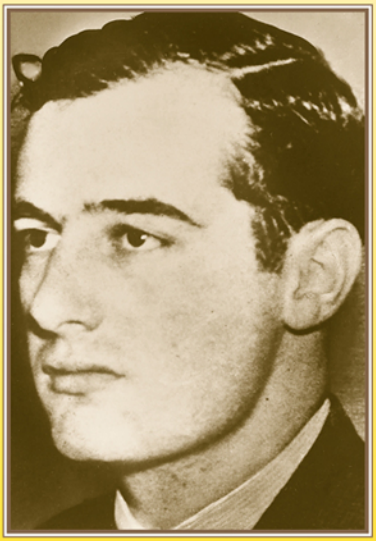
THE RAOUL WALLENBERG INSTITUTE NEW AUTHORS SERIES

Human Rights and Intellectual Property Rights

Tensions and Convergences



Edited by
Mpasi Sinjela

Martinus Nijhoff Publishers

HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS

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VOLUME 2

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INTRODUCTION

Mpazi Sinjela

The relationship between human rights and intellectual property rights (IPRs) has been a subject of intense discussion during the last two decades among various stakeholders around the globe. The adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) at the international level and strengthening of intellectual property (IP) protection standards at bilateral and regional levels have intensified discussions on the subject during recent times. There are two angles from which this relationship is analyzed. The first dimension of this relationship relates to the question whether the right to IP protection is part of human rights that individuals enjoy, that is, whether IPRs are human rights by themselves. The second dimension concerns the effect that IP rights may have on States' ability to comply with their obligations under international human right treaties, such as the obligation to ensure access to food, medicine and education. It is recognized that the issue of the relationship between human rights and IPRs is of a complex character and requires a thorough understanding of the nature and scope of both rights.

Existing human rights treaties do not make an extensive reference to IPRs. However, the following provisions within human right treaties are relevant to the discussion. The Universal Declaration of Human Rights (UDHR), adopted in 1948, states in Article 27.2 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 addition to recognizing the right of authors, the UDHR guarantees the right to property. Article 17 states that "everyone has the right to own property" and "no one shall be arbitrarily deprived of his property". The International Covenant on Social, Economic and Cultural Rights (Covenant), adopted in 1966, is one of the most important legal instruments though which the relationship between the two fields can be further explored. It was introduced as a second-generation human rights treaty developing further some of the issues contained in the UDHR. Similar to the UDHR, the Covenant recognizes, for example, everyone's right to food and health. In addition the Covenant recognizes in Article 15.1 the right of the author "to benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production".

Some regional human rights instruments also contain provisions relating to property rights in general which can also contribute to this discussion. The American Convention on Human Rights of 1969 provides in Article 21.1 that "Everyone has the right to use and enjoyment of his property". The provision further states that "The law may subordinate such use and enjoyment to the interest of society". The

European Convention on Human and Fundamental Freedoms of 1950 provides in Article 1 of its Protocol that "every natural or legal person is entitled to the peaceful enjoyment of his possessions". Further it recognizes that the State has the right "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". The African Charter on Human Rights and People's Rights of 1981 provides in Article 14 that "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community".

The issue whether IPRs are a form of property right recognized by international human rights instruments is a contentious one. It has been argued by some commentators that IPRs do not belong to the category of fundamental human right, because human rights are of such importance that their international protection includes the right or even an obligation for international enforcement. For that reason, IPRs as well as most of the other property rights, the argument continues, cannot be considered within this category. Moreover, it has been noted, there is a conceptual problem to including property rights within the category of fundamental human rights. This is because under private and public international law, states can regulate property rights, to adjust them to meet social and economic needs. However, fundamental human rights cannot be adjusted on the basis of particular needs of the states.

In addition, the statements contained in Article 27.2 of the UDHR and Article 15.1 of the Covenant, which recognize intellectual contributions in general without making any specific reference to existing IPRs, have raised two opposing views. On the one hand, it is argued that IPRs are implicit in the right to the protection of moral and material interest of authors and the right of property in the UDHR and the Covenant. On the other hand, it is argued that protection of the moral and material interest of authors granted by these provisions cannot be equated with IP protection. This is because human rights are deemed to be fundamental, inalienable and universal entitlements, while IPRs are statutory rights granted by the state which are temporary, can be traded or revoked. Therefore, the argument concludes that IPRs lack the fundamental characteristics of human rights and cannot be regarded as such. Despite the above listed differences between the nature of both rights, a complete exclusion of the IPRs from the realm of human rights seems for some unacceptable. Issues remain as to how far IPRs, if deemed to be within the realm of human rights can go. Would it include the rights of business corporations, or is the right limited to the individual seeking protection for his work?

