today (and probably forever), human cloning is unsafe and dangerous to the resulting child.¹⁴ There is no way to predict what this kid is going to be like. Every animal model, so far, has resulted in major physical deficiencies in the offspring, as Ian Wilmut and Rudolf Jaenisch have documented.¹⁵ There is no legitimate scientist who actually thinks there is a way out of this. In sexual reproduction, when our mother's and our father's genes come together there is a mechanism by which the genes decide which one is going to express itself, called imprinting. In cloning, imprinting cannot happen because you start with an already fully formed cell. And geneticists just can't even imagine how that cell can actually grow a whole creature without having some major problems and figuring out how to produce the organs or produce the brain. No one has even begun to conceptualize that. Maybe someday they will. But right now, there is universal scientific agreement that it is dangerous to attempt this.

Not only in the scientific community, but also all the international agreements and covenants on human experimentation caution against

¹⁴ Calvin Simerly *et al.*, *Molecular Correlates of Primate Nuclear Transfer Failures*, 300 *SCIENCE* 297, 297 (2003) ("With current approaches, NT to produce embryonic stem cells in nonhuman primates may prove difficult—and reproductive cloning unachievable.") On genetic engineering, see Jon W. Gordon, *Genetic Enhancement in Humans*, 283 *SCIENCE* 202 (1999) available at <http://www.sciencemag.org/cgi/content/full/283/5410/2023> (last visited Jan 30, 2004) ("Before a human embryo is treated with recombinant DNA, we must know exactly what we are doing.") and Barry Commoner, *Unraveling the DNA Myth: The Spurious Foundation of Genetic Engineering*, *HARPER'S*, Feb. 2002, at 39, 47 available at <http://www.organicconsumers.org/patent/dnamyth.cfm> (last visited Jan. 29, 2004) ("What the public fears is not the experimental science but the fundamentally irrational decision to let it out of the laboratory into the real world before we truly understand it.") *But see* Wendy Goldman Rohm, *Seven Days of Creation: The Inside Story of a Human Cloning Experiment*, *WIRED*, Jan. 2004, at 122-129 available at <http://www.wired.com/wired/archive/12.01/clones.html> (last visited Jan. 29, 2004).

¹⁵ See Rudolf Jaenisch & Ian Wilmut, *Developmental Biology: Don't Clone Humans*, 291 *SCIENCE* 2552 (2001).

cloning because it is inherently dangerous. First is the 1947 Nuremberg code, which has become part of international law. Moreover, the 1948 Universal Declaration of Human Rights must be seen and treated like a “living document to be re-appropriated by each generation”¹⁶ and has to be adapted to the new historical challenges that threaten “the uniqueness of human beings and the foundation of their claim to dignity,”¹⁷ because “if the goal of protecting human dignity is still valid . . . it is necessary to consider future risks, and to react to them” no matter what.¹⁸ The International Covenant on Civil and Political Rights, which outlaws human experimentation without informed consent, also cautions against this.

Another common and powerful argument is that reproductive cloning, assuming it could ever be safe, commodifies children. It treats children as goods, made-to-order kids with a pre-programmed genome that you've already seen grown-up, which is dehumanizing to children. Because reproductive cloning commodifies children, it tends to undercut their human rights. The Europeans have a term called human dignity, and their position is simply that cloning is an affront to this human dignity. Americans are not that comfortable with the term of human dignity, although it is the basis of human rights and the basis for all the international covenants on human rights. The concept of human rights is not interchangeable with the notion of human dignity; however, these terms are closely related. And, historically, there would be an argument that humans have rights because they have dignity. Nonetheless, articulating what human dignity actually means remains a challenge. The core argument is that by commodifying children we dehumanize them and treat them like pets; like interchangeable products we can manufacture to our specifications and theoretically reject if they don't meet with our specifications.

Ultimately, the central argument in favor of an international convention banning human reproductive cloning is that it is a potentially species – endangering activity, and no scientist, no corporation, no individual group of people has the moral warrant to put the species at risk for their own gain. If humans are to change the definition of what it means to be human, or to try to develop a new or modified human (that may ultimately surpass us so much as to see us as fit for slavery or slaughter) then that decision should be made openly and democratically by all humans. Outlawing cloning is thus an application of the precautionary principle to modifications in human reproduction. Once a global ban is in place, only the world together can decide whether and when to lift it.

¹⁶ MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* at xvii (2001).

¹⁷ Ernst Brenda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 SMU L. REV. 443, 449 (2000).

¹⁸ *Id.*

Reproductive cloning and genetic engineering raise serious human rights concerns. And precisely because these technologies have the potential of impacting all of us as *humans* – not just habitants of any one state, country, or continent – action must be taken at the international level. Nonetheless, even though there is universal agreement on human reproductive cloning, the countries of the world have not been able to agree on a Convention to outlaw human reproductive cloning; instead they have become embroiled in a debate that has also frustrated attempts in the U.S. Congress to ban human reproductive cloning: a debate over embryo research (also called “research cloning” when embryos are used to make stem cells) and whether both research and reproductive cloning should be banned, or neither. As we write this, the UN process has been suspended for one year (in December 2003). What has been done to date is, however, instructive, and helps explain how difficult it is for the world to act on its consensus against reproductive cloning because of the competing agendas on other related issues. Perhaps the most remarkable thing in all this debate is that although many countries have said they will be havens for research cloning (regardless of a treaty signed by others), no country has announced that it would be a haven for reproductive cloning – and the near unanimous condemnation of it, coupled with the very low likely demand even if it was a safe technique (most people don’t want their children to be genetically identical to them), means that regulatory arbitrage may not be the problem with cloning that it is with many other technologies. It may also mean that we can de facto have an international ban on human cloning even in the absence of an international convention.

Bringing Cloning to the United Nations

In June 2001, following the appeals calling for an international convention banning human reproductive cloning, the Foreign Ministers of France and Germany, Joschka Fischer and Humbert Ve’drine, agreed to launch a joint effort aimed at reaching a universal legally binding instrument prohibiting human reproductive cloning.¹⁹ Later on August 7 of the same year, they submitted a request to the United Nations’ Secretary-General to include on the agenda of the 56th Session of the General Assembly the item “International Convention against the Reproductive Cloning of Human Beings.”²⁰

The General Assembly’s Sixth Committee – the legal committee – later in December, unanimously approved the proposal and added its

¹⁹ Press Release, Spokesperson from the Ministry of Foreign Affairs, Cloning (Aug. 8, 2001), available at http://www.un.int/france/documents_anglais/010808_mae_presse_dh.htm (last visited Jan. 28, 2004).

²⁰ *Request for the Inclusion of a Supplementary Item in the Agenda of the Fifty-Sixth Session*, GAOR, 56th Sess., U.N. Doc. A/56/192 (2001).

support to a ban on human reproductive cloning. By Resolution A/RES/56/93²¹ the UN General Assembly approved by consensus the establishment of an Ad Hoc Committee to consider the language of an international convention against the reproductive cloning of human beings. The Ad Hoc Committee was open to all state members and specialized agencies.²²

The French-German proposal aimed at enshrining the principles asserted by the Universal Declaration on the Human Genome and Human Rights²³ (adopted by UNESCO and endorsed by the United Nations General Assembly in 1997), with particular reference to article 11 of the Declaration which sanctions, as a practice contrary to human dignity, the reproductive cloning of human beings; and invited States and international organizations to cooperate in taking, at the national or international level, measures necessary to prevent it.²⁴

The French-German Cloning Convention

The French-German initiative was envisaged as a two-stage process because of the complex nature of the issues at stake. It was foreseen that the General Assembly at its 56th session would adopt a resolution

²¹ G.A. Res. 56/93, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/93 (2001), available at http://www.virtual-institute.de/en/hp/embryo/global/A56_93.pdf. The Resolution mentioned the legal issues that the Convention should address, such as the scope, definitions, prohibition on human reproductive cloning, national implementation (including penalties and preventive measures), jurisdiction, promotion and strengthening of international cooperation and technical assistance and the mechanisms for monitoring its implementation.

²² *The Ad Hoc Committee including the International Atomic Energy Agency, World Health Organization, and UNESCO*, Report of the Working Group, U.N. Doc. A/c.6/57/L.4 (Sept 30, 2002), available at <http://www.ods-dds-ny.un.org/doc/UNDOC/LTD/NO2/615/01/PDF/NO261501.pdf>

²³ On Nov. 11, 1997 at UNESCO's General Conference, the Universal Declaration on the Human Genome and Human Rights was adopted with the basic purpose of ensuring that developments in genetics takes due account of the need to protect human rights. Up to this date it remains the only instrument of universal scope in the field of bioethics. U.N.E.S.C.O., INTERNATIONAL BIOETHICS COMMITTEE (IBC), REVISED OUTLINE OF A DECLARATION ON THE PROTECTION OF THE HUMAN GENOME, (1995), available at <http://www.biol.tsukuba.ac.jp/~macer/EJ54M.html>. Two years later, UNESCO's General Conference endorsed The Guidelines for its implementation (30 C/Res. 26), which provided for an evaluation of both the results of the Guidelines and of the impact of the Declaration worldwide. Currently the evaluation process is taking place and is conducted by the International Bioethics Committee (IBC) and the Intergovernmental Bioethics Committee (IGBC). This evaluation constitutes one of UNESCO's priority tasks for the current biennium.

