**International Journal of Intellectual Property**
ISSN 2210-1772
Int. J. Res. Intel. Pro. Vol. 2, 1, (Jan. 2014)

# The Impact of TRIPS on Human Rights Law

***Dr. Salwa Yousef Elekiaby***
*College of Law – University of Bahrain*
*Lecturer at faculty of law – Zagaziq University (Egypt)*

## Abstract

The impact of TRIPS on Human Rights law" explores the intersections between intellectual property and human rights law. The relationship between these two fields has captured the attention of governments, policymakers, and scholars. Those intersections affect many aspects of human rights including public health, technology transfer, agriculture, and the rights of indigenous peoples. At the same time, the creators and owners of intellectual property are asserting a human rights justification for the expansion of legal protections.

The paper analyzes the relationship between human rights and the TRIPS Agreement from a legal perspective. The observations in this paper reflect the preliminary nature of IP right, the sources of human rights relating to TRIPS, and it also discusses the impact of each IP protection on human rights law, the paper ends with a conclusion and summarizes results and remarks.

**Keywords:** human rights, civil and political rights, economic, social and cultural rights, right to health, intellectual property, TRIPS agreement, authors' rights, copyright, patent, pharmaceuticals, indigenous peoples, WTO.

# أثر اتفاقية تريبس على حقوق الإنسان

**د. سلوى يوسف الأكيابي**
كلية الحقوق – جامعة البحرين
محاضر في كلية الحقوق – جامعة الزقازيق (مصر)

## الملخص

يتناول البحث العلاقة بين فكرة الملكية الفكرية كما وردت فى اتفاقية التربس وحقوق الإنسان، فيتعرض أولاً لمفهوم حقوق الملكية الفكرية كحق من حقوق الإنسان وفقاً للمعاهدات الدولية لحقوق الإنسان، وطبيعة تلك الحقوق ونطاق تطبيقها من منظور القانون الدولى لحقوق الإنسان، ثم يبرز مجهودات الأمم المتحدة فى هذا السياق، ويناقش بشىء من التفصيل أوجه التعارض بين حماية حق الملكية الفكرية كما هو وارد فى اتفاقية التربس، وحقوق الإنسان كما وردت فى المواثيق الدولية لحقوق الإنسان، ومنها على سبيل المثال الحق فى الصحة والحق فى الغذاء، ويختتم البحث بخاتمة تتضمن النتائج والتوصيات.

**الكلمات المفتاحية:** إتفاقية تريبس، حقوق الإنسان.

# The Impact of TRIPS on Human Rights Law

***Dr. Salwa Yousef Elekiaby***

*College of Law – University of Bahrain*

## I) Introduction:

Intellectual Property Rights (IPRs) are human rights recognized in most major human rights instruments[1]. It is protected simply because it is the fruit of human mind, and it should be protected as the persons are generally the only owners of their work, therefore, taking their work fruit will harm inventors and creators right to benefit from their own work fruit[2]. Furthermore, inventors or creators are bestowing their works, and their work is stamped with their mind thoughts and personality, so there should be an ethical assumption to exploit their own work without third parties intervention[3]. Moreover, the well-known reward-justification theory contends that protecting IP is acting like an incentives or compensation to encourage invention and creations, thus states must prevent any unauthorized

1- For example; the Universal Declaration of Human Rights (UDHR) stipulated that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author", Universal Declaration of Human Rights, G.A. Res. 217, UN. GAOR, 3rd Sess., 1st Plen.mtg., UN. Doc A/810 (Dec.10, 1948) [hereinafter UDHR], also the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognized everyone's right to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), GA.Res.2200 (XXI), 21 UN GAOR Supp. (No 16) at 49, UN Doc A/ 6316 (1966). [here inafter ICESCR].

2- Commentators, notably, professors William Fisher and Lawrence Lessig, argue that loosening of control of copyrighted works, will promote creativity and cultural diversity As Fisher explained, collective creativity is important because it transforms listeners and viewers from passive consumers to active producers (or reproducers); it creates a "more collaborative and playful, less individualist or hierarchical" creative environment" See; Peter K. Yu, Reconceptualizing Intellectual Property interests in a Human Rights Framework, University of California, Davis, Vol.40, at 1102.

3- Michael Blakeney, Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement (London: Sweet and Maxwell, 1996), at 10

exploitation to such rights and reward its inventors or creators[4]. Therefore, IP is brushed with human rights characteristics, such as indivisibility and interdependence, which means that IPR should be practiced equally to any other human right, as it is not of less or more importance than any other human right[5].

In fact, IP received global attention not only in human rights law, but also in major intellectual property instruments. However, no references to "human rights" appear in various IP treaties such as Paris, Berne,[6] and most recently TRIPS[7]. These treaties describe the legal protection to IP as a "private rights" or "exclusive rights"[8]. Moreover, TRIPS demonstrates the intensive protection for IPRs, as it requires states members to fulfill the "minimum standards" of protection, while there are absolutely no concerns about "maximum standards", which may open the door for governments to embrace more stringent domestic IP laws or treaties[9]. Furthermore, "TRIPS plus", which are bilateral agreements with developing countries, impose even higher standards protection for IP than TRIPS require, and subsequently it has been a subject for strong opposition on human rights grounds[10]. In fact, TRIPS

4- Ibid.

5- There are three possible interpretations for IPRs: the first; is that IPRs have no human right dimension and is purely legal right, and this interpretation appears incorrect, the second; is that IPRs are human rights because it has long been recognized as a basic human right, the third; is that some aspects of IPRs have potentially adverse implications for human rights. See; Duncan Matthews, Intellectual Property Rights, Human Rights, and the Right to Health, In W. Grosheide (ed.) Intellectual Property rights and Human Rights: A Paradox, Edward Elgar, (2009), at 2.

6- Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised at Paris, July 24, 1971, 1161 U.N.T.S. 31 [hereinafter Berne Convention].

7- Agreement on Trade-Related Aspects of Intellectual Property Rights, April. 15, 1994, Marrakesh agreement establishing the World Trade Organization, Annex 1c, LEGAL Instruments-Results of Uruguay Round, Vol.31, 33I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

8 Laurence R. Helfer, Towards a Human Rights Framework for Intellectual Property, U.V. Davis Law Review, vol.40, p.971, 2007, at 979, also, S Walker, 'A Human Rights Approach to WTO's TRIPS Agreement' in FM Abbott, C Breining-Kaufman, and T Cottier (eds), International Trade and Human Rights: Foundations and Conceptual Issues (2006) 171–179.

9- Genetic Resources Action International, "TRIPs-plus" Through the Back Door: How Bilateral Treaties Impose much Stronger rules for IPRs on Life than the WTO (July 2001) at http://www.grain.org , See, e.g., TRIPs Agreement, supra note 4, at art. 1(1) ("Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement."); Laurence R. Helfer, Human Rights and Intellectual Property: Conflict or Coexistence?, 5 MINN. INTELL. PROP. REV. 47 (2003), available at http://mipr.umn.edu/archive/v5n1/Helfer.pdf, at 58

10- See, e.g., Intellectual Property Rights and Human Rights: Report of the Secretary-General, ESCOR Sub-Comm'n. on the Promotion and Protection of Human Rights, 52nd Sess., Provisional Agenda Item 4 at 8, U.N. Doc. E/CN.4/Sub.2/2001/12 (2001), Globalization, TRIPS and Access to Pharmaceuticals, WHO POLICY PERSPECTIVES ON MEDICINES (World

is treating IPRs as private rights, thus placing it over public interests, through protecting producers and owners of IP products as the only "right holders", while there were no protection for IP products' consumers whether individuals or groups.