The immediate relevance of existing IPRs to human rights has been seen from the impact that IPRs may have on the realization of human rights. Thus it has been argued that the realization of the right to food, health and education is undermined by the high license fees and royalties brought about by the present IP protection system. Much discussion has brought the issue of patenting life forms, which

involve the issue of human dignity. Thus the ethical issues related to patenting of human genes have been acknowledged. Another example is the introduction of product patent in the health sector, which has given rise to the concern that this would undermine access to essential drugs at low cost and would thus result in a lack of the realization of human right to health in most developing countries. The increase in the number of AIDS effected people has fueled the debate. Moreover, the tension has arisen when some developed countries sought to seek the restriction of generic drugs and parallel imports by invoking the provisions of the TRIPS Agreement. In addition copyright has been blamed for restricting the right to education and freedom of expression, freedom of the press and for free speech.

The above issues have developed two schools of thought. The first school maintains that human rights and IPRs are in fundamental conflict. Strong protection of IP is incompatible to human rights obligations. Thus, for resolving the conflict between the two, it is suggested that human rights should always prevail over IPRs. Whereas the second school of thought asserts that human rights and IPRs pursue the same aim; that is to define the appropriate scope of private monopoly power to create incentives for authors and inventors, while ensuring that the public has adequate access to the fruits of their efforts. Accordingly, they argue, human rights and IP are compatible. However, what is needed is to strike a balance between the provision of incentives to innovate and public access to products of that innovation.

From this overview of the issues involved concerning the interface between human rights and IP, it is clear that direct answers to these questions are not easy to find. Human rights and IPRs at present coexist, each on its own legitimacy. For the future it will be interesting to see to what extend human rights standards can and would influence the interpretation of IP norms, for example in defining the scope of IPRs.

We wish to reiterate that the discussion on the relationship of human rights and IPRs is currently an ongoing one. We believe that the articles in this book will have a valuable contribution to the debate and will further stimulate the interest to explore and address these complex and challenging issues.

The papers presented in this manuscript were written by students as a part of their fulfillment towards the Master's of Human Rights and Intellectual Property Law (LL.M) Degree Program which is offered by the Raoul Wallenberg Institute and University of Lund jointly with the World Intellectual Property (WIPO) Worldwide Academy. The essays have been edited for the purpose of this manuscript.

The implication of the TRIPS Agreement on the individual's right to food in Africa is analyzed in the paper of Jeannete Mwangi. A study of other relevant international and regional agreements is made to assess the impact of TRIPS.

The essay by Mahboob Murshed explores the suitable legal measures for curbing software piracy in e-Commerce and studies the compatibility of such measures with human rights.

The relationship between patent rights and access to medicines is analyzed in a paper by Björn Ley.

Anna Dahlberg's essay explores the effect that the adoption of the TRIPS Agreement and the strengthening of IPRs have on technology transfer to developing countries.

The final paper by Esther Almeida analyzes the current international debate on traditional knowledge protection and possible future trends. These issues are primarily analyzed in the context of the traditional knowledge of the Amazon indigenous groups of Ecuador.

CURBING SOFTWARE PIRACY IN ECOMMERCE

Compatibility with Human Rights: Challenges and Possible Solutions

Md. Mahboob Murshed[*]

Abstract. Software and electronic Commerce (eCommerce) are inseparable. The aim of this thesis is to discover suitable legal measures for curbing software piracy in eCommerce and to explore the compatibility of such measures with human rights. The World Intellectual Property Organisation (WIPO) Copyright treaty, the Berne Convention, the TRIPS Agreement and other international laws on copyright, patent and software will be discussed in relevant places. Information and statements from the papers prepared by the WIPO on digital rights management, eCommerce, and copyright are frequently used in this thesis. Since the USA is the pioneer in the software industry and eCommerce, particular attention will be given to the US legal system, and a considerable number of relevant cases from the US will be discussed in relevant chapters of this thesis. Also, European law and British law will be explored by providing for a limited number of case references. Since I am a Bangladeshi and Bangladesh is a developing country, its role in the software industry has also been briefly provided for.

1. INTRODUCTION

1.1. Prelude

Software is one of few intangible products that can be sold and delivered online. The heart and soul of the digital revolution is computer software. But software piracy can undermine the sound growth of the flourishing software industry. Online software

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piracy or software piracy in eCommerce can easily be conducted from any place in the world and takes little time. Therefore, the loss resulting from software piracy in eCommerce is tremendous. Since software involves intellectual property rights and intellectual property law plays a vital role in the protection of software in eCommerce, the issue at hand is one of the most heated in intellectual property law.

Recently, the World Intellectual Property Organization (WIPO) in collaboration with the Sub-Commission on the Promotion and Protection of Human Rights sought to discover the relationship between intellectual property rights and human rights. Therefore, besides dealing solely with measures aimed at limiting software piracy in eCommerce there is now an initiative to find out the compatibility of such measures with human rights.

1.2. Software and eCommerce

Software includes computer programs, databases, preparatory material and associated documentation (in printed or electronic form), such as manuals for users of programs and for persons who have to maintain them. Software also includes other works stored in digital form, interfaces (for example, with the user of hardware or other software), programming languages and software tools used to develop software systems.[1] A computer program is a series of instructions by which desired output can be achieved from the computer. Under the Korean Computer Program Protection Act, 1987 (CPPA), a computer program is defined as a work expressed in the form of a series of instructions or orders that are used directly or indirectly to obtain a specific result in a computer or other device having information-processing capability.[2]

As early as 1986, the first company operating a commercial service on the Internet was a stamp exchange called the 'International Stamp Exchange'. The 'electronic commerce' component of the stamp company was performed through telex terminals or personal computers. In 1996, the term eCommerce first appeared. However, many regard 1998 as the year eCommerce really began, leading to today's wide consumer adoption of eCommerce.[3]

The term 'electronic commerce' is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means.[4] The term electronic commerce has been defined as follows: "[e]lectronic commerce, or e-commerce, is a term that has become synonymous with commercial transactions involving both organisations and individuals, based upon the processing and

[1] Bainbridge, D., *Intellectual Property* (fourth edition) London: Pitman, 1999, p. 199.
[2] Park, J. K., 'Asian Protection Strategies for the Internet', in Lee, L. C. and Davidson, J. S. (eds.), *Intellectual Property for the Internet* New York: Panel Publishers, 1997, pp. 274, 275.
[3] Cunard, J. P., Hill, K., and Barlas, C., *Current Development in the Field of Digital Rights Management*, prepared for WIPO's Standing Committee on Copyright And Related Rights, Tenth Session held on 3 to 5 November 2003, SCCR/10/2, 1 August 2003, p. 6.
[4] WTO, *Work Programme on Electronic Commerce*, adopted by the General Council on 25 September 1998.

transmission of digitised data, including text, sound, and visual images, transmitted over open networks such as the internet".[5]

1.3. Role of Software in eCommerce

Over the past several years, advances in computer software have brought us time-saving business programs, educational software that teaches basic skills and sophisticated subjects, graphics programs that have revolutionized the design industry, Internet applications that help connect us with other computer users and an increasingly complex variety of computer games to entertain us. As the software industry grows, everyone stands to benefit.

The Internet facilitates trading of physical products as well as intangible products. For commerce involving physical products, the Internet functions as a global system facilitating sales, in which the placing of an order and the making of payment can (but does not necessarily have to) take place online, while the goods themselves are delivered separately through a postal or other delivery service. For trading intangible products, the Internet serves not only as a system to promote sales but also as a system to effectuate the delivery of the intangible product itself, such as a piece of music or software, a film or a publication. The order, payment and the delivery of an intangible product can take place almost instantaneously, and the intangible product can travel virtually without restriction across national borders.[6]

To develop eCommerce and the Internet, system software plays a significant role. The World Wide Web, HyperText Transfer Protocol (HTTP), HyperText Markup Language (HTML), hyperlink, metatag and other necessary aspects of the Internet depend on software.

1.4. Software Infringements in eCommerce

Software infringements can take place in several ways in eCommerce. The Software and Information Industry Association (SIIA) has summed up the most popular types of software piracy as follows.[7]

Softlifting: Softlifting takes place when a person purchases a single licensed copy of a software program and loads it on several machines, in violation of the terms of the license agreement. