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# Intellectual Property Rights, Human Rights and the Right to Health

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## Introduction

*“The allocation of rights over intellectual property has significant economic, social and cultural consequences that can affect the enjoyment of human rights”.*<sup>1</sup>

In many respects, this statement by the United Nations Committee on Economic, Social and Cultural Rights in 2001 sums up the tensions between intellectual property rights, human rights and the right to health that will be examined in this chapter. These tensions are driven by the manner in which creative works, cultural heritage, and scientific knowledge are turned into property which, subsequently, has significant human rights implications,<sup>2</sup> particularly the right to health. Accordingly, this chapter undertakes an analysis of the tensions between intellectual property rights, human rights and the right to health by dividing the chapter into four parts.

The first part of the chapter engages with the debate on whether intellectual property rights are human rights. It reappraises, in particular, Article 27 of the Universal Declaration of Human Rights, Article 15(1) the International Covenant on Economic, Social and Cultural Rights, and the report of the High Commissioner on Human Rights on the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The second part of the chapter then examines the tensions between intellectual property rights and the right to health, specifically in relation to whether a rights-based approach to health can be used as a mechanism to facilitate access to medicines. To do this, the second part of the chapter re-examines Article 25 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Economic, Social and

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<sup>1</sup> Statement by the Committee on Economic and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights. Follow-up to the day of general discussion on article 15.1(c), Monday 26 November 2001, Human Rights and Intellectual Property*. United Nations Committee on Economic, Social and Cultural Rights, E/C.12/2001/15, 14 December 2001, para 1.

<sup>2</sup> For a lengthy discussion on this point see *Implementation of the International Covenant on Economic, Social and Cultural Rights*. Discussion paper submitted by Audrey R. Chapman, American Association for the Advancement of Science (AAAS), Washington, USA, to the United Nations Committee on Economic, Social and Cultural Rights, E/C.12/2000/12, 3 October 2000.

Cultural Rights. The third part of the chapter then discusses the implications of the right to health for intellectual property rights with reference to the experiences of using a human rights-based discourse to assert the right to health in the context of pharmaceutical product patents, compulsory licences and access to medicines, particularly anti-retroviral drugs for people living with HIV/AIDS in Brazil and South Africa. In the light of this analysis of rights-based discourse and implications of the right to health for access to medicines, the fourth part of the chapter then concludes by drawing attention to two significant initiatives at the World Health Organisation (WHO) relating to human rights and health: first, the WHO the Resolution on Public Health, Innovation and Essential Health Research and Intellectual Property Rights of 27 May 2006; and, second, the WHO Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property, adopted at the Sixty-First World Health Assembly on 24 May 2008. In doing so, the chapter concludes that recent activity at the WHO has brought back to the fore tensions between intellectual property rights, human rights and the right to health that have long existed and are likely to persist in debates on the right to health versus the right to own intellectual property for the foreseeable future.

### **Intellectual property rights and human rights**

At the heart of the debate on intellectual property rights and human rights lies a distinction between individual rights and community rights. Three possible interpretations are available: the first is that intellectual property rights have no human rights dimension and are purely legal rights; the second is that intellectual property rights are human rights, with the emphasis on property rights and individual concerns; the third interpretation is that some aspects of intellectual property rights have potentially adverse implications for human rights.<sup>3</sup>

The first interpretation, namely that intellectual property rights have no human rights dimension and are purely legal rights appears incorrect given that, with regard to copyright at least, the little-known solemn declaration by the States members of the Assembly of the Berne Union for the Protection of Literary and Artistic Works, 1886, asserted clearly and unambiguously that “copyright is based on human rights and justice and that authors, as creators of beauty, entertainment and learning, deserve that their rights in their creations be recognized and effectively protected both in their country and in all other countries of the world.”<sup>4</sup>

With regard to the second interpretation, namely that intellectual property is essentially the same as property in tangible assets and must therefore be secured by the same legal guarantees, Tom Giovanetti and Merrill Matthews assert that the protection of intellectual property rights has long been recognised as a basic human right and those concerned about human rights made a conscious and concerted effort to ensure that intellectual

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<sup>3</sup> See also 3D: Trade-Human Rights-Equitable Economy (2005) *Background Note: Intellectual Property, Human Rights and the Drafting of the General Comment on Article 15(1)(c) ICESCR*, Geneva: 3D.

<sup>4</sup> Assembly of the Berne Union “Solemn Declaration” of 9 September 1886.

property rights were protected.<sup>5</sup> In support of this claim, they draw on the Constitution of the United States<sup>6</sup> and the American Declaration on the Rights and Duties of Man.<sup>7</sup> This is the rationale for arguing that provisions made by international human rights documents with regard to property cover intellectual property, with the latter elevated to the status of “fundamental rights”.

Foremost amongst the international human rights documents that are often claimed to regard the right to own property as including the right to own intellectual property are the Universal Declaration of Human Rights and the United Nations International Covenant on Economic, Social and Cultural Rights.

The Universal Declaration of Human Rights,<sup>8</sup> in Article 17(1), recognises that “[e]veryone has the right to own property alone as well as in association with others” and, in Article 17(2), that “[no] one shall be arbitrarily deprived of his property.” The Universal Declaration of Human Rights then goes on, in Article 27, to state that: “(1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) 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”.

Article 15(1) of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966,<sup>9</sup> contains similar provisions to the Universal Declaration of Human Rights: “The States Parties to the present Covenant recognise the right of everyone: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.”

For Audrey Chapman, author of a discussion paper entitled “Implementation of the International Covenant on Economic, Social and Cultural Rights”, presented to the United Nations Committee on Economic, Social and Cultural Rights in 2000, intellectual property rights should be viewed as human rights because the three provisions of Article 15(1) ICESCR were viewed by drafters as intrinsically interrelated to one another; the rights of authors and creators are not just good in themselves but were understood as

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<sup>5</sup> T. Giovanetti and M. Matthews, “Intellectual Property Rights and Human Rights”, Lewisville, Texas: Institute for Policy Innovation, 2005.

<sup>6</sup> “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.

<sup>7</sup> “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.” American Declaration of the Rights and Duties of Man, Article 13.

<sup>8</sup> Universal Declaration of Human Rights *Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948*, G.A. Res217A (III) 3 U.N. GAOR (Resolutions, part 1) at 71, U.N. Doc. A/810 (1948). Available at: <http://www.un.org/Overview/rights.html> (visited on 4 April 2007).

<sup>9</sup> International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc.A/6316 (1966).

essential preconditions for cultural freedom and participation and scientific progress.<sup>10</sup> However, Chapman goes on to point out that, conversely, human rights considerations impose conditions on the manner in which author's rights are protected in intellectual property regimes. For Chapman, to be consistent with the provisions of Article 15, intellectual property law must assure that intellectual property protections complement, fully respect, and promote other components of Article 15, so that the rights of authors and creators facilitate rather than constrain cultural participation on the one side and scientific progress and access on the other. The language of the Covenant underscores the importance of the obligation to respect the moral and material interests of the author, artist, inventor and creator but, in contrast with the individualism of intellectual property law, Chapman argues that a human rights approach also recognises that an author, artist, or creator can be a group or a community as well as an individual.

Chapman also points out that intellectual property rights have an intrinsic value as an expression of human dignity and creativity and that, put another way, artistic and scientific works are not first and foremost economic commodities whose value is determined by their utility and economic price tag.<sup>11</sup> A human rights approach takes what is often an implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and it makes it far more explicit and exacting – for Chapman, from a human rights perspective, the rights of the creator are not absolute but conditional on contributing to the common good and welfare of society.<sup>12</sup> Chapman concludes that, because a human rights approach also establishes a different and often more exacting standard for evaluating the appropriateness of granting intellectual property protection, in order for intellectual property fulfil the conditions necessary to be recognised as a universal human right, intellectual property regimes and the manner they are implemented first and foremost must be consistent with the realisation of the other human rights, particularly those enumerated in the Covenant.<sup>13</sup>

This leads us to the third interpretation of intellectual property rights and human rights, namely that some aspects of intellectual property rights have potentially adverse implications for human rights. The report of the High Commissioner on Human Rights on the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights of 27 June 2001, acknowledged that Article 15 ICESCR identifies a need to balance the protection of both public and private interests.<sup>14</sup> On the one hand, Article 15 recognises the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications. On the other hand, the same article recognises 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 or she is the author. Taking these two aspects of Article 15 together, the ICESCR could be said to bind States to design intellectual property systems that strike a balance between

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<sup>10</sup> Chapman, above n. 2 at para 23.

<sup>11</sup> Chapman, above n. 2 at para 26.

<sup>12</sup> Chapman, above n. 2 at para 27.

<sup>13</sup> Chapman, above n. 2 at para 28.

<sup>14</sup> United Nations Commission on Human Rights (2001) *Economic, Social and Cultural Rights: The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human Rights. Report of the High Commissioner*, 27 June 2001, E/CN.4/Sub.2/2001/13, page 5.

promoting general public interests in accessing new knowledge as easily as possible and in protecting the interests of authors and inventors in such knowledge. Of course, as the report of the High Commissioner on Human Rights points out, the balance between public and private interests found under Article 15 ICESCR (and under Article 27 of the Universal Declaration) is one familiar in intellectual property law. In the view of the report of the High Commissioner on Human Rights, there is consequently a degree of compatibility between Article 15 and traditional intellectual property systems, but the question is essentially where to strike the right balance, namely whether greater emphasis should be given to protecting interests of inventors and authors or to promoting public access to new knowledge.<sup>15</sup>

It is notable that the Charter of Fundamental Rights of the European Union acknowledges the tensions between private rights and public interests. Article 17 of the Charter states that: “(1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.” Article 17 goes on to state explicitly that: “(2) Intellectual property shall be protected”.

The drafting committee responsible for the Charter of Fundamental Rights of the European Union commented on sub-paragraph (2) as follows: “Protection of intellectual property, one aspect of the right of property, is mentioned explicitly in paragraph 2 because of its growing importance and Community secondary legislation. Intellectual property covers not only literary and artistic property but also patent and trademark rights and associated rights. The guarantees laid down in paragraph 1 shall apply *as appropriate* to intellectual property” [emphasis added]. What, then, would be the *appropriate* application of property rights under the EU Charter in the context of intellectual property rights? The answer to this question would appear to be of crucial importance to determining the appropriate balance between public and private interests that the report of the High Commissioner on Human Rights on the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights of 27 June 2001 had highlighted.

On 21 November 2005, the UNHCR Committee on Economic, Social and Cultural Rights adopted General Comment 17 elaborating on 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, as set out in Article 15, paragraph 1(c), of the Covenant.<sup>16</sup> General Comment 17 noted the right of everyone to benefit from the

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<sup>15</sup> Ibid. page 5.

<sup>16</sup> General Comment No. 17 on 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 (article 15(1)(c) of the Covenant), adopted by the UNHCR Committee on Economic, Social and Cultural Rights on 21 November 2005 (E/C.12/2005/GC/17). The earlier title of the draft document was General Comment No. 18. This draft document, for which Eibe Riedel (CESCR member, Germany) was Rapporteur, was ultimately adopted by the Committee on Economic, Social and Cultural Rights on 21

protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author is a human right, which derives from the inherent dignity and worth of all persons. General Comment 17 notes that this fact distinguishes Article 15, paragraph 1(c) and other human rights from most legal entitlements recognisable in intellectual property systems. It stated that human rights are fundamental, inalienable and universal entitlements belonging to individuals and, in under certain circumstances, groups of individuals and communities. General Comment 17 also noted that human rights are fundamental as they are inherent in 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.<sup>17</sup>

General Comment 17 goes on to suggest that, in contrast with human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations, and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the General Comment stated that the scope of protection of the moral and material interests of the author provided for by Article 15(1)(c) does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.<sup>18</sup>

### **Intellectual property rights and the right to health**

With regard to the relationship between intellectual property rights and the right to health, on the one hand, under Article 27(1) of the TRIPS Agreement, patents must be available for all fields of technology. This scope of coverage includes the availability of patents for pharmaceutical products. However, when considering the availability of patents for pharmaceutical products, one must also take into account the right to health. Article 25 of the Universal Declaration of Human Rights, 1948, states explicitly that “(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and *medical care*...” [emphasis added]. This principle of the right to health is underpinned by Article 12 of the United Nations International Covenant on Economic, Social and Cultural Rights, 1966, which states that

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November 2005 and re-numbered as General Comment No. 17 (confusingly, a separate General Comment No. 18 now relates to the right to work (Article 6 of the Covenant).

<sup>17</sup> Ibid., para 1. See also n. 1, above, at para 6.

<sup>18</sup> Above, n. 16, para 2. See also above, n. 1 at para 6.

“(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

UN Committee on Economic, Social and Cultural Rights has also elaborated, in General Comment 14, adopted on 11 May 2000,<sup>19</sup> on the concept of the highest attainable standard of health, as set out in Article 12 of the Covenant. General Comment 14 sets out the content of the right, obligations on States to respect, and fulfil the right, the elements of international cooperation relevant to implement the right, as well as acts constituting violations of the right. In particular, General Comment 14 states that health is a fundamental human right indispensable for the exercise of other human rights.<sup>20</sup>

General Comment 14 also makes clear that the reference to Article 12(1) of the Covenant to “the highest attainable standard of physical and mental health” is not confined to the right to health care and that, on the contrary, the wording of Article 12.1 acknowledges that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.<sup>21</sup> In this regard, General Comment 14 makes specific reference to the promotion of research, access to affordable treatments, in particular essential drugs; HIV/AIDS; national measures for the promotion of the right to health; clarification of international obligations; and acts that constitute violations of the right to health.

Furthermore, General Comment 14 notes that, while the notion of “the highest attainable standard of health” in Article 12(1) of the Covenant must be understood as taking into account both the individual’s biological and socio-economic preconditions and a State’s available resources, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health.<sup>22</sup>

According to the report of the High Commissioner on the impact of TRIPS on human rights,<sup>23</sup> States are bound to promote the right to health through the ensuring of access to affordable treatments. The right to health contains certain essential elements to be applied by States according to the prevailing national conditions. These elements include ensuring the availability, accessibility, and quality of health facilities, goods and services. States are also bound to ensure the availability, accessibility acceptability and quality of health facilities, goods and services. The report of the High Commissioner goes on to state that accessibility also includes the notion of affordability , namely that health

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<sup>19</sup> United Nations Economic and Social Committee General Comment No. 14 on the right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights). Committee on Economic, Social and Cultural Rights, Twenty-second session, Geneva, 25 April-12 May 2000, E/C.12/2000/4.

<sup>20</sup>Ibid., para 1.

<sup>21</sup> Above, n. 19, para 4.

<sup>22</sup> Above, n. 19, para 9.

<sup>23</sup> Above, n. 14, page 5.



facilities, goods and services must be affordable to all, whether privately or publicly owned.

General Comment 14 also examines the specific steps that States should undertake in fulfilment of their obligations, particularly in the context of Article 12(2)(c) ICESCR, which indicates that States parties to the Covenant must undertake steps necessary for “the prevention, treatment and control of epidemic, endemic, occupational and other diseases”. The control of diseases refers to States’ individual and joint efforts to make available relevant technologies and the promotion of strategies of infectious disease control.<sup>24</sup>

Furthermore, the right to health includes a right to facilities, goods and services, under Article 12(2)(d). This obliges States to provide equal and timely access to basic preventive, curative and rehabilitative health services and appropriate treatment of prevalent diseases, injuries and disabilities, preferably at the community level. The right to facilities, goods and services also includes the provision of essential drugs.<sup>25</sup>

The right to health obliges States to take into account HIV/AIDS in respecting, protecting and fulfilling the right to health. General Comment 14 notes that formerly unknown diseases, such as HIV/AIDS and others, as well as the rapid growth of the world population have created new obstacles to the realisation of the right to health which need to be taken into account when interpreting Article 12.<sup>26</sup>

General Comment 14 goes on to set out some of the national measures that States must take to implement the right. It notes that, as with other rights, States are obliged to respect, protect and fulfil the right to health. It states that “(t)he obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with Article 12 guarantees. Finally the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right to health”.<sup>27</sup>

General Comment 14 sets out international obligations under the right to health. Specifically, States parties should recognise the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realisation of the right to health, taking into account the gross inequality in the health status of people, particularly between developed and developing countries.<sup>28</sup> States parties should ensure that the right to health is given due attention in international agreements and States parties should take steps to ensure that these instruments do not adversely impact upon the right to health.<sup>29</sup> Similarly, States parties have an obligation to

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<sup>24</sup> Above, n. 19, para 16.

<sup>25</sup> Above, n. 19, para 17.

<sup>26</sup> Above, n. 19, para 10.

<sup>27</sup> Above, n. 19, para 36.

<sup>28</sup> Above, n. 19, para 38.

<sup>29</sup> Above, n. 19, para 39.

ensure that their actions as members of international organisations take due account of the right to health.<sup>30</sup> General Comment 14 recognises that while States are ultimately responsible for compliance with the Covenant, all members of society, including the private business sector, have responsibilities regarding the realisation of the right to health.<sup>31</sup> States parties to the Covenant also have international obligations to “provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs” and to “take measures to prevent, treat and control epidemic and endemic diseases”.<sup>32</sup> Further, international organisations, including WHO and the World Trade Organisation (WTO), should cooperate effectively with States to build on their respective expertise in relation to the right to health.<sup>33</sup>

Finally, General Comment 14 notes certain acts that constitute violations of the right to health. Violations of the right to health can be the result of the actions of States, or the actions of other entities insufficiently regulated by the State.<sup>34</sup> Violations of the obligation to protect the right to health include the failure to regulate individuals, groups or corporations so as to prevent them from violating the right to health of others.<sup>35</sup> Violations of the obligation to fulfil the right to health include, amongst others, the failure to adopt or implement a national health policy designed to ensure the right to health of all; insufficient expenditure which results in non-enjoyment of the right; and the failure to take measures to reduce the inequitable distribution of health facilities, goods and services.<sup>36</sup>

Furthermore, the United Nations Sub-Commission on the Promotion of Human Rights affirmed, in Resolution 2000/7,<sup>37</sup> that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with Article 27(2) of the Universal Declaration of Human Rights and Article 15 of the Covenant (ICESCR) a human right, subject to limitations in the public interest.<sup>38</sup>

The United Nations Sub-Commission on the Promotion of Human Rights also declared, in Resolution 2000/7, “that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other”.<sup>39</sup>

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<sup>30</sup> Above, n. 19, para 39.

<sup>31</sup> Above, n. 19, para 42.

<sup>32</sup> Above, n. 19, paras 43 and 44.

<sup>33</sup> Above, n. 19, para 64.

<sup>34</sup> Above, n. 19, para 64.

<sup>35</sup> Above, n. 19, para 51.

<sup>36</sup> Above, n. 14, para 39.

<sup>37</sup> United Nations High Commission for Human Rights Sub-Commission on Human Rights Resolution 2000/7: Intellectual property rights and human rights.

<sup>38</sup> Above, n. 36, para 1.

<sup>39</sup> Above, n. 36, para 2.

The United Nations Sub-Commission on the Promotion of Human Rights, in Resolution 2000/7, also encouraged the Committee on Economic Social and Cultural Rights (CESCR) to “clarify the relationship between intellectual property rights and human rights, including through the drafting of a general comment on this subject”;<sup>40</sup> and recommended to the World Intellectual Property Organisation, the World Health Organisation, the United Nations Development Programme and other relevant United Nations agencies that they continue and deepen their analysis of the impacts of the TRIPS Agreement, including a consideration of its human rights implications.<sup>41</sup>

In addition, the United Nations Sub-Commission on the Promotion of Human Rights, in Resolution 2000/7, commended the Conference of Parties to the Convention on Biodiversity for its decision to assess the relationship between biodiversity concerns and intellectual property rights in general, and between the Convention on Biodiversity and TRIPS, in particular, and urges it also to consider human rights principles and instruments in undertaking this assessment.<sup>42</sup> It also encouraged the relevant civil society organisations to promote with their respective Governments the need for economic policy processes fully to integrate and respect existing human rights obligations, and to continue to monitor and publicise the effects of economic policies that fail to take such obligations into account.<sup>43</sup>

The starting point for a consideration of the operational aspects of intellectual property systems with regard to access to drugs is that access to essential drugs is a human right. While the protection and enforcement of intellectual property rights can provide a more secure environment for the transfer of technology to developing countries, it can also provide a basis for charging higher prices for drugs and for technology transfer which can restrict access to the poor.<sup>44</sup>

In this respect, although Cornides asserts that intellectual property rights only interact with human rights where the question involves making available the most recent results of medical research to a greater public, or the funding of new research,<sup>45</sup> in fact intellectual property rights are an issue for human rights and access to medicines precisely because the UNHCR has made them so.

This can be seen clearly in the Statement of the UN Committee on Economic, Social and Cultural Rights (CESCR), 2001, which addressed explicitly this link between human rights and the right to health. The Statement presents a substantial argument that is worthy of particular note here since it highlights issues central to this chapter:

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<sup>40</sup> Above, n. 36, para 11.

<sup>41</sup> Above, n. 36, para 12.

<sup>42</sup> Above, n. 36, para 13.

<sup>43</sup> Above, n. 37, para 14.

<sup>44</sup> Above, n. 14, para 42.

<sup>45</sup> J. Cornides (2004) “Human Rights and Intellectual Property: Conflict or Consensus”, *Journal of Intellectual Property*, 7(2): 135 at 162.

*“5. Human rights derive from the inherent dignity and worth of all persons, with the human person as the central subject and primary beneficiary of human rights. The moral and legal guarantees of fundamental freedoms, protections and entitlements both derive from and support people’s self-respect and dignity... To be consistent with obligations in respect of international human rights, intellectual property regimes must promote and protect all human rights, including the full range of rights guaranteed in the Covenant.*

*6. The fact that the human person is the central subject and primary beneficiary of human rights distinguishes human rights, including the right of authors to the moral and material interests in their works, from legal rights recognized in intellectual property systems... Human rights are fundamental, inalienable and universal entitlements belonging to individuals, and in some situations groups of individuals and communities... Human rights are fundamental as they derive from the human person as such, whereas intellectual property rights derived from intellectual property systems are instrumental, in that they are a means by which States seek to provide incentives for inventiveness and creativity from which society benefits... In contrast with human rights, intellectual property rights are generally of a temporary nature and can be revoked, licensed or assigned to someone else. While intellectual property rights may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person...*

*Whereas human rights are dedicated to assuring satisfactory standards of human welfare and well-being, intellectual property regimes, although they traditionally provide protection for individual authors and creators, are increasingly focused on protecting business and corporate interests and investments... Moreover, the scope of protection and the moral and material interests of the author provided under article 15 of the Covenant does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements...*

*8. A human rights-based approach focuses particularly on the needs of the most disadvantaged and marginalized individuals and communities. Because a human right is a universal entitlement, its implementation is evaluated particularly by the degree to which it benefits those who hitherto have been the most disadvantaged and marginalized and brings them up to the mainstream level of protection... Thus, in adopting intellectual property regimes, States and other actors must give particular attention at the national and international levels to the adequate protection of human rights of disadvantaged and marginalized individuals and groups, such as indigenous peoples.”*

So, did the CESCR Statement resolve once and for all the tensions between human rights and intellectual property rights? Well, it certainly set out a manifesto for those who seek to promote the balance between the rights of the disadvantaged and marginalized in society on the one hand and the rights of intellectual property owners on the other, over intellectual property rights.

### **Intellectual property rights and the right to health: the Brazilian and South African experiences**

In the light of the foregoing debate it is instructive to note that, at the nation state level, there are indeed particular tensions underpinning the debate on intellectual property rights and human rights. This section of the chapter will explain the practical manifestations of these tensions by using examples from human rights-based discourse and the access to medicines campaign of non-governmental organisations (NGOs) in two developing countries: Brazil and South Africa.

As acknowledged in the Report of the High Commissioner on the impact of the TRIPS Agreement,<sup>46</sup> the tensions between provisions on the fundamental right to health and the view that intellectual property rights are human rights can be seen clearly in the Brazilian context, with Article 196 of the Brazilian Constitution, 1988, stating that “Health is a

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<sup>46</sup> Above, n. 14, para 55.

right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access of actions to access and services for its promotion, protection and recovery”.

As the Brazilian experience demonstrates, the debate on whether to override the patent rights of pharmaceutical companies by the use of compulsory licences has been inextricably linked to the right to health as enshrined in Article 196 of the Brazilian Constitution.

Throughout the late 1980s and 1990s, Article 196 of the Brazilian Constitution was used by groups representing people living with HIV/AIDS in Brazil as justification for advocating the right to free anti-retroviral drugs produced by the State, if necessary produced using compulsory licences which limit the rights of the patentee in relation to particular pharmaceutical products. The linkage between the right to health as a human right underpinned arguments in favour of providing free anti-retroviral drugs when, in 1990, the Federal Government began free delivery of AZT, one of the first anti-retroviral drugs, to the citizens of Brazil. Initially, the Brazilian Federal Government purchased anti-retroviral drugs from the multinational proprietary pharmaceutical companies that had undertaken research and development work and had subsequently been granted patents on these drugs. However, given the high costs associated with the Brazil purchasing large consignments of these patented drugs at the market price, in 1993 the Federal Government instead began to purchase anti-retroviral drugs manufactured by Brazilian pharmaceutical companies which produced cheaper, but equally effective, generic versions of the patented medicines. In the pre-TRIPS era, this was permissible under international law because Brazil was not required to grant patents to all areas of technology, such as pharmaceuticals.

However in 1996, a year after the TRIPS Agreement had come into force, Brazilian Industrial Property Law 9279/96 was introduced to provide for the protection of pharmaceutical products by patent law. In so doing, Brazil, as a WTO member with developing country status, came forward early to offer patent protection for pharmaceutical products since it was only required to do so, under the transitional arrangements of the TRIPS Agreement, on 1 January 2000. Nevertheless, attempts are apparent within Law 9279/96 to achieve a balance between the patent rights accorded to pharmaceutical products and the right to health, in particular, the provision of anti-retroviral drugs to people living with HIV/AIDS in Brazil.

Brazilian Law 9279/96 allows a government authority to issue a compulsory licence where a patent holder exercises patent rights in an abusive manner, or by means of an abuse of economic power proven by an administrative or court decision. There are certain other instances where compulsory licences may be issued, including under Article 71, in cases of national emergency or public interest (Intellectual Property Law (1996) Brazil, No. 9279/96, Article 71 of which states: “In cases of national emergency or public interest, declared in an act of the Federal Authorities, insofar as the patentee or his licensee does not meet such demand, a temporary non-exclusive compulsory license for

the exploitation of the patent may be granted, without prejudice to the rights of the respective patentee.”) The terms “national emergency” and “public interest” are defined in the Presidential Decree on Compulsory Licensing (1999) (Presidential Decree on Compulsory Licensing (1999) Brazil, No. 3201, article 2): “(a) national emergency is understood to be a condition of impending danger to the public, even if existing only in a part of the national territory”. Further, “(t)here are considered to be within the public interest those facts, among others, related to the public health, nutrition, protection of the environment, as well as those of primordial importance to the technological or social and economic development of this country”.

As a further safeguard designed to address the right to health in Brazil, 1996 also saw the introduction of Federal Law 9313/96 to guarantee federal responsibility in providing ARV treatment to all Brazilian citizens. Yet Law 9313/96 had the effect of putting Brazil back in the position it had been prior to 1993 when it had begun to purchase generic versions of anti-retroviral drugs from Brazilian pharmaceutical manufacturers at prices far lower than the market price of patented drugs available from multinational pharmaceutical companies. As a result, in 1999 Presidential Decree 2301/99 was issued to define situations of national and public interest in which compulsory licences can be issued for product patents, thus increasing significantly the likelihood that lower cost generic versions of anti-retroviral drugs subject to product patents could still be produced by Brazilian pharmaceutical companies in specified circumstances.

However, in 2001 the United States initiated a complaint to the WTO Dispute Settlement Body against Brazil in relation to Decree 2301/99 on grounds that this measure was not TRIPS compliant because it envisaged failure to work the patent locally through manufacture as sufficient grounds for the issuance of a compulsory licence to a pharmaceutical manufacturer in Brazil. Decree 2301/99, the United States argued, was contrary to the provisions of Article 27.1 TRIPS, which requires patents to be available within the territories of WTO members without discrimination as to their place of manufacture.

In response to the US complaint in 2001, NGOs such as Grupo de Incentivo a VIDA (GIV) and the Council of the Brazilian Interdisciplinary AIDS Association (ABIA) representing people living with HIV/AIDS articulated their opposition to the United States complaint by using the language of human rights and the right to health, as enshrined in Article 196 of the Brazilian Constitution, when they demonstrated outside US Consulates in Brazil – initially in Sao Paulo and then elsewhere in the country – claiming that the complaint by the United States to the WTO had the potential to infringe their human rights. The United States and Brazil subsequently notified the WTO Dispute Settlement Body that a mutual agreed understanding had been reached to settle the dispute but, in effect, the US had stepped back from further confrontation on this issue, subject to a bilateral understanding to the effect that, should Brazil seek to issue a compulsory licence on grounds of failure to work the patent locally, it would consult the United States before doing so.<sup>47</sup>

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<sup>47</sup> C. Raghavan (2001) *US to withdraw TRIPS dispute against Brazil*, *South-North Development Monitor* (SUNS). Available at: <http://www.twinside.org.sg/title/withdraw.htm> (visited on 1 August 2007).

The continued existence of the safeguard provisions on compulsory licences in Brazil was considered by the Report of the UN High Commissioner on the impact of the TRIPS Agreement as being helpful in improving the implementation of the Brazilian HIV treatment programme.<sup>48</sup> While no compulsory licence was issued under Brazilian Law 9279/96 until 2007, the provisions were nevertheless useful in negotiating lower prices with the owners of patents on pharmaceutical products. The Report of the High Commissioner concluding that: “On the facts that have been provided by the Government of Brazil, it is possible to say that the Brazilian case demonstrates how the provisions of the TRIPS Agreement can be implemented in ways that respect, protect and fulfil the right to health. Through careful legislative implementation of TRIPS provisions...the Brazilian IP law supports the implementation of national health policy aimed at providing essential drugs to those who need them.”<sup>49</sup>

Nevertheless, in Brazil the relationship between the right to health and the provision of pharmaceutical products under the state system has led to tensions. In Brazil, public health care service delivery is shared equally by the different levels of government: federal, state, municipal and the national government health system (*Sistema Unico da Saude* or SUS) but in practice the delivery and management of health care services is increasingly being decentralised to the state and municipal levels. While the federal government defines the policies and regulations, grants technical and financial support to the states and municipal governments and provides some service delivery, the state and municipal governments in turn share responsibility for health care delivery.<sup>50</sup>

In February 2007, the Brazilian Federal Supreme Court (*Supremo Tribunal Federal* or STF) suspended a motion that determined that the State of Alagoas had to acquire medicine not supplied by the SUS to patients who had had renal transplants as well as those who suffered from chronic renal disease.<sup>51</sup> In finding that scarcity of resources should be taken into account when determining the efficient allocation of funding in a manner that is compatible with the principals of the health system, the STF determined that the right to health did not impose an obligation on the State of Alagoas to provide the medicines for renal patients. This led to allegations from patients’ associations that the STF ruling limited citizens’ rights to health and to integral therapeutic assistance under Article 196 of the Constitution. Similarly, academic commentators have criticised the refusal to supply a specific pharmaceutical product as a lack of recognition of a citizen’s right to health and this remains an issue of concern.<sup>52</sup>

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<sup>48</sup> Above, n. 14 above at para 56.

<sup>49</sup> Above, n. 14 at para 58.

<sup>50</sup> J.C. Cohen and K.M. Lybecker (2005) AIDS Policy and Pharmaceutical Patents: Brazil’s Strategy to Safeguard Public Health, *World Economy*, 28, 2: 211-230.

<sup>51</sup> Supremo Tribunal Federal. Suspensão de Tutela Antecipada nº 91 de 26 de fevereiro de 2007. *Diário de Justiça* nº 43 March 5th 2007. Available from: <http://www.stf.gov.br/portal/jurisprudencia/listarJurisprudenciaDetalhe.asp?s1=000002928&base=basePresidencia> (visited 21 September 2008).

<sup>52</sup> Sulpino Viera, F. (2007) Right to Health Litigations: a discussion on the observance of the principles of Brazil’s Health System, *Revista de Saúde Pública*, Scientific Electronic Library Online, 42(2). Available at:

In South Africa, HIV/AIDS activists working within the Treatment Action Campaign (TAC) have similarly framed their struggle for anti-retroviral treatment in terms of the human rights of people living with HIV/AIDS. TAC insists that access to life-saving combination anti-retroviral treatment for all HIV positive people is a human right.<sup>53</sup> TAC's formation in 1988 was based on a distinctly post-apartheid period when human rights issues were particularly to the fore. Accordingly, TAC's successes in advocating wider access to anti-retroviral drugs has utilised the human rights discourse to good effect, using the language of socio-economic rights and human rights enshrined in the South African constitution, which include: the right to life set out in Article 11; and the right of everyone to have access to healthcare services set out in Article 27(1)(a); and the right of every child to basic health care services set out in Article 28(1)(c).<sup>54</sup> The link between human rights and the right to life and to health has been crucial not only for TAC's strategy on mobilising activists and in its advocacy work.

By linking the right to health to human rights principles, TAC shares historical continuities with the late 1980s and early 1990s anti-apartheid gay rights activism, particularly the emphasis on human rights-based discourse. However, this use of human rights language in civil society activism is based on the presumption that such rights are absolute, true and universal rather than contested, constructed and given different meanings and contexts.<sup>55</sup> This, however, is by no means clear-cut.

Boulle and Avafia, in their internal evaluation report for TAC, identify its two main roles as being, first, a campaign for treatment, prevention of new infections and transforming the public health care system to provide a higher quality and a more comprehensive level of health care; and, second, to make a contribution to developing a culture of human rights and democracy in South Africa.<sup>56</sup> For Boulle and Avafia, how the two main roles relate to one another is at the heart of the debate on whether TAC is focused on issue-based campaigning or whether it is a broad-based human rights movement. A human rights focus allows for a holistic approach and sustainable long term solution for people living with AIDS, given that treatment is but one of several required conditions for people living with AIDS to live healthy lives. A human rights approach is also considered to widen the opportunities with partnerships. On the other hand, Boulle and Avafia are concerned that a human rights approach dilutes the clarity and power of the message, requires a more politicised support base and limits the quality and depth of the commentary and interventions, as the scope is so wide that it is not possible to be an

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[http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S0034-89102008000200025&lng=e&nrm=iso&tlng=en](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-89102008000200025&lng=e&nrm=iso&tlng=en) (Visited 21 September 2008).

<sup>53</sup> M. Mbali, (2005) *The Treatment Action Campaign and the History of Rights-Based, Patient-Driven HIV/AIDS Activism in South Africa*, Research Report No. 29, University of Kwazulu-Natal Centre for Civil Society, page 2. Available at: [http://www.ukzn.ac.za/ccs/files/RReport\\_29.pdf](http://www.ukzn.ac.za/ccs/files/RReport_29.pdf) (visited on 30 July 2007).

<sup>54</sup> Constitution of the Republic of South Africa, 1996. Available at: <http://www.constitutionalcourt.org.za/site/theconstitution/english.pdf> (visited 30 July 2007).

<sup>55</sup> Above, n. 50 at 3.

<sup>56</sup> J. Boulle and T. Avafia (2005) *Treatment Action Campaign (TAC) Evaluation*, internal TAC report, page 23. Available at: <http://www.tac.org.za/Documents/FinalTACEvaluation-AfaviaAndBoulle-20050701.pdf> (visited 11 July 2007).



expert in every area. An access to treatment focus, they argue, would allow TAC to undertake a single issue campaign that allows more targeted campaigns and delivery and enables the organisation to develop a real base of expertise in the area and become experts in the advocated field, and prevents the organisation from being stretched too thinly, which in turn facilitates the achievement of results. On the negative side, a single issue campaign does not allow a holistic approach to addressing HIV/AIDS, which cannot be separated from other complex socio-economic issues impacting on the lives of poor people, especially those who are HIV-positive.<sup>57</sup>

While TAC has utilised human rights discourse to mobilise activists and underpin its advocacy work, human rights principles have also been used by TAC to good effect in judicial terms, particularly before the South African Constitutional Court in *Minister of Health & Others v. Treatment Action Campaign & Others* in 2002.<sup>58</sup> This case was brought by TAC and others following the refusal of the South African government to make the anti-retroviral drug nevirapine available in the public health sector and not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV. Nevirapine is a non-nucleoside reverse transcriptase inhibitor for use against mother-to-child transmission of HIV.

The applicants, Treatment Action Campaign & Others, contended that restrictions on the availability of nevirapine were unreasonable when measured against the South African Constitution, which commands the state and all its organs to give effect to the rights guaranteed in the Bill of Rights, in particular: section 27(1) “Everyone has the right to have access to (a) health care services including reproductive health care”; section 27(2) “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”; and section 28(1) “Every child has the right to ... (c) to basic nutrition, shelter, basic health care services and social services.”

Finding in favour of the applicants, the South African Constitutional Court declared that sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV. The Court also confirmed that the state is obliged to ensure that children are accorded the protection contemplated by section 28(1)(c) of the Constitution. Accordingly, the South African government was ordered without delay to remove the restrictions that prevent nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics.

In addition to events in Brazil and South Africa, the link between human rights and access to medicines has also been central to debates in the international law context

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<sup>57</sup> Boule and Avafia, above, n. 53 at 24.

<sup>58</sup> Constitutional Court of South Africa, *Minister of Health & Others v. Treatment Action Campaign & Others*, Case CCT 8/02, 5 July 2002. Available at: <http://www.constitutionalcourt.org.za/Archimages/2378.PDF> (visited 21 September 2008).

concerning the impact of the TRIPS Agreement. This link was first made explicit in the international context in January 1999 when senior staff of Médecins Sans Frontières (MSF) wrote, in the *Journal of the American Medical Association*, that “[t]he lack of access to essential drugs or vaccines because of economic reasons raises new human rights issues in a world that remains divided among wealthy countries, developing countries, and the rest of the world.”<sup>59</sup>

In the subsequent WTO negotiations on access to medicines, commencing with the Doha Declaration on the TRIPS Agreement and Public Health of 14 November 2001, through to the 30 August 2003 Decision on Implementing Paragraph 6 of the Doha Declaration and resulting in the agreement on 6 December 2005 to amend the TRIPS Agreement, the process of seeking to facilitate access through the compulsory licensing provisions of the TRIPS Agreement was very much underpinned by the human rights-based, right to health discourse.

Academic commentators have also acknowledged the significance of the human rights-based discourse. For Lang, the UN work programme on human rights and intellectual property described in this chapter can itself be understood in part as a response to civil society pressure.<sup>60</sup> Lang stresses the important place of civil society in the trade and human rights debate can be seen in a number of different developments: the diffusion of human rights language into the work of NGOs primarily interested in trade matters; the trend among human rights NGOs to develop new expertise in, and pursue activities related to, international economic questions.

As Lang explains, if human rights norms and values are to be a source of substantive guidance for trade policy-makers, it is necessary for human rights norms to undergo a degree of elaboration if they are to provide meaningful guidance to trade policy-makers.<sup>61</sup> For Lang, re-framing the analysis in terms of the right to health performs a number of potentially important functions, human rights norms do not provide substantial policy guidance, are not a source of new policy ideas, and do not provide a means of choosing between competing ideas.

Instead Lang argues that, to the extent that the human rights movement can mobilise actors and interest groups presently marginalised in trade debates, and provide effective tools to augment their political influence, the human rights movement may be able to achieve real change. Although it is difficult to measure the precise impact, there is at least some indication already of such an important part in the negotiations leading to the 30 August 2003 WTO Decision. Human rights institutions and actors added weight to the campaign for the modification of TRIPS commitments by lending additional legitimacy,

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<sup>59</sup> Pécoul, B., Chirac, P., Trouiller, P., Pinel, J. (1999) “Access to Essential Drugs in Poor Countries – A Lost Battle?” *Journal of American Medicine Association*, Vol. 281, No. 4.

<sup>60</sup> A. Lang (2007) “The Role of the Human Rights Movement in Trade Policy-Making: human rights as a trigger for social learning”, *New Zealand Journal of Public and International Law*, 5: 147-172.

<sup>61</sup> See, for example, F. Abbott (2005) “The ‘Rule of Reason’ and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS” in Cottier, T., Bürgi, E. and Pauwelyn, J. (eds.) *Human Rights and International Trade*, 279 at 294.

new constituencies and (to a certain extent) further resources to those groups pressuring for change.

For Lang, the deployment of human rights language also helped to frame the debate as a moral issue, and through the mobilisation of moral outrage, thereby helped to generate a widespread sense that the TRIPS Agreement in its current form could not be justified. While Lang makes it clear that he does not think ‘human rights’ themselves necessarily provide a vision of the most appropriate ends towards which the trade regime ought to be striving, he suggests that human right actors have nevertheless been instrumental in generating a renewed critical debate about the social purposes of the international trading system and, although he acknowledges that no-one would suggest that the human rights movement is solely responsible for shifts which are already observable, in his view human rights have contributed to this process by providing resources and institutional space for the production and dissemination of this knowledge, and a ready-made audience for it.

When human rights actors produce their numerous commentaries on the ‘human rights impact’ of the trading system, Lang’s observation is that one of the most important functions they are performing is facilitating the production of social knowledge: generating shared narratives; synthesising some kind of consensus about how certain aspects of the trading system operate; the selecting, reframing and imparting new meaning to information produced by various kinds of trade policy experts.

### **The World Health Assembly Resolution on Public Health, Innovation and Essential Health Research and Intellectual Property Rights**

So how is this discourse on intellectual property rights, human rights and the right to health likely to develop in the future? One indication of the shape of the debate can be found in the World Health Assembly *Resolution on Public Health, Innovation and Essential Health Research and Intellectual Property Rights* of 27 May 2006.<sup>62</sup> In this Resolution, the World Health Assembly appears to have reignited the debate on the relationship between human rights and the right to health, asserting the significance of intellectual property rights as human rights by: “Stressing that the Universal Declaration of Human Rights provides that ‘everyone has the 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 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.’” At the same time, the Resolution noted that the World Health Assembly is concerned about the impact of high prices on access to medicines. The tensions between the right to own intellectual property rights and the implications this could have on high prices for pharmaceutical products and on access to medicines were clearly set out in the Resolution.

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<sup>62</sup> World Health Assembly (2006) *Public Health, Innovation, Essential Health Research and Intellectual Property Rights: towards a global strategy and plan of action*, Fifty-Ninth World Health Assembly, WHA59.24, 27 May 2006.

Subsequently, at the Sixty-First World Health Assembly on 24 May 2008, the *WHO Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property* attempts to balance the right to health with the right to own intellectual property.<sup>63</sup> Accordingly, the *WHO Global Strategy* sought to achieve this balance by calling for more efforts to be made to implement States' obligations arising under applicable international human rights instruments with provisions relevant to health, while at the same time acknowledging that the Universal Declaration on Human Rights provides that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share scientific advancement and its benefits" and 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".

In many respects, therefore, the debate encapsulated by deliberations at the World Health Assembly appears to have run full circle. Tensions remain between, on the one hand, the interpretation of intellectual property as a human right in terms of property and ownership and, on the other hand, the right to health as a human right, with all this implies for intellectual property rights and access to medicines.

How this tension is resolved and the extent to which intellectual property rights, human rights and the right to health can be best interpreted in a developing countries where problems of access to medicines are most acute will largely depend on the capacity of those developing country governments to utilise the language of human rights to their best advantage. In this respect, as the General Comment 14 on the right to health confirmed, it is particularly incumbent on all those in a position to assist, to provide "international assistance and cooperation, especially economic and technical" in order to enable developing countries to fulfil their core obligations under the Convention.<sup>64</sup> Accordingly, it is incumbent upon developed States and other actors in a position to assist, to develop international intellectual property regimes that enable developing States to fulfil at least their core obligations to individuals and groups within their jurisdictions."<sup>65</sup>

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<sup>63</sup> World Health Assembly (2008) *Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property*, Sixth-First World Health Assembly, WHA61.21, 24 May 2008.

<sup>64</sup> Above, n. 19, para 45

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