²⁴ *Records of the General Conference*, UNESCO, 29th Sess., Res. 16, available at <http://unesdoc.unesco.org/images/0011/001102/110220e.pdf> (last visited Dec. 10, 2003).

supporting negotiations on an international legal instrument banning human reproductive cloning and establishing to this end – under the auspices of the Sixth Committee – a special committee to draw up the negotiating mandate; and during the second stage, to steer the negotiations.²⁵

The cooperation among France and Germany in this field is not new. The Germans choose to work with the French for two main reasons. First, the instrumental role that France played in the adoption of the UNESCO's Declaration on the Human Genome and Human Rights was seen as an asset in terms of collaborating with an experienced partner. Second, it was a political strategy to work in collaboration with another European nation, as it will send a positive signal of cooperation between two European countries.²⁶ This joint project was also possible due to the similarities in their respective domestic legislation²⁷ and their national authorities' joint call for international governance on bioethical issues.

There were several reasons why the governments of France and Germany chose as a venue for negotiations the United Nations' General Assembly instead of UNESCO. According to German diplomats, an important reason to favor the venue of the United Nations was that it has a wider membership than UNESCO. Most importantly, the United States was not then a UNESCO State member²⁸ and they did not consider it appropriate to leave one of the most powerful nations of the world aside in such an important matter.

²⁵ Revised Proposal submitted by France and Germany, A/C.6/57/WG.1/CRP.1/Rev.; See U.N. GAOR 6th Comm., 57th Sess., available at http://www.virtual-institute.de/en/hp/embryo/global/AC6_57_L4.pdf.

²⁶ See Joachim Schemel, Taskforce on Environmental and Biopolitical Issues, German Federal Foreign Office, presentation at the 6th World Congress of Bioethics, Brasilia (Nov. 1, 2002).

²⁷ Germany and France currently have one of the most conservative national laws on genetic technologies. Both the German Embryo Protection Law of 1990 and the French Bioethics Law of 1996 prohibit all types of cloning procedures. See The 1990 Embryo Protection Act, v. 13.December.1990 (BGBl. I p.2747) (German Embryo Protection Law of 1990).

²⁸ In 1984, during Ronald Reagan's presidency, the United States withdrew from UNESCO citing mismanagement and opposite values. In September 2002—18 years later—President George W. Bush's administration decided to rejoin the organization. Another cited reason why both countries decided to go directly at the UN's General Assembly instead of to any of the specialized bodies of the United Nations—such as the High Commission on Human Rights, UNESCO or the World Health Organization—was to speed up the process. For them the supreme body of the United Nations was the most appropriate forum for dealing with a cross-cutting, multidisciplinary issue like human cloning. Finally, they believed that they could benefit from the particular legal expertise to draft conventions of the General Assembly's Sixth Committee. See *President's Message to Congress*, 20(2) WEEKLY COMP. PRES. DOC. 226 (Feb 17, 1984); *Fact Sheet: United States Rejoins UNESCO*, 38(4) WEEKLY COMP. PRES. DOC. 1540 (Sept. 12, 2002).

At first, the French-German initiative focused on banning only reproductive cloning to take advantage of international consensus on this issue. According to their strategy, negotiations would concentrate on adopting an international legally binding instrument prohibiting the reproductive cloning of human beings, and once the convention had been sanctioned by the UN's General Assembly, other negotiations of a separate convention (or a Protocol to the Reproductive Cloning Convention) related to other cloning and human genetic technologies would begin.²⁹

The French and Germans had "a simple, practical and urgent objective."³⁰ The objective of banning the birth of children produced by the means of cloning was simple, "because it was aimed at the protection of the inherent dignity of the human individual by avoiding his instrumentalisation."³¹ It was practical because it could be "worded in a single sentence and the prohibited act can be easily identified in practice, and punished by the means of easily workable procedures."³² Finally, it was urgent because it was directed at "not striving to neutralize a potential threat, but . . . to hinder a drift that is already happening."³³

The First Years of Negotiation: The Competing Proposals Emerge

The first meeting on the treaty was held in February 2002, and began with experts providing background information on scientific, ethical, philosophical and legal issues relevant to the reproductive cloning of human beings. The expert panel was criticized for not representing all regions of the world,³⁴ and for not conveying a clear message about the risks and the societal implications of human reproductive cloning.³⁵

²⁹ Aide-Memoire relating to the proposal submitted by France and Germany in document A/C.6/57/WG.1/CRP.1/Add1; U.N. GAOR, 57th Sess., Agenda Item 162, at 7, U.N. Doc. A/C.6/57/L.4 (2002).

³⁰ Jacques Villemain, on behalf of the French and German U.N. Delegations, Address to the Ad Hoc Committee on International Convention for the Prohibition of Human Reproductive Cloning (Sept. 23, 2002).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ The Syrian and Iraqi representatives felt that "there was a lack of equitable geographical representation on the panel of experts, particularly with regards to the Arab Group and the Islamic Faith." Press Release, *U.N. Ad Hoc Comm. for International Convention against Reproductive Cloning of Human Beings, At First-Ever Meeting, Committee on Convention to Ban Human Cloning Hears Expert Views on Science, Ethics Involved* (Feb. 25, 2002), U.N. Doc. SOC/4599, available at <http://www.un.org/News/Press/docs/2002/soc4599.doc.htm>.

³⁵ "The clone next door posed no special threat, an American professor of philosophy . . . told the UN Ad Hoc Committee on an International Convention Against Reproductive

The French-German initiative was received enthusiastically by the majority of the member states, reluctantly by some, and with strong opposition by a few.³⁶ In the early stage of the negotiations the sponsor delegations highlighted the fact that no state member had expressed support for the reproductive cloning of human beings. They characterized divergent positions as based on “philosophical or religious beliefs as divergent in their orientation as they are strong in the object” and reiterated that they did not think that it was “realistic to expect that the gap may be bridged in a foreseeable future.”³⁷

Some delegations supported the elaboration of an international convention that would ban only reproductive cloning as a priority. They noted that it was vital for the international community to send a clear message that the reproductive cloning of human beings was unethical, intolerable and illegal.³⁸ It was thought that, in view of the lack of consensus on research cloning, it would be difficult to elaborate a comprehensive convention swiftly, and therefore it would be unwise to attempt to include research cloning at the first stage. It was therefore suggested that research cloning could be the subject – at a later stage – of a protocol to the convention or to an entire separate convention.³⁹

It was also suggested that the legal, social, cultural, moral and ethical aspects of cloning techniques should be examined, as well as the role of women.⁴⁰ Moreover, other delegations expressed that consideration should have to be given to the fact that developing countries were particularly susceptible to the threat posed by new biotechnologies.⁴¹ Furthermore,

Cloning of Human Beings today. Clones were just people made differently, like test-tube babies. The ethical issue was whether human embryos deserved the same respect as human adults.” Press Release, *supra* note 27 (quoting Arthur Caplan).

³⁶ President Bush gave instructions to promote a total ban on human cloning. This was in turn, immediately endorsed by the Vatican, Italy and Costa Rica. President Bush still maintains his position against all forms of human cloning. See Office of the Press Secretary, Statement by the President, Feb. 27, 2003, available at <http://whitehouse.gov/news/releases/2003/02/20030227-20.html> (stating “I believe that human cloning is deeply troubling, and I strongly support efforts . . . to ban all human cloning.”).

³⁷ Villemain, *supra* note 26.

³⁸ Report of the Working Group Ad Hoc Committee on an International Convention against Reproductive Cloning of Human Beings (Sept. 30, 2002), U.N. Doc. A/C.6/57/L.4, available at <http://www.un.org/law/cloning>.

³⁹ Report of the Ad Hoc Committee on an International Convention Against the Reproductive Cloning of Human Beings (Feb. 25-Mar. 1, 2002), U.N. Doc. A/57/51, available at <http://www.un.org/law/cloning>.

⁴⁰ *Id.*

⁴¹ “Developing countries are at risks from the dangers posed by this scientific venture. As a result of poverty and ignorance prevalent in developing countries, particularly in Africa, women from these societies are likely to fall prey to guinea pig experiments from the

some delegations stated that, in the adoption of a convention against human reproductive cloning, it was important to avoid the “development of practices contrary to the recognition of equality and dignity and the rights of all human beings; and the dissemination of scientific results in a manner that is not equitable and is to the detriment of developing countries.”⁴²

Soon after the negotiation process began, two competing proposals were developed. The French and German proposal (an international ban on reproductive cloning) and a proposal sponsored by the United States, Spain and the Philippines, which called for a ban on both reproductive and research cloning in a single treaty.⁴³

The U.S. position was that by excluding research cloning, the international community would risk creating the perception that such cloning was permissible. For them, a partial ban (covering only reproductive cloning) would be a false ban, it would be ineffective in practice, and would create legal uncertainty.⁴⁴ Supporters of the dual approach have claimed that “in the current state of scientific research and knowledge, human cloning is really a single process” and that “we are at a stage in which all cloning – however it might be termed and whatever the ethical concerns it raises – is by its very nature reproductive.”⁴⁵ They also

developed or industrialized countries. There is also the problem of malfunctioning of scientific products, a situation which cannot be divorced from cloned human beings. There is a clear apprehension that cloned human beings may develop traits that work at cross-purposes with human nature.” Statement by Kenjika L. Ekedede, Minister of Legal Matter on behalf of the Nigerian delegation at the 57th U.N. Gen. Assembly, 6th Comm., Agenda Item 162 on an International Convention against Reproductive Cloning of Human Beings, (Sept. 23, 2002).

⁴² Report of the Ad Hoc Committee, *supra* note 32.

⁴³ See Report of the Working Group, Ad Hoc Committee on the International Convention Against the Reproductive Cloning of Human Beings, U.N. Doc. A/C.6/57/L.4 (Sept. 30, 2002) available at http://www.virtual-institute.de/en/hp/embryo/global/AC6_57_L4.pdf. Those states who supported a broader scope to the Convention’s mandate considered that the mandate of the Ad Hoc Committee was not constrained to a ban on human reproductive cloning. For them, the possibility of human reproductive cloning could not be adequately encountered without addressing research cloning, and therefore the scope of the proposed convention would have to take that into account. It was thus proposed that any such ban should focus on the process of cloning, as opposed to just looking at the end result of cloning.

⁴⁴ See The U.S. Delegation to the United Nations Meeting on a Treaty to Ban Human Cloning, *Views of the United States on the Science and Ethical Implications of Human Cloning*, U.S. Position Paper presented to the UN Ad Hoc Committee on the International Convention Against the Reproductive Cloning of Human Beings, (Feb. 26, 2002), available at http://www.cloninginformation.org/info/un-us_cloning_view.htm. (last visited Apr. 10, 2004).

⁴⁵ Statement by the delegation of Italy to the Working Group Ad Hoc Committee on an International Convention Against the Reproductive Cloning of Human Beings, United Nations, (Sept. 24, 2002).

considered that “the values legally protected in the prohibition of both reproductive and research cloning are necessarily the same” and in consequence a partial prohibition of human cloning would lose a great part of its legal basis.⁴⁶

In contrast, advocates for a narrow ban believe that it is possible, although admittedly difficult, to regulate them separately. It would require country-by-country regulation of research cloning (e.g., to prevent cloned embryos from being implanted in a woman’s uterus), but this could be done by a national research licensing scheme (as in England), and the physical and staffing separation of research facilities from infertility facilities.

In an effort to build an effective consensus that would permit the process to move ahead and allow the Ad Hoc Committee to lay the groundwork for the treaty to be drafted, other member States proposed alternative approaches to the Convention’s scope.

The delegation of Mexico, for example, favored a third approach, consisting of a temporary moratorium on all human cloning techniques; moratoria that would be in effect while the adoption of an international binding instrument was pending.⁴⁷ The Netherlands in turn proposed a “balanced approach,” in which the Convention would contain a permanent prohibition on human reproductive cloning and a temporary ban (of maximum five years) on research cloning, so as to enable the international community to consider changes in standards and relevant scientific developments over time.⁴⁸

A “two-tiered” approach was proposed by the Republic of Korea, where the elaboration of the convention “would focus on the reproductive cloning of human beings, and also contain provisions on other human cloning activities such as therapeutic or experimental cloning that Contracting Parties would be able to opt in or opt out of when signing or ratifying the convention or at any time thereafter.”⁴⁹ Furthermore, Malaysia suggested proceeding with a ban on reproductive cloning on the basis of a ‘fast-track approach,’ “given the urgency of the matter, and at the same time proceed with work on therapeutic and experimental cloning on the

⁴⁶ Statement of Spain before the Working Group Ad Hoc Committee on an International Convention Against the Reproductive Cloning of Human Beings, United Nations, (Sept. 23-27, 2002).

⁴⁷ Proposal submitted by Mexico A/C.6/57/WG.1/CRP.3 and Statement by the Mexican Delegation at the 57th Sess. of the U.N. Gen. Assem., (Oct. 17, 2002) *available at* <http://www.un.org/law/cloning> (last visited Apr. 10, 2004).

⁴⁸ Statement by Mr. Bart Wijnberg, Permanent Mission of the Kingdom of Netherlands to the United Nations, U.N. Gen. Assem. 57th Sess., 6th Comm. (Sept. 24, 2002).

⁴⁹ Statement by Head of Delegation, Mr. Hahn Myung-jae, Permanent Mission of the Republic of Korea to the UN at the Working Group for the International Convention against Reproductive Cloning of Human Beings, (Sept. 24, 2002).

basis of a 'slower-track approach.'⁵⁰ Besides the issue of the scope it was stated that a crucial element for ensuring the adoption of the Convention and its implementation was the promotion of international cooperation geared towards alternative technologies for developing countries, capacity building, and the setting up of international research networks.⁵¹

Deadlock

The rifts between the two primary factions at the United Nations deepened during the negotiations, making it impossible to reach a consensus on a comprehensive prohibition on cloning. At the last minute envoys from France, Germany, United States, Spain and the Philippines agreed to end their dispute and to instead put off the drafting for another year. There was broad support from the 190 United Nations member countries for a ban on reproductive cloning, but this was not the case for a ban on research cloning. In consequence, the Sixth Committee adopted a draft decision without a vote and decided not to take action on any other proposals. Subsequently, the General Assembly adopted the submitted draft decision and agreed once again to extend negotiations for a mandate on an international convention to ban cloning for another year.⁵² A year later, in September 2003, the Sixth Committee was called upon to decide on the future course of the negotiation process. The Committee usually operates in a consensual manner, but after informal consultations at the Working Group it was concluded that no compromise proposal could be agreed to.

This sharp division remains today among two factions. The governments of Costa Rica and the United States headed a forty-nation block⁵³ that derailed the efforts to reduce the human cloning ban to cover

⁵⁰ Statement by Mr. Hasmy Agam, Permanent Representative of the Government of Malaysia to the UN in New York, on the International Convention against Reproductive Cloning of Human Beings, Feb. 26, 2002.

⁵¹ Proposal submitted by Brazil concerning the revised proposal submitted by France and Germany in document A/C.6/57/WG.1/CRP.1/Rev.1, A/C.6/57/WG.1/CRP.6.

⁵² At the 28th meeting, the 6th Committee adopted the draft decision A/C.6/57/L.24. *See Report of the 6th Comm. 57th Sess., International Convention against the Reproductive Cloning of Human Beings*, U.N. Doc. A/57/569 (Nov. 11, 2002), available at http://www.virtual-institute.de/en/hp/embryo/global/A57_569.pdf.

⁵³ Antigua and Barbuda, Benin, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, El Salvador, Eritrea, Ethiopia, Fiji, Gambia, Georgia, Grenada, Haiti, Honduras, Italy, Kazakhstan, Kenya, Kyrgyzstan, Lesotho, Madagascar, Marshall Islands, Micronesia, Nauru, Nicaragua, Nigeria, Palau, Panama, Paraguay, Philippines, Portugal, Saint Kitts and Nevis, Saint Vincent and the Grenadines, San Marino, Sierra Leone, Spain, Suriname, Tajikistan, Timor-Leste, Uganda, United Republic of Tanzania, United States of America, Uzbekistan, Vanuatu and Zambia. *See U.N. GAOR, 58th Sess., 6th Comm., Draft Res., International Convention against the Reproductive Cloning of Human Beings*, U.N. Doc.

only reproductive cloning.⁵⁴ The French and Germans devised a new proposal consisting of a single convention containing two obligations on all contracting parties: a ban on human reproductive cloning – without the possibility of making any reservations – and, regarding other types of cloning technologies, an obligation to prohibit, impose a moratorium, or otherwise regulate them by means of national legislation.⁵⁵

Supporters of the Costa Rican-U.S. proposal called for an international convention against all types of human cloning. They also appealed to member States to prohibit – pending the adoption of the convention – any research experiment, development or application in their territories, or areas under their jurisdiction, or control of any technique aimed at human cloning.⁵⁶ In addition, their proposal called on nations to adopt measures to prohibit “those techniques of genetic engineering that may have adverse consequences on the respect for human dignity.” Finally, the proposal pleaded to states to allocate “funds that might be used for human cloning technologies to pressing global issues in developing countries such as famine, desertification, infant mortality and diseases, including HIV/AIDS.”⁵⁷

A rival group of over fourteen countries, led by the governments of Belgium and the United Kingdom, propose that the top priority should be a ban on reproductive cloning. They recommend the elaboration of a specific convention against the cloning of human beings for reproductive purposes;

A/C.6/58/L.2 (2003), available at <http://www.un.int/usa/A-C6-58-L2-cloning.pdf> (last visited Dec. 10, 2003).

⁵⁴ This change falls in line with existing German and French law. The German government has come under serious pressure from its parliamentarians and citizens for promoting a partial ban on human cloning since this would stand in contradiction with domestic law. Further clouding the issue for the Germans and French was a recent vote in the European Parliament calling for a comprehensive ban on human cloning.

This year Germany’s lower house of Parliament (Bundestag) overwhelmingly approved a motion calling for an international comprehensive ban on human cloning. The motion calls for the German government to work “within the framework of the UN towards a ban on both reproductive and therapeutic/research cloning.”

⁵⁵ German-French non-paper submitted at the Ad Hoc’s Committee Working Group on Sept. 29, 2003 described in A/C.6/58/L.9.

⁵⁶ Letter dated 2 April 2003 from the Representative of Costa Rica to the United Nations addressed to the Secretary General, U.N. Doc. A/58/73, available at <http://www.un.org/law/cloning> (last visited Apr. 10, 2004).

⁵⁷ Antigua and Barbuda, Benin, Costa Rica, Côte d’Ivoire, Dominica, Dominican Republic, El Salvador, Eritrea, Ethiopia, Fiji, Gambia, Georgia, Grenada, Haiti, Honduras, Italy, Kazakhstan, Kenya, Kyrgyzstan, Lesotho, Madagascar, Marshall Islands, Micronesia, Nauru, Nicaragua, Nigeria, Palau, Panama, Paraguay, Philippines, Portugal, Saint Kitts and Nevis, Saint Vincent and the Grenadines, San Marino, Sierra Leone, Spain, Suriname, Tajikistan, Timor-Leste, Uganda, United Republic of Tanzania, United States of America, Uzbekistan, Vanuatu and Zambia. See Draft Res., *supra* note 46.

and regarding other forms of cloning, this faction of countries suggest to address it (including the elaboration of an appropriate separate instrument) as soon as the negotiations on a convention against human reproductive cloning have been concluded. The Belgium proposal also contains a call to States who have not yet done so, to adopt at the national level a prohibition on reproductive cloning, and a moratorium on, or a prohibition of other forms of human cloning that are contrary to human dignity.⁵⁸

The U.S. delegation claimed that “promises to consider, at some future time, proposals for other international instruments, such as those contained in draft resolution . . . are too vague to be taken seriously.”⁵⁹ This was consistent with the U.S. insistence all along of an ‘all-or-nothing’ approach, favoring nothing rather than a ban just on reproductive cloning.⁶⁰

Most recently, as U.S. officials were campaigning for a General Assembly vote on the Costa Rican-U.S. draft resolution,⁶¹ the Organization of the Islamic Conference (OIC) moved to defer the issue in the hope that consensus could be achieved on the matter at a later time.⁶² In early November 2003, the Sixth Committee approved the OIC’s motion to postpone consideration of the cloning convention for two years. In early

⁵⁸ Belarus, Belgium, Brazil, China, Czech Republic, Denmark, Finland, Iceland, Japan, Liechtenstein, South Africa, Sweden, Switzerland and United Kingdom of Great Britain and Northern Ireland. See U.N. GAOR, 58th Sess., 6th Comm., Draft Res. International Convention against the Reproductive Cloning of Human Beings, U.N. Doc. A/C.6/58/L.8 (2003), available at http://www.virtual-institute.de/en/hp/embryo/global/AC6_58_L8.pdf (last visited Dec. 10, 2003).

⁵⁹ Press Release, United States Mission to the United Nations, Statement by Ambassador Sichan Siv, United States Representative to the Economic and Social Council, on the International Convention against Reproductive Cloning of Human Beings, at the 57th Session of the United Nations General Assembly, 6th Committee (Oct. 17, 2002), available at http://www.un.int/usa/02_157.htm.

⁶⁰ See Press Release, United States Mission to the United Nation, Statement by Carolyn Wilson, U.S. Deputy Counselor for Legal Affairs, on Agenda Item 158: International Convention Against the Reproductive Cloning of Human Beings, in the Sixth Committee, (Oct. 21, 2003), available at http://www.un.int/usa/03_187.htm. See also *D.C. Derails Drive at U.N. for Cloning Treaty*, (CNN News Report, Nov. 6, 2002) (stating that a U.S. official reportedly said “we very strongly feel that no decision is better than a bad decision.”).

⁶¹ Wilson, *supra* note 55. See also Kirk Semple, *U.N. to Consider Whether to Ban Cloning of Embryos*, N.Y. TIMES, Nov. 3, 2003, at A11; *U.S.-led Push to Ban Human Cloning Falters*, THE STRAITS TIMES, Oct. 31, 2003.

⁶² The representative of Iran orally introduced a procedural motion on behalf of the Organization of the Islamic Conference (OIC) prior to action on the Sixth Committee’s agenda item pertaining to the cloning convention. *Differing Views Heard as Legal Committee Discusses Conditions for States, Others to Express Reservations to Treaties*, Press Release, U.N. GAOR 6th Comm., 58th Sess., (2003) U.N. Doc. GA/L/3242, available at <http://www.un.org/News/Press/docs/2003/gal3242.doc.htm>.

November 2003, the Sixth Committee approved the OIC's motion to postpone consideration of the cloning convention for two years.⁶³ Consequently, the committee will not take any action on the drafts resolutions. While delegates against the deferral criticized the committee's inaction on such a significant issue, delegates voting in favor of deferral cited concern over the lack of consensus on the issue of therapeutic cloning and expressed hope that the additional time would provide the opportunity to study the subject in greater detail and build a stronger consensus.⁶⁴ Those in favor of the motion emphasized that deferral "reaffirmed the importance of the question."⁶⁵ The General Assembly, after reviewing the Sixth Committee's recommendation, decided to postpone consideration of the issue for one year.⁶⁶

The Road Ahead

The General Assembly traditionally seeks to reach a consensus on new conventions to generate support and legitimacy. The legitimacy of the United Nations in providing leadership on biomedical issues such as cloning is not questioned, but its effectiveness will depend almost entirely on near unanimity (or effective consensus), among the nations of the world.

France and Germany believe (reflecting the General Assembly) that an international convention on cloning can only be achieved successfully by a consensus, and that achieving such a consensus is not an impossible task. The U.S. agrees but with a caveat; it must be a consensus based on U.S. doctrine:

Is consensus optimum? Is universal ratification desirable? Absolutely. But it is also important to confront the phenomenon of cloning and to make clear that the international community will not tolerate the degradation of human life and dignity.⁶⁷

More depressingly is the increasing political (and ethical) isolation of the United States, which includes the President's Bioethics Council which seems to see American bioethics as a home grown product. At least since

⁶³ The motion to postpone passed by a vote of 80-79, with fifteen abstentions. Press Release, U.N. GAOR, 58th Sess., 6th Comm., *Legal Committee, Ending Session, Recommends that General Assembly Defer for Two Years Consideration of Human Cloning*, U.N. GAOR 6th Comm., 58th Sess. (2003) U.N. Doc. GA/L/3246, available at <http://www0.un.org/News/Press/docs/2003/gal3246/doc.htm>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Warren Hodge, *U.N. Delays Debate on Cloning of Human Beings One Year*, N.Y. TIMES, Dec. 10, 2003, at A5.

⁶⁷ Wilson, *supra* note 55.

the beginning of the Iraq war, the Council has not been overly enthusiastic in its examination of ethical opinions from France and Germany. The deadlock is disheartening both for itself, and for the role of the U.S. in manufacturing it. How we deal with the challenges posed by the new human genetic technologies implicates our self-understanding not only as moral persons but also as members of the species. As in the Kyoto treaty, the International Criminal Court, and in waging preemptive war, the United States has decided to go its own way in defiance of international consensus. In the case of the cloning treaty, just as U.S. domestic abortion politics has resulted in a failure of regulatory policy on embryo research, so at the other extreme only total bans are acceptable to the current administration. In the cloning arena, this has resulted in a major missed opportunity for the world, and a missed opportunity for the U.S. to show international moral leadership and help lead an international dialog on universal values in bioethics and human rights.

The only good news is that human reproductive cloning may not be possible, and even if it is, attempts to do it will likely be universally condemned because of its inherent dangerousness to children, making it an illegal experiment. This will not, however, stop the international outlaws who consider themselves above international consensus from trying, since they are willing to pursue their dangerous experiments in any country that will have them. So we end where we began: a convention to outlaw human reproductive cloning was important not so much for what it did, but for the process of international agreement on a major bioethics issue, and for the precedent it set. Unfortunately, to date the precedent is that it is very difficult, if not impossible, for the world to agree on any issue involving research on human embryos, at least without the active support and leadership of the U.S. During the lull at the U.N., other avenues will have to be pursued. Regional agreements are still possible, as are national laws. More universally applicable declarations from medical and scientific organizations on ethical standards also have a role to play.

The ABCs of arbitrage, bioethics, and cloning remain unchanged from the way they were on Dolly's birthday seven years ago: countries and scientists can opt out of the general global consensus, but there is little to be gained scientifically and economically from doing so in this area, and – as even the early results of the South Korean cloning experiments indicate – there will likely be a very high political price to pay for defying the worldwide moral consensus, even if we have thus far been unable to memorialize it in a treaty.