By contrast, human rights law grants almost equal status for both producers and consumers. Such TRIPS treatments are generally considered to be non-human rights aspects of protection for IP rights. This approach raises current and future concerns on a wide range of human rights in developing and LDCs[11].

Possible contradiction between TRIPS and human rights most likely undermine fundamental human rights, for example; pharmaceutical patents as it has a massive impact to the rights to life and health, patenting of plant varieties impact the right to food, in addition to other adverse effects to the rights of indigenous people, and the right to benefit from scientific progress. Most of these contradictions returns to the ambiguous scope and the evolving norms of various human rights over time, while IP protection in TRIPS is clearly defined, so there is no estimation for the possible complication between human rights and TRIPS in present or in future.

The discomfort between human rights and TRIPS has been reflected in various events, it can be traced through the Human Development Report 2000 'Human Rights and Human Developments adopted by the United Nations Development Programme (UNDP). The resolution on 'Intellectual Property and Human Rights adopted by the UN Sub-Commission on the Protection and Promotion of Human Rights[12].

This paper analyzes the relationship between human rights and TRIPS Agree ments from a legal perspective. So it is important to discuss first the nature of IP right, then to propose the possible contradiction between TRIPS and human rights, and lastly conclude with results and remarks.

## II) Intellectual Property in Human Rights Instruments:

Intellectual property right can be recognized in major human rights treaties, as well as the intellectual property law, particularly, TRIPS agreement. Thus it is important to precisely determine the nature and scope of intellectual property as a

Health Organization), No. 3, Mar. 2001, at 5. The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner, ESCOR Sub.Comm. on the Promotion and Protection of Human Rights, 52nd Sess., Provisional Agenda Item 4 at 5, U.N. Doc. E/CN.4/Sub.2/2001/13 (2001) [hereinafter High Commissioner Report]

11- See TRIPS Agreement, supra note 6, at pmbl. ("recognizing that intellectual property rights are private rights"), Laurence R. Helfer, supra note 7, at 58.

12- United Nations Development Programme (UNDP), Human Development Report 2000 (2000). UN Sub-Commission on the Promotion and Protection of Human Rights, 'Intellectual Property Rights and Human Rights' adopted 17 August 2000, UN Doc. E/CN.4/Sub.2/RES/2000/7.

human right[13]. Accordingly, this part tries to discuss the nature of intellectual property as it was set in major human rights instruments, and its scope effects on states obligations.

**1. Nature of intellectual property rights:**

The protection of intellectual property rights has long been recognized as a basic human right. In major human rights instruments, namely, the Universal Declaration of Human Rights (UDHR)[14] - adopted unanimously by the UN General Assembly in 1948- provides protection to the authors' "moral and material interests"[15] resulting from their "scientific, literary, or artistic production"[16], as part of its fundamental liberties, just as the right to life, food, health, and work. A similar provision was included in the International Covenant on Economic, Social and Cultural rights (ICESR) - which has been ratified by 161 nations[17] - as it recognized the right of everyone to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"[18]. In addition to major human rights instruments, the American Declaration on the rights and duties of Man, elevated the status of the protection of intellectual property right to "fundamental rights"[19].

However, it is not safe to say that all IPRs are purely human rights, since some of them don't have any human right dimension, and can be only recognized as legal rights in IP laws, like for example; the protection of the economic investments of institutional authors and inventors[20]. In addition to this, general comments on ICESCR stated that intellectual property rights are temporary, not permanent; they may be "revoked, licensed or assigned" and they may be "traded, amended and even forfeited". By contrast, human rights are

13- The preamble of TRIPS Agreement explicitly says that "intellectual property rights are private rights".

14- art.27 (2) UDHR.

15- Ibid, Article 27.

16- Ibid, Article 27.

17- This was the number as of November 2013 http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-3

18- ICESR, Article 15 (1) c.

19- "He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author". The American Declaration of the rights and Duties of Man, Article 13, Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, available at: http://www.oas.org/en/iachr/mandate/Basics/declaration.asp, also Article 36 of the Arab charter for human rights states that "Everyone has the right to participate in cultural life, as well as the right to enjoy literary and artistic works and to be given opportunities to develop his artistic, intellectual and creative talents. Also, the constitution of the United States stipulated that "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries". U.S. Constitution Article 1, Section 8, Clause 8.

20- Peter K. Yu, supra note 2, at 1080, also Chapman added that "there is no basis in human rights to justify using intellectual property instruments as a means to protect economic investments" See Audrey R. Chapman, Core Obligations Related to ICESCR Article 15(1) (c), in CORE Obligations, In Core Obligations: Building A Framework For Economic, Social And Cultural Rights, at 316-17.

recognized as, "fundamental, inalienable and universal entitlements."[21]

Even during the draft history of UDHR and ICESCR the issue was controversial. *Firstly*, in the drafting history of UDHR, delegates questioned whether the right to the protection of interests in intellectual creations should be considered as a basic human right. Most delegates agreed that the UDHR should be universal and recognize only general principles[22]. Accordingly, the "protection of interests in intellectual creations" substituted with "the right to participate in the cultural life of community, to enjoy the arts and to share in the benefits of science", which eventually was modified as article 27 (1) of the present UDHR[23].

*Secondly*, during the drafting of ICESCR, delegates had been reluctant to repeat the UDHR language, while they feared - at the same time - that the omission of some UDHR wordings in a legally binding covenant might undercut the respect of those parts of the declaration that were not included in the covenant[24]. The inclusion of the right to cultural participation and development and the right to benefit from scientific progress was not controversial, as most states agreed generally on the right of everyone to take part in cultural life, to enjoy the benefits resulting from scientific progress and its applications, and to obtain protection for his moral and material interests resulting from any literary, artistic or scientific work of which he is the author[25]. By contrast, the discussion on the right to the protection of interests in intellectual creations was controversial, delegates rejected to include such right by a vote of seven to six with four abstentions.

Only in 1955 when the Universal Copyright Convention entered into

21- Duncan Matthews, supra note 5, at 870.

22- British delegate F. Corbet noted that "the declaration of human rights should be universal in nature and only recognize general principles that are valid for all men", while Australian delegate Alan Watt added that "the indisputable rights of the intellectual worker could not appear beside fundamental rights of more general nature"

See; Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting, and intent 221 (1999).

23- For more on the History of the UDHR drafting, See, Johannes Morsink, supra note 22, at 8, John P. Humphrey, Human Rights and United Nations: A great Adventure (1983), article 44, at 274

24- The Danish delegate Max Sorensen noted that "it would clearly be undesirable merely to transpose the relevant sections from the Universal Declaration to the Draft Covenant, for to do so would weaken the authority of the former, and lead to unwarranted conclusions about significance of those of its provisions which were not reiterated in the latter", The US delegate Roosevelt added "the declaration consisted of a statement of standards which countries were asked to achieve …. but …. a covenant was a very different kind of document, since it must be capable of legal enforcement. The task of drafting such an instrument was wholly unlike that of setting out hopes and aspirations relating to the rights and freedoms of peoples".

Peter K. Yu, supra note 2, at 1060, 1061.

25- Jacques Havet, the representative of UNESCO, noted: "The UNESCO delegation considered that recognition of authors' rights should find a place in the covenant, since it had already been included in the Universal Declaration, and represented a safeguard and an encouragement for those who were constantly enriching the cultural heritage of mankind. Only by such means could international cultural exchanges be fully developed" Yu, supra note 2, at 1062.

force, it appears that delegates began to change their minds, as the new convention helped to remove a major impediment to the recognition of the right to the protection of interests in intellectual creations, and subsequently caused delegations to change their positions, to the extent that the provision on the protection of interests in intellectual creations was adopted in ICESCR by a wide margin of thirty-nine votes to nine, with twenty-four abstentions[26].

Though most of IPRs are human rights recognized in human rights instruments, there are some other IPRs that have no human right dimension, and furthermore, if IPRs were recognized solely as a legal right it can have massive harmful effects on some of the basic human rights like, for example the right to food or the right to health. Thus IPRs have a dual nature they are recognized as a human rights, governed by human rights laws, which impose certain obligations on states. At the same time, they are recognized in IP laws which impose certain obligations on states. These two sets of obligations are coexisting but at the same time they are conflicting.

## 2. Scope of IP as a human right:

The UDHR enumerates a comprehensive list of rights which includes a series of civil and political rights such as right to life, liberty and security, in addition to a series of economic and social rights, which include rights to work, to an adeuate standard of living, to participate in the cultural life of the community, to share in the benefits of scientific advancement, and the most relevant to this discussion, "to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"[27].

All rights provided in the UDHR are of equal status and interdependent, this is supported by Vienna declaration and program of action of the 1993 world conference on human rights, as it stated that "all human rights are universal, indivisible, interdependent and interrelated"[28] Though the UDHR is not strictly legally binding on member states, it is considered as internationally accepted common law and a part of customary international law.

Therefore, the right to the protection of intellectual creations should be construed in connection with related rights[29]. for example, it is related to "the

26- Ibid, at 1067 -9.

27- Article 27.

28- Vienna Declaration added also that " the International community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis". Vienna Declaration and Programme of Action, World Conference on Human Rights, June 14-25, 1993, UN.doc. A/CONF.157/23 (July 12, 1993), para. 5, available at: http://www.unhchr.ch/huridocda/huridoca.nsf /(symbol)/A.CONF.157.23.23.En.

29- As James W. Nickel asserted "human rights are held to exist independently of recognition or implementation in the customs or legal systems of particular countries". Torreman also noted that the rights involved in the UDHR "are independently of implementation or even recognition in the customs or legal systems of individual countries", See, Peter K. Yu, Supra note 2, at 1080.

right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits", and should be construed as an essential precondition for cultural freedom and participation and scientific progress.[30]

ICESCR asserted that everyone has the right to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." This provision covers two sets of interests: moral interests and material interests. It also recognizes the public's right to benefit from the scientific and cultural progress that intellectual property products can endanger.[31] Although the general comment 17 affirmed the respect of "moral and material interests" as one of the core obligations, it doesn't define the content of the moral and material interests[32]. However, it can be inferred from the general comments' that moral interests means to "safeguard the personal link between authors and their creations and between peoples, communities or other groups and their collective cultural heritage"[33], and material interests are means which "enable authors to enjoy an adequate standard of living"[34].

ICESCR imposes certain obligations on states to ensure the best application to its provisions, including the right to the protection of interests in intellectual creations. These obligations include: *first*, to respect the right by refraining from undertaking legal or policy measures that would violate its specific provisions; *second*, to protect the right through legislative and other measures in order to prevent other parties from violating its provisions, *third*, to fulfill the right by implementing positive measures that enable and assist individuals and communities to enjoy the right[35].

30- In General Comment No. 17 the Committee explained:" Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole". See Comm. on Econ., Soc. & Cultural Rights [CESCR], General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Art. 15(1)(c)), 4, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) [hereinafter General Comment No. 17] available at http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf

31- Laurence R. Helfer, supra note 7, at 976

32- General comment No.17, supra note 28, para. 28.

33- The general comment no.17 also noted that the moral right "includes the right of authors to be recognized as creators of their scientific, literary, and artistic production". See Comm. on Econ., Soc. & Cultural Rights [CESCR], General Comment No. 17, supra note 28.

34- Ibid.

35- As the Committee explains in the General Comment 17: "The obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests

In order to ensure states fulfillment to the ICESCR provision, any additional IP protection "must be balanced with the other rights recognized in the covenant" and states must give "due consideration" to the public interest in enjoying broad access to "authors' productions".[36] Accordingly, states could modify protection required under TRIPS provided that such protection does not have any human rights basis. It can also exceed requirements under their core minimum obligations, or to offer compelling evidence of the competing demands of other human rights obligations.[37]

Taking into account that not all countries might have sufficient resources immediately to realize the full provisions, the covenant directs states to take steps through international assistance and cooperation to "the maximum of its available resources, with a view achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means"[38]. General comment 3 interpreted this provision as it requires state parties to make every effort towards full realization of all rights enumerated in the covenant[39].

ICESCR provides some guidance on when the rights can be restricted. Article 4 provides: "The States may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". It adds also that

of the author. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15, paragraph 1 (c)." General comment No.17, supra note 28, para 25.

36- Laurence R. Helfer, supra note 7, at 971.

37- Peter K. Yu, supra note 2, p.1105.

38- Similarly, UDHR stated that economic, social and cultural rights are to be realized "in accordance with the organization and resources of each state" UDHR, supra note 1, art.22.

39- As General Comment No. 3 stated: "[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations".

ICESCR, General Comment No. 3: The Nature of States Parties Obligations (Art. 2, Para. 1), ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter General Comment No. 3], available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument.

"nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."[40] Thus the government restrictions on authors' rights must meet certain conditions "[1] determined by law, [2] in a manner compatible with the nature of these rights, [3] must pursue a legitimate aim, [4] must be strictly necessary for the promotion of the general welfare in a democratic society."In addition, it must "be [5] proportionate, meaning that [6] the least restrictive measures must be adopted when several types of limitations may be imposed."[41]

The imposition of these conditions should be accompanied by suitable compensatory measures, as General Comment No. 17 stated, "the imposition of limitations may, under certain circumstances, require compensatory measures, such as payment of adequate compensation for the use of scientific, literary or artistic productions in the public interest."[42]

This contention illustrated by the German Constitutional Court decision, which held that, "it is a matter for the legislature to determine the limits of copyright by imposing appropriate criteria, taking into account the nature and social function of copyright and ensuring that the author participates fairly in the exploitation of his work".[43] Thus, the constitutional court balanced between removing the exclusive aspect of copyright and ensuring that authors receive fair remuneration for such exempted use.

II) **United Nations efforts:**

TRIPS adopted relatively high minimum standards of protection for all WTO members, including many developing and LDCs. Moreover, non-compliance with the treaty can be challenged through WTO's dispute settlement body[44].

As the transitional periods expired for developing countries in 2000, UN made efforts to resolve the conflict between TRIPS and human rights. In August 2000, the sub-commission on the promotion and protection of human rights adopted resolution on intellectual property rights and human rights, the resolution noticed that: "actual or potential conflicts exist between the implementation of the TRIPS agreement and the realization of economic, social, and cultural rights" including the transfer of technology to developing countries, the right to food, the right to health, and the control of indigenous communities' natural resources[45]. The

40- ICESCR, supra note 1, art 25. Similarly, UDHR states that the economic, social, and cultural rights are to be realized "in accordance with the organization and resources of each state". UDHR, supra note, art 22

41- Laurence R. Helfer, supra note 7, at 994

42- General Comment No. 17, supra note 28, 24.

43- Peter K. Yu, supra note 2, at 1096, (quoting German Constitutional Court, July 7, 1971, 1972 GRUR 481).

44- Duncan Matthews, supra note 5, at.9.

45- Intellectual Property Rights and Human Rights, Sub-Comm'n on Human Rights Res. 2000/7, ¶ 3, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000) [hereinafter Resolution 2000/7], available at http://www.unhchr.ch/Huridocda/Huridoca.ns

sub-commission also reminded all governments of the importance of fundamental human rights such as the right to food and the right to health, that it should give "the primacy of human rights obligations over economic policies and agreements"[46].

The resolution proposed a new agenda for reviewing intellectual property issues, though it had no legal force, as it is nonbinding by the resolution terms itself. The subsequent five years after the resolutions' adoption received many actions by UN human rights bodies. In the same context, these documents which discuss the impact of IP on human rights, however, failed to provide a detailed textual analysis of human rights framework for intellectual property.[47]

As a follow-up to the 2000/7 resolution, the committee on economic, social and cultural rights (CESCR)[48] began work on a statement on human rights and intellectual property, that was adopted on December 2001[49]. Its purpose was to "identify some of the key human rights principles deriving from the covenant that are required to be taken into account in the development, interpretation and implementation of contemporary intellectual property regimes"[50].

The statement recognized the conflict between intellectual property right and human rights. It stated that "the committee wishes to emphasize that any intellectual property regime that makes it more difficult for a state party to comply with its core obligations in relation to health, food, education, especially, or any other right set out in the covenant, is in consistence with the legally binding obligations of the state party"

f/0/c462b62cf8a07b13c12569700046704e?Opendocument.

46- Resolution 2000/7, ibid, at.3

47- These documents include: (1) annual resolutions by the U.N. Commission on Human Rights on "Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria,"(2) an analysis of TRIPS by the U.N. High Commissioner for Human Rights (3) a report by two Special Rapporteurs on Globalization, which asserts that intellectual property protection has undermined human rights objectives; (4) a second resolution by the Sub-Commission that identifies a widening set of conflicts between TRIPS and human rights, including "the rights to self-determination, food, housing, work, health and education, and transfer of technology to developing countries"; (5) an attempt by the High Commissioner for Human Rights to seek observer status with the WTO and participate in the reviews of TRIPS; and (6) a report by the U. N. Secretary General on intellectual property and human rights based on information submitted by states, intergovernmental organizations, and NGOs. Laurence R. Helfer, supra note 8, at 986

48- The committee is a supervisory body, consisting of eighteen human rights experts. Office of the United Nations high commissioner for human rights, status of ratification of the principal international human rights treaties, available at: http://www.ohchr.org/english/bodies/docs/ratificationstatus.pdf

49- U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C12/2001/15 (Dec. 14, 2001) available at http://www.unhchr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/$FILE/G0146641.pdf

50- Audery Chapman, supra note 20, p.871.

In addition, the statement reiterated the primacy principle of human rights over any other rights. It noticed that "the end, which intellectual property protection should serve, is the objective of human well-being, to which international human rights instruments give legal expression".

The "statement on human rights and intellectual property" of fall 2001 was the committees' first use to its principal function to interpret ICSECR. The statement sets an agenda for the committee to draft general comments on every ICESCR's clauses, which were published by the end of 2005.[51]

**III) Conflict between Trips and Human Rights Law:**

**1. The Right of Indigenous People:**

In early 1990s, there were rising claims of the rights of indigenous people, mainly, the right to recognize and to control their culture including traditional knowledge[52] relating to biodiversity, medicine, and agriculture[53].

From indigenous peoples' perspective, traditional knowledge cannot be alienated from the community by transferring ownership to another person or corporation because that knowledge is part of the distinct and collective identity and has meaning in the context of that community, not outside it[54]. Moreover, it should be kept in perpetuity to be safeguarded, developed and passed from one generation to the next. The transfer of this knowledge is a collective responsibility and in most cases it is transmitted orally.In response to those concerns, the UN adopted a declaration in September 2007, on the rights of indigenous people[55].

Clearly, there are some possible contradictions between TRIPS and indigenous people's rights, as follows:

**Firstly,** TRIPS fails to recognize indigenous people's customary systems to safeguard and protect traditional knowledge – which is considered as discriminatory and racist - because it ignores generally any system which doesn't conform economic and legal framework for intellectual property law. As it states that patents shall be

51- Audrey Chapman, supra note 20, at 868.

52- The traditional knowledge defined as the creative production of human thought and craftsmanship, language, cultural expressions which are created, acquired and inspired, such as songs, dances, stories, ceremonies, symbols and designs, poetry, artworks; scientific, agricultural, technical, and ecological knowledge and the skills required to implement this knowledge and technologies.
United Nations International Workshop on Traditional Knowledge, Panama City, 21-23 September 2005, IPRs Series No. 5, Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples, at 4.

53- Ibid, at 982.

54- "some cultural objects are secret in nature, intended to be seen only by a restricted group of people at particular times or exposed only in specific places" Peter K. Yu, supra note 2, footnote 247.

55- The United Nations Declaration on the Rights of Indigenous Peoples adopted on 13 September 2007 [hereinafter the Declaration], states that "indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.", art. 13/1, available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

available "for any inventions, whether products or processes, in all fields of technology",.Accordingly, biotechnological products which often are made of natural resources and traditional knowledge of indigenous people may be patented. However, the UN declaration on the rights of indigenous peoples recognized that "indigenous people enjoy rights as recognized in UN charter, UDHR, and International Human Rights Law".

**Secondly**, TRIPS fails to respect the right to protect traditional knowledge as a collective right, and treats it as part of the public domain[56]. It doesn't provide any provision on the protection of natural resources and traditional knowledge forming the natural biodiversity[57]. Therefore, it becomes available for unrestricted exploitation by others who used it as upstream innovations that were privatized afterwards through patents and copyrights.

From IP laws perspective, such a treatment is justified maybe because traditional knowledge protection as such didn't meet needed criteria for protection, or because the indigenous communities didn't endorse private ownership rules, or simply as Dutfield stated "there is a presumption that nobody is harmed and no rules are broken when research institutions and corporations use it freely"[58].

In contrast, the declaration on the rights of indigenous people's states that Article 31/1 *" Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions"*[59]

**Thirdly**, TRIPS ignores the high social costs which come about with the granting of exclusive IPRs to individuals and legal persons. The social costs range from undermining and destructing indigenous peoples cultures and

56- Public domain refers to that which is not claimed as private property or that which is commonly known or disclosed. What is categorized to be in the public domain can be accessed and freely used by anybody. Ibid, at 11.

57- Thus, it undermines the equity principles of prior informed consent (PIC), 85 and access and benefit-sharing (ABS) as recognized and authenticated by the Convention on Biological Diversity (CBD). and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) for providing rewards to the Indigenous Communities who grow and nurture these resources from time immemorial. See; Mohammad Towhidul Islam, "Protection of public interests through a human rights framework", supra note, at 579.

58- See Graham Dutfield, TRIPS-Related Aspects of Traditional Knowledge, 33 CASE W. RES. J. INT'L L. 233, 238 (2001)

59- Art. 31/1 of the declaration.

heritage, theft or biopiracy of plant, animal, and human genetic materials, the increasing monopolization of control over knowledge and technologies by fewer individuals, countries and corporations.

Additionally, TRIPS ignores the financial and technological benefits of these innovations for the indigenous people, as they rarely shared such benefits. The sub-commission noted that: "the theft and patenting of Indigenous Peoples' bio-genetic resources is facilitated by TRIPS. Some of the plants which Indigenous Peoples have discovered, cultivated, and used for food, medicine, and for sacred ceremonies since time immemorial have already been patented in the United States, Japan and Europe".[60]

UN declaration urged States to *"provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs".*[61]

However, economic compensation alone would not satisfy their needs, thus states need to protect the intrinsically personal and cultural character of traditional creations and ensure durable link between traditional communities and their creations.[62]

In fall 2000, WIPO approved the creation of a new intergovernment committee on intellectual property and genetic resources, traditional knowledge and folklore (IGC). The committee held meetings to respond to developing countries and indigenous peoples' concerns, then WIPO general assembly extended the committees' mandate to include any development of new international instruments.[63]

The WIPO IGC undertake to document and record traditional knowledge and put them into databases so that indigenous people can claim prior art and therefore prevent others from claiming IPRs over them. Without such a documentation, there is no way patent examiners can know that these are already known.[64] In response, many States are developing databases for the documentation and conservation of

60- See United Nations, Economic and Social Council, Sub-Commission on Human Rights, Written Statements submitted by International Indian Treaty Council 3, U.N. Doc. E/CN/4/2003/NGO/127 (2003).

61- Art. 11/2 of the declaration.

62- General comment 17, supra note 28, 12.

63- The high commissioner for human rights, the WHO, and numerous NGOs have been granted observers' status to take part in the committees' discussion. WIPO is currently conducting "text-based negotiations" with a view to reaching an agreement on an international legal instrument(s) which "will ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions". Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, Human Rights Council Twentieth session Agenda item 3 promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, A/H/C20/26, 14 May 2012, [hereinafter the special rapporteur report], at.17

64- United Nations International Workshop on Traditional Knowledge, supra note 52, at.15

traditional knowledge[65], Such as, Brazil, Guatemala, Peru and Portugal, which took measures to give legal protection to the rights of indigenous peoples and local communities to their accumulated scientific knowledge.

There is still a need to pay more attention for indigenous people's rights, through the United Nations Permanent Forum on Indigenous Issues (which is under the UN Economic and Social Council) together with the UN Working Group on Indigenous Populations (which is under the Commission on Human Rights), along with WTO & WIPO to bring together governments, UN agencies and other multilateral bodies, indigenous peoples, to a technical meeting which can explore mechanisms to address and preserve indigenous peoples heritage and traditional knowledge.

## 2. The Right to Health:

The right to health is a central element of the international human rights system. It is part of the UDHR as it states that everyone has "the right to a standard of living adequate for the health and well-being of himself and his family, including….. medical care."[66] This right has been interpreted to include the right to access essential medicines, Article 12 of the ICESCR recognizes a right to the "highest attainable standard of physical and mental health,"[67] although states may "achieve progressively the full realization of the rights." Health-related rights are also recognized in other UN treaties.[68]The WHO Constitution was

65- For example the India Traditional Knowledge library http://www.tkdl.res.in/tkdl/langdefault/common/, which provides national patent offices with access to 223,000 indigenous medicinal formulations. As a result, at least two patents have been withdrawn and more than 75 applications with drawn, rejected or amended. Report of the Special Rapporteur in the field of cultural rights, supra note 63, at. 17

66- UDHR, supra note 1, art.

67- The right to life recognized also in ICCPR, as art.7 affirmed that no one shall be subjected without his/her free consent to medical or scientific experimentation, Under the International Convention on the Elimination of All Forms of Racial Discrimination (1965), states parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, national or ethnic origin, the enjoyment of the right to public health and medical care. Art 5(e)(iv), International Convention on the Elimination of All Forms of Racial Discrimination, GAOR, 2100 A (XX) of 21 December 1965, 660 UNTS 195 (entered into force 4 January (1969). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) directs state parties to take all appropriate measures to eliminate discrimination against women in the field of health care Art 12 (1), the Convention on the Elimination of All Forms of Discrimination Against Women, GA Res34/180, UN GAOR, 34th Sess, Supp No 46, UN Doc A/34/46 (1980), reprinted in 19 ILM 33 (1980), entered into force 3 September 1981. The Convention on the Rights of the Child (1989) extends provisions of the right to health enumerated in ICESCR to the child, Art 24, Convention on the Rights of the Child, GA Res 25 (XLIV), UN GAOR, 44th Sess, Supp No 49, UN Doc A/RES/44/25 (1989), reprinted in 28 ILM 1448 (1989).

68- It is noted also that states parties should take the following steps to achieve (a) the full realization of the right to health which includes: the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child. (b) the prevention, treatment and control of epidemic, occupational and other diseases. Art. 12 ICESCR

the first international instrument to stipulate "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition"[69]. It is also recognized in many of regional human rights instruments and many national constitutions.[70]

General comment 3 provides an expert interpretation of the right to health. It recognizes that access to essential drugs - as defined by the WHO Action Programme on Essential Drugs - is a "core obligation" of states under the ICESCR[71] which is applied to all states parties irrespective of their level of development, the availability of resources, or any other factors and difficulties[72]. This means that resource constraints do not justify non-compliance with this obligation. The general comment does not indicate clearly whether full realization of the right to health includes access to additional medicines, subject to progressive realization as states' resources permit[73].

To facilitate the ability of poor countries to meet these requirements, the Committee emphasizes the responsibility of states parties and other actors to provide international assistance and cooperation, especially economic and technical, as it defined the role of the state in protecting human life, as to include obligations to undertake measures to eliminate epidemics.[74]

TRIPS agreement protected pharmaceuticals' patent on the grounds that this protection would lead to more inventions in pharmaceuticals by

69- See the preamble of the WHO constitution, also Promoting Access to Medical Technologies and Innovation Intersections between public health, intellectual property and trade, WIPO, 2013, P.40 http://www.wto.org/english/res_e/booksp_e/pamtiwhowipowtoweb13_e.pdf

70- In addition, over 100 countries have incorporated the right to health into their constitutions, and 160 countries have acceded to the right to health through their international treaty obligations. A human rights approach to intellectual property and access to medicines, global health justice partnership, policy paper 1, September 2013, at.7 [ hereinafter Human Rights approach to IP].

71- General comment no3; the nature of states parties obligations (art. 2/1), supra note 38.

72- According to the Committee's view, core obligations related to the right to health include at least the following: (1) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; 2) to ensure for everyone access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger; (3) to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; 4) to provide essential drugs, as from time to time defined by WHO's Action Programme on Essential Drugs (5) to ensure equitable distribution of all health facilities, goods, and services (6) to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population. See, Audery R. Chapman, supra note 20, AT 876

73- In the two places where the general comment refers to core obligations or minimum standards, it cites the WHO essential medicines list, but in its general discussion of the "right to health facilities, goods and services," it refers to "essential drugs" without referencing the WHO list. See; Chapman, Supra note 88, at 877.

74- General Comment No.6: the right to life, Human Rights committee, UNDOC/ A/37/40.

rewarding its innovators and thus increased welfare in health sectors. As TRIPS requires members to offer patent protection to "any inventions, whether products or processes, in all fields of technology"[75], including "patent protection for pharmaceutical products"[76]. Those grounds are only in theory, but in fact the pharmaceuticals industry system is based on commercial motivation, where it is not necessary to work well in producing medicines appropriate for the needs of poor countries.[77]

It is well understood that any increase in medicines' patent protection would increase the price of medications and thereby decreases access to them[78]. Thus, it creates possible conflicts between TRIPS provisions regarding medicine's patents and the right to heath. This conflict could impede access to medicine, as follows:

**Firstly,** Article 33 of TRIPS determines that patent protection could last for a minimum of 20 years, which could lead multinational companies (MNCs) to monopolize drugs and then to be sold at a relatively high price for a long period. This monopolization would have massive effects on health in developing and LDCs, as it will leave some pandemic or endemic diseases such as HIV/AIDS or tropical diseases - where up to 95% of those infected reside - without any affordable medication.[79]Therefore, it appears that TRIPS preserved the price of pharmaceuticals at a high price, which would affect health particularly in countries where people live below the poverty line.[80]

Subsequently, it affects the right to life. If the protected medication was a life saving drug, this contend was illustrated by the High Court of Delhi decision of 2008, when it found that: "*Unlike in cases involving infringement of other products, the Courts have to treat with care [when] pharmaceutical products and more specifically life saving drugs are involved. In such cases, the balancing would have to*

75- TRIPS Art 70.8 states, 'Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall. provide patent protection in accordance with this Agreement ."

76- Art. 70/8 TRIPS.

77- The commissioners' report noted that pharmaceutical industry directs its research first and foremost towards "profitable" diseases in markets where the return is likely to be greatest.

Report of the high commissioner for human rights, the impact of the agreement on Trade-Related Aspects for Intellectual Property Rights on Human Rights. [hereinafter the commissioners' report]

78- The Commissioners' report, ibid, para 42.

79- The commissioners' report noted that the protection and enforcement of intellectual property protections result in higher prices for drugs which then restrict access for the poor. Ibid. The Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (Report of the Commission on Intellectual Property Rights, London, September 2002) 33; See also, P Cullet, 'Patents and medicines: the relationship between TRIPS and public health' 79(1) International Affairs (2003) 139, 157.

80- Where people spend between $1 and $25 per capita per year on health. World Health Organization (WHO), The World Health Report 2000 (Geneva, 2000) Annex Table 8.

*factor in unknowns such as the likelihood of injury to non- parties and the potentialities of risk of denial of remedies."*[81]

**Secondly,** most of developing states tend to obtain comparative advantage by copying and supplying drugs at a cheaper price, while TRIPS restricts that. In *Novartis v. Monte Verde*, the Argentinean court asserted that "*one cannot ignore that developing countries imitate medical products through reverse engineering in order to cover the public health necessities; nor that the right to health – internationally recognized in treaties that carry constitutional weight – is rigorously tied to the right to life, without which the rest of the guarantees of the Constitution lose their purpose.*" The court also noted that *"[t]he reasonability of an impugned legal regime is better understood when one reads it in light of international human rights obligations*."[82]

To balance between patents' rights and right to health and right to life, Doha Declaration on TRIPS and public health affirmed that TRIPS will not prevent a member from using "measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate"[83], however. Unfortunately, the declaration puts some requirements that may impede the realization of such a clause as follows; *first*, the clause applies only to known diseases. *Second*, the production of generic drugs[84]must be "predominantly for the supply of the domestic market, which means that countries with limited or no manufacturing capacity cannot neither

81- The court further explained that, although "India entered into the TRIPS regime, and amended her laws to fulfill her international obligations," the Court cannot be unmindful of the right of the general public to access life saving drugs which are available and for which such access would be denied if the injunction were granted. The degree of harm in such eventuality is absolute; the chances of improvement of life expectancy; even chances of recovery in some cases would be snuffed out altogether if injunction were granted. Such injuries to third parties are un-[compensatable]. Another way of viewing it is that if the injunction in the case of a life saving drug were to be granted, the Court would in effect be stifling Article 21 [which protects the right to life] so far as those [who] would have or could have access to Erloticip are concerned."
F. Hoffmann-LA Roche AG v. Cipla Ltd., I.A 642/2008 IN CS (OS) 89/2008 (2008) (India) [Hereinafter Roche v. Cipla]. , referred to in: Human Rights approach to IP, supra note, at 18.

82- Cámara Federal de Apelaciones [CFed.] [Federal Appeals Court], 1/2/2011, "Novartis Pharma AG c. Monte Verde SA / propiedad industrial e intellectual," Causa No. 5.619/05 (Arg.) (internal citations omitted), Human Rights approach to IP, supra note 67, at. 22

83- WTO Doc. WT/MIN (01)/DEC/1, www.wto.org (7 July 2008) (hereinafter Doha Declaration). Also; M Rafiqul Islam, 'The Generic Drug Deal of the WTO from Doha to Cancun: A Peripheral Response to Perennial Conundrum' (2004) 7(5) Journal of World Intellectual Property, at 675.

84- Dictionaries tend to define a "generic" as a product — particularly a drug — that does not have a trademark. For example, "paracetamol" is a chemical ingredient that is found in many brandname painkillers and is often sold as a (generic) medicine in its own right, without a brandname. This is "generic from a trademark point of view". Sometimes "generic" is also used to mean copies of patented drugs or drugs whose patents have expired — "generic from a patent point of view".
See; Trade and Pharmaceutial patents, fact sheet, September 2006, WTO, at. 7

produce such drugs domestically nor the declaration allows to import them for their own domestic use[85]. *Third*, the Doha Declaration requires generic producers to obtain other member countries' consent through notifications, which would consume time and thus cost lives.

**Thirdly,** TRIPS provides flexibility for governments to attain the protection granted without losing social goals. For patents, it allows governments to make exceptions to patent holders' rights such as in national emergencies, anti-competitive practices. For pharmaceutical patents, the flexibility has been clarified and enhanced by Doha Declaration of 2001. The enhancement was put into practice in 2003 with a decision enabling countries that cannot make medicines themselves, to import pharmaceuticals made under compulsory licence.[86]

Unfortunately, nearly all developing nations fail to make extensive use of TRIPS flexibilities. Instead, they continue to enforce stringent IP protections, despite the consequences of these laws on the right to health. At the same time developed nations put pressure on developing countries, using trade agreements and threats to impose trade sanctions or withhold trade or investment benefits. Fearful of sanctions and desirous of increased tariff liberalization pushed developing nations often to favor intellectual property provisions with important public health implications for ostensible economic benefits.

The Peruvian constitutional court asserted the same deficiencies in its decision of 2004, it states that: "*even if the protection of intellectual property is important for the development of new medications, the concern regarding the effect of intellectual property rights on medicines cannot be left to one side. The TRIPS Agreement does not signify an obstruction to the member country to take measures to protect public health and, particularly, the promotion of medication for all*". Furthermore, it recommended the utilization of the provisions and measures that allow maximum amount of flexibility in interpretating TRIPS agreement so that any government can achieve its health policy objectives. Hence, the court encouraged the Peruvian government to take advantage of TRIPS flexibilities and to interpret it in accord with maximization of human rights protection[87].

**Finally,** TRIPS permits governments to allow – in certain cases – the reproduction of patented product or process without the consent of the patent owner, which known as "compulsory licensing", as part of the agreement's overall attempt to strike a balance

85- This provision was amended by a waiver decision in the WTO general council on 30 august 2003. See; Ibid.

86- In 2005, members agreed to make this decision a permanent amendment to the TRIPS Agreement, which will take effect when two thirds of members accept it. Trade and Pharmaceutial patents, supra note 76, at 2

87- Tribunal Constitutional [T.C.] [Constitutional Court], 20 April 2004, XP. N. 2945-2003-AA/TC, p. 40 (Peru), referred to in: Human Rights approach to IP, supra note 67, at. 19

between promoting access to existing drugs and promoting research and development into new drugs. However, though TRIPS permits compulsory licensing it imposes extensive conditions on its use, aimed at protecting the legitimate interests of the patent holder,[88] such as failing to obtain a voluntary licence from the right holder on reasonable commercial terms[89], and the obligation to pay an adequate remuneration to the patent holder[90], if a compulsory licence was issued.

Additionally, it permits waiver of the patent right in pharmaceuticals through production of generic drugs in order to face national emergencies and other circumstances of extreme urgency or in cases of public noncommercial use only in the domestic market of the member authorizing such use[91]. Thus, the exercise of this permissible exception to compulsory licensing may put developing and LDCs under the threat of conflict with developed countries, as recent examples of Thailand and South Africa show[92].

In response to the critique, Doha Ministerial Conference 2001 emphasized that TRIPS should not prevent member countries from taking necessary measures to protect public health. In situations of national emergency and extreme urgency, compulsory licensing of necessary drugs is permissible.[93]

On June 2013, the United Nations Human Rights Council adopted a resolution urging governments to encourage technology development & transfer and to apply intellectual property rights measures in ways that avoid creating barriers to trade in "affordable, safe, efficacious and quality medicines."[94] Among its numerous provisions, the resolution reinforces countries' right to use flexibilities to intellectual property rights as provided in TRIPS. It also encourages governments "to explore and promote a range of incentive schemes for research and development, including addressing, where appropriate, the delinkage of the costs of research and development and the price of health products, in accordance with the Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property."

88- TRIPS and Pharmaceutial patents, supra note 76, at.4-5

89- Art. 31/b TRIPS agreement.

90- Art. 31/h TRIPS agreement.

91- Art. 31/b TRIPS agreement.

92- Mohammad Towhidul Islam, supra note 55, at. 577.

93- The UK commission on intellectual property rights noted extensive use of developed countries tend to compulsory licensing to reduce drugs prices, and asserted in its report that "Canada used compulsory licensing extensively in the pharmaceutical field from 1969 until the late 1980s. This resulted in prices of licensed drugs being 47% lower than in the US in 1982. The UK also used compulsory licensing until the 1970's, including for important drugs such as Librium and Valium. "Comm'n on Intellectual Prop. Rights, Integrating Intellectual Property Rights and Development Policy: Report Of the Commission on Intellectual Property Rights, 42 (2003)

94- The vote was 31 in favour, 0 against and 16 abstentions, according to the UN. The resolution, A/HRC/23/L.10/Rev.1, available at:
http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G13/147/13/PDF/G1314713.pdf?OpenElement

### 3. The Right to Food:

A large part of developing countries' population depends on the production and sale of agricultural products[95]. The expansion of agricultural exports may contribute in reducing poverty and global income inequalities. During the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), developed countries demanded acceptance of the TRIPS Agreement by developing countries as a precondition to reduce their barriers to agricultural trade[96].

However, TRIPS introduced a system of plant varieties protection (PVP), which protects agricultural chemical products and biotechnology as products or processes made of biological and genetic materials. TRIPS obliges state members to provide PVP to micro-organisms, non-biological and micro-biological processes on the basis of three patent eligibility criteria: patent, "effective *sui generis* system", or a combination of both.[97] Plant variety protection (PVP) was developed to protect the interests of commercial plant breeders and not indigenous peoples and farmers.[98]

Justifications of PVP's advocators are always present, as to "rewarding the creators" and encouraging inventions of new hybridizing varieties seeds, which would lead to realization of the right to food in most developing and LDCs. However, traditional farmers and growers expressed their concerns about PVP adverse effects on the right to food as TRIPS didn't define PVP through "an effective *sui generis* system". It opens the door to variations in definition depending on concerns and interests of developed countries on one hand, and developing and LDCs on the other.

Developed countries tend to define the expression "an effective *sui generis* system" as an IP right, namely the plant breeders' rights (PBRs) as laid down in the International Convention for the Protection of New Varieties of Plants 1991 (UPOV convention), which is one form of a high standards PVP for plant breeders, that relates PBRs to production or reproduction, and requires member states to protect the rights of breeders of plant varieties against unauthorized production of these varieties for commercial use, and exempt only saving

95- According to the World Development Report 2008, Published October 15, 2007 by World Bank.

96- Report of the Panel of Eminent Experts on Ethics in Food and Agriculture: ch 2, Food and Agriculture Organization of the United Nations, p.33.

97- Article 27.3 (b) TRIPS. A sui generis (of its own) system of protection is a special system adapted to a particular subject matter, as opposed to protection provided by one of the main systems of intellectual property protection, e.g., the patent or copy rights system. Further, it is a mild or a diluted form of a patent and it provides a framework of plant breeder's rights through which protection is accorded to the breeders, researchers, and farmers with regard to use and exchange of seeds and plant genetic materials. Dilani Hirimuthugodage; Trade Related Intellectual Property Rights (TRIPS) Agreement and the Agriculture Sector in Sri Lanka, Asia-Pacific Research and Training Network on Trade Working Paper Series, No. 92, January 2011 http://www.unescap.org/tid/artnet/pub/wp9211.pdf

98- Ibid

seeds for farmers' own use. Moreover, it extends the PBRs protection from 18-20 to 20-25 years.[99] This protection actually favors the plant breeders, who monopolize the market in the name of PBRs. As a result, it contributes to increase the cost of farming which many farmers are unable to afford. Moreover, monopolists may sometimes encourage farmers to shift to single crops threatening agricultural diversity.

In addition, TRIPS obliges farmers to buy special types of fertilizers, herbicides, and pesticides with seeds, and forbids the common customs known as farmers' privilege of reusing seeds which would diminish the facility to sow different varieties of plants adapted to the local environment that can further facilitate the misappropriation of germplasm and traditional varieties bred and nurtured by indigenous peoples and farmers. Adding insult to injury, governments of developed countrie are pushing developing countries to adopt UPOV l991 as a *sui generis* system[100].

Thus the monopolization and taking farmers' privileges would affect the right to food as recognized in Article 25 of UDHR, and reaffirmed in Article 11 of the ICESCR. It can also block the free and public exchange of technologies that may benefit poor people. The UNDP notes the existence of a discomfort between the limitation of farmers rights by patents or PVP in the field of genetic resources and access to food, so far as to relinquish the right of farmers to save or replant seed from a harvest or to sell or trade that seed to other persons.

In sum, the system under TRIPS Agreement should be improved through measures to ensure that there is no misappropriation of genetic resources in the public domain by enterprises and plant breeders. Patents should be given only for a genuine invention that has created a biological product significantly different from any that existed before, and the patent should cover only the inventive step itself, nothing beyond it.

