**Institutions of International Policy and Governance: Experience of the United Nations / UNESCO**

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\*This is work in progress\*

My focus is essentially on the 1997 Declaration on the Human Genome and Human Rights. I will be using this instrument to talk about types of binding sources of international law and how one of them is of particular relevance in the context of human reproductive cloning. In the process I will look at the role of UNESCO and the UN and their contribution to the regulation of human reproductive cloning. I will be stating that while there was a failed attempt at putting together a treaty to prohibit human reproductive cloning, there however exists binding law by way of customary international law that establishes a norm against human reproductive cloning, tracing its origin to the 1997 Declaration. I will then be asking the general question about the relevance of international custom as a source of law in other areas of technology such as the topics under the key emerging global challenges that we will be talked about shortly.

I will then be touching on institutional challenges to regulating biotechnologies using the example of ownership of the genome.

**Customary international law and human reproductive cloning**

Customary law – the principles

Customary law is unwritten international law based on a general and consistent practice of States accepted by them as legally binding. (‘The termination and revision of treaties in the light of new customary international law’, Nancy Kontou, Clarendon Press, Oxford, 1994, p.2) Under Article 38 (1) (b) of the Statute of the International Court of Justice allows the international court to apply custom as a source of international law in resolution of disputes. This provision is generally accepted as a listing of the sources of international law and is regularly quoted in reference to what is accepted as law at the international level by States. Although listed in a particular order, treaty and custom are not considered to be any better than each other as both are based on consent of States and can act to nullify each other or supercede each other given the right conditions are satisfied. (Examples where treaty superceded by custom – law of sea, three mile territorial sea to 12 mile. Non intervention, prohibition of use of force rules have been changed. Fisheries – law fast changing – long standing concepts may become incompatible with new custom within a short period of their entry into force. Anctartic treaty regime had become incompatible with legal developments taking place in the course of two decades following its adoption.) But for practical reasons – ease of determination of content and precision- all the advantages that come with written law, treaties are more important as sources of law. However it has been argued that customary law is the highest source of law. In ‘principles of international law (1952), Hans Kelsen postulates that customary international law is the highest source. International law’s grundnorm is : ‘ the states ought to behave as they have customarily behaved’. The norm ‘ pacta sunt servanda’ as the grundnorm of the subordinate legal order - international treaty law, is merely a norm of positive (customary) law. (Uncertainty in International Law : A Kelsenian perspective, Jorg Kammerhofer, Routledge, 2011, p.236)

The conditionality attached to establishment of state practice comes from the rules of consistency. The requirement for overall broad consistency in practice does not rule out some deviations unless they are substantial inconsistencies. (North sea continental case, Anglo-norwegian fisheries case at 137-8, Asylum case, ICJ reports 1950, at 276).

Statements about State practice is also counted as State practice because if there is discrepancy between what is being said and what is actually happening, there is no consistency and hence no State practice (US nationals in morocco case (diplomatic correspondence) ICJ reports,1952, 200)

The objective element is established via State practice as mentioned above and the subjective element required to establish custom is the need for State practice to be contemporaneous with *opinion juris.* ‘not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it… The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even the habitual character of the acts is not in itself enough. – ICJ reports 1969, at 44. Lotus case 1927, PCIJ Series A, No.10 at 28 *opinio juris* can also be inferred from circumstances surrounding particular acts or omissions. – US restament 1986, ss 102, comment c. In any event what is required is opinion juris communis – not just one state but other states must also follow the rule or fail to protest in the belief that their conduct is legally obligatory.

General Assembly Resolutions as custom initiators –the case of Resn. 53/152, 1998.

A General Assembly resolution, adopted by consensus and not being voted upon is a strong statement about the rules of conduct of entities towards which it is directed, could be States or those regulated by States. The UN Charter proclaims recommendatory powers to GA resolutions under Article 13 (1). The General Assembly resolution 53/152 adopted in 1998 and entitled ‘ Universal Declaration on the Human Genome and Human Rights’ is a rule creating declaration that has since been adopted in parts or in whole by various States’. Article 11 states ‘reproductive cloning should be prohibited, contrary to human dignity therefore’. This statement is indicative of emerging rule in international law. (*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) While it can be debated as to whether this is indeed an emerging or an existing rule (See ‘National Legislation Concerning Human Reproductive and Therapeutic Cloning’, UNESCO, 2004 for national legislation prohibiting human reproductive cloning, and passed prior to the 1997 UNESCO Declaration), it certainly is indicative of an emerging international rule. In the Texaco case (53 ILR, 1979, at 486), it was stated ‘what is required is an examination of whether resolutions with similar context, repeated through time, voted by overwhelming majorities, giving rise to a general opinio juris, have created the norm in question’.

Article 11 explicitly pronounces human reproductive cloning to be contrary to human dignity. On the other hand operative paragraph b of the 2005 resolution on human cloning states ‘to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life.” (resn.59/280 of 2005). The official records of the discussion following the adoption of the resolution clearly indicate that States declared human reproductive cloning to be incompatible with human dignity and protection of human life.(A/59/PV.82). The resolution adopted by the GA in 2005 comes in the wake of its adoption of 1997 UNESCO declaration of which Article 11 deals with the same subject. The expression of norm in both these declarations are clearly of the same nature and although the former resolution has been voted upon and includes numerous negative votes, these votes are not an expression of non acceptance or discontinuity in norm on human reproductive cloning. The statements following the adoption indicate that the norm has been reiterated and therefore is continuous. There indeed is an overwhelming majority of States that support the prohibition of human reproductive cloning. The existence of national legislation present some idea of the legal obligation that States feel they ought to keep to, providing the subjective element of State practice which is essential for building custom.

Some difficulties with customary international law

Despite all the examples of how custom has played and continues to play a role in international law, there are a number of theoretical and practical challenges when it comes to identifying and establishing binding law by way of custom. Lepard in his new look at customary international law starts by saying that customary human rights law has burgoned in recent decades (‘customary international law: A new theory with practical applications’, Brian D. Lepard, (ASIL Studies in international legal theory) CUP 201). It is in this trend that I think regulation of human genome will take us – more customary international law developed around genetic research.

While it is seemingly advantageous to have a system of law formation through custom which seems flexible and yielding to change particularly in the context fast moving technologies, it is not so easy to grasp how the flexibility actually works and under what conditions. Suppose the reproductive cloning technique were to improve greatly in animals with chance that such a technique can be safely applied on humans, will the law be difficult to change or alter under those circumstances? If there are some countries/ groups that would like to research in this area, will it be possible? How does custom change? These aside there are some difficult challenges in fundamentals – identification of customary law is one among them. State practice and *opinio juris* are necessary elements as already discussed. What acts as evidence of the presence of these two elements? (Kammerhofer and theoritical challenges)

Custom poses the ultimate challenge – to use modern popular gaming lanugage- in international law and for that matter in terms of any system of law.

Summary on CIL and HRC

Customary international law can play a significant role in the establishment of principles that govern human genetic research and its application. Where the possibility of consistent practice is very low such as in research cloning and stem cell research, pluralist frameworks will be develop presenting us with the challenge of harmonising applications of these norms within their respective jurisdictions. The role of domestic legislation and courts are important is in the context of developing international law in this area. International organisations are forums for discussion and debate will continue to play a role in the development of norms in bioresearch governance. The role of transnational networks in conjunction with State enforcement agencies will provide valuable practice points to plug into.

Institutional Challenges in regulating biotechnologies.

There are a few institutional challenges in producing hard law in human biotechnologies. The International Bioethics Committee of UNESCO which produced the 1997 Declaration, is an innovative committee made of independent experts and tasked to deal with challenges in the ‘life sciences’. But by the very nature of the body, sitting within an intergovernmental organisation and using a mandate set by the States, it has been more focussed on the public law aspects of governance of biotechnologies. Human rights law has been the framework if not the complete focus of the three main instruments elaborated by the IBC. The public-private interface and private commercial interests have been out of focus in this context. But there is still room to reclaim space in private-public issues and reopen the discussion on ethical aspects of ownership on the genome. The 1997 Declaration encapsulates in Articles 1 and 4 some of the tensions between the commercial and public interests that featured in its debates between 1993-’97 wherein the human genome was (symbolically) given the status of ‘the heritage of humanity’ indicating some form of regulated ownership. It is interesting to note that when discussed at a forum such as the IBC the idea of regulated ownership emerged, whereas in other forums focussed on trade this would not have been the outcome. But perhaps it is not so true anymore that trade forums and organisations can operate without heed to concerns such as health and the environment. The Doha Round of the World Trade organisation has led to proposed amendments to the TRIPS Agreement in relation to Article 31 demonstrating that the international community’s parallel interests in health and trade have converged with some positive results for the protection of health.

Another approach to looking at ownership on the human genome would be to look upon the human genome as a natural resource and to consider application of principles of ownership that have been developed for plant genetic resources. The human genome may be intimately tied to identity of the human being, but is also happens to be a valuable natural resource. There are some rich debates on genetic resources in international law, the Convention on biological diversity have just concluded a protocol on access and benefit sharing of genetic resources. This in effect marks a turning point in international law and is making in-roads into international intellectual property law.

Multiple coordinates need to be established for the debate on ownership of human genetic resources. Various forums are suitable to deal with various aspects of the regulation of human genetic resources, and this should include the IBC and trade forums.

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