**4. The Right to Benefit from Scientific Progress:**

The right to science is usually regarded as a mean to advance the realization of other human rights and to address "the needs common to all humanity" [101]. The rights to science and culture are interlinked - as inferred from

99- For plants other than trees and vines, see Articles 14, 15 and 16 of UPOV convention. Act of 1991 International Convention for the Protection of New Varieties of Plants, December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, available at: http://www.upov.int/export/sites/upov/en/publications/conventions/1991/pdf/act1991.pdf

100- This proposal for a *sui generis* system is still within the IPR framework and does not detract from the patenting of life approach.

101- Science must be understood as knowledge that is testable and refutable in all fields of inquiry, including social sciences, and encompassing all research. The terms "benefits" of science and "scientific progress" convey the idea of a positive impact on the well-being of people and the realization of their human rights. The "benefits" of science encompass not only scientific results and outcomes but also the scientific process, its methodologies and tools. The special rapporteur report, supra note 63.

the draft history of the UDHR and ICSECR - both reflect the intention of the drafters to include a provision promoting universal access to science and culture,[102] and recognizes the right to share in scientific advancement benefits, in conjunction with the right to take part in cultural life and to the protection of the moral and material interests resulting from scientific, literary or artistic production.

The ICESCR stipulates the obligations of States Parties to promote the conservation, the development and the diffusion of science and culture,[103] to respect the freedom indispensable for scientific research and creative activity,[104] and to recognize the benefits derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.[105]

The normative content of the right to benefit from scientific progress and its applications includes (a) access to the benefits of science by everyone without discrimination; (b) opportunities for all to contribute to the scientific enterprise and freedom indispensable for scientific research; (c) participation of individuals and communities in decision-making; and (d) an enabling environment fostering the conservation, development and diffusion of science and technology.

In the same context, the Special Rapporteur recommends that: *"(c) States ensure freedom of access to the Internet, promote open access to scientific knowledge and information on the Internet, and take measures to enhance access to computers and Internet connectivity, including by*

102- In addition, it has been suggested that, at the signing of the Universal Declaration, "the United Nations had come to envision the sharing of scientific and cultural knowledge as something that could unite an international community – a common task that would contribute to cross-cultural understanding and yield a more secure world" and that these international norms require a public good approach to knowledge innovation and diffusion". This idea is reflected in the Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), mandated to protect "the world's inheritance of books, works of art and monuments of history and science" and to encourage international "cooperation in all branches of intellectual activity". The special rapporteur report, supra note 63.

103- art.15/2 of ICESCR

104- art. 15 (3) of ICESCR

105- art. 15 (4) of ICESCR. The right to benefit from science progress recognized also in many regional treaties like for example; the Charter of the Organization of American States, states "shall extend among themselves the benefits of science and technology by encouraging the exchange and utilization of scientific and technological knowledge" (Art. 38). The American Declaration on the Rights and Duties of Man upholds the right of every person "to participate in the benefits that result from intellectual property, especially scientific discoveries" and "to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author" (Art. XIII), Article 42 of the Arab Charter on Human Rights recognizes the right of everyone "to take part in cultural life and to enjoy the benefits of scientific progress and its application", together with the obligations of States to "respect the freedom of scientific research and creative activity", to "ensure the protection of moral and material interests resulting from scientific, literary and artistic production". Article II (2) of the Charter of the African Union identifies scientific and technical cooperation as essential for meeting its goals. Article 13 of the European Charter of Fundamental Rights requires that scientific research be "free of constraints".

*appropriate Internet governance that supports the right of everyone to have access to and use information and communication technologies in self-determined and empowering ways*".

The right to benefit from scientific progress and its applications, including scientific freedom, may be subjected to limitations. Such limitations should pursue a legitimate aims which are the compatibility with the nature of this right or to be strictly necessary for the promotion of general welfare in a democratic society, in accordance with Article 4 of the ICESCR.

However, TRIPS imposes strict protectionism on the scientific tradition of open publication which impede developing and LDC members' of their right to enjoy the benefits of scientific progress as laid down in Article 15 of ICESCR, because it restricts technology transfer through its authoritarian copyright and patent regime. Also some scientists are delaying publication and withholding data so as to secure intellectual property rights which result in increasing costs in developing and LDCs from further technological development through research and development[106].

Furthermore, the UN sub-commission on the protection and promotion of human rights notes that TRIPS has an adverse effect on the human right to enjoy the benefits of scientific progress. Marginalized populations with limited financial or political power and scientific awareness run a greater risk of violations as human research subjects.[107]

The Council of Europe Convention on Human Rights and Biomedicine also contains important provisions safeguarding the rights of research subjects which must include benefit-sharing and providing remedies in the event of abuse. In its general comment No. 20, the CESCR elucidated that special measures are needed to protect persons incapable of giving their consent and vulnerable populations such as prison inmates.

The special rapporteur recommended that: "Developing countries should prioritize the development, importation and dissemination of simple and inexpensive technologies that can improve the life of marginalized populations. Industrial States should comply with their international legal obligations by means of direct aid and the development of international collaborative models of research and development".

The Special Rapporteur recommends that: "(f) States fully respect, protect and promote scientific freedom, encompassing academic freedoms, the right to freely publicize results regardless of frontiers, and to promote "the transfer of technologies, practices and procedures to ensure the well-being of people." and at the same time, protecting both the moral and material interests of creators. Also to protect all individuals against any harmful effects

106- Mohammed tawhidul islam, supra note, p.580.

107- Ibid, at 580.

of the misuse of scientific and technological developments while ensuring that limitations to the right to benefit from scientific progress and its applications, including scientific freedom are in conformity with international standards.[108]

IV) **Conclusion:**

This article explores the intersections between IPRs and Human Rights Law through analyzing the human rights dimension of IPRs, focusing on the nature and scope of IP protection in Human rights instruments & TRIPS. The article then proposed the area of conflicts between TRIPS and Human Rights Law, namely in the right to health, food, scientific progress, and traditional knowledge, with a highlight on the most relevant UN efforts to represent solutions to balance the public interests as regarded in Human Rights Law, and the protection of private interests as regarded in most IPRs.

The article concludes that with the growing expansion of intellectual property rights, human rights standards could serve as a powerful counter-measure to harmful IP laws in place. It is necessary to balance between the protection of public interests covering all human rights in developing and LDCs, and to reward creators with adequate incentives. To this end, it is useful to establish some interaction between TRIPS and human rights through recognizing the primacy of human rights in cases of conflicts since the interests of the larger group need to be prioritized in the name of public interests. The WTO and WIPO should allow greater opportunities for human rights influence on intellectual property issues, and help developing and LDC to make best use of TRIPS felixibilities.

Finally, the article highlights the need for advancing a constructive dialogue at the intersection of human rights and intellectual property rights. The Office of the High Commissioner on Human Rights (OHCHR) bodies such as the Human Rights Council, treaty bodies, and special rapporteurs could convene and participate in expert consultations for discussion of particular topics among UN representatives, academics, government representatives, and NGOs. These consultations are basically informational, but final documents can provide the core for arguments for new standards. Like for example; the Human Rights Council call for October 2013 expert consultation on the right to benefit from science.

108- The special rapporteur report, supra note 63, at.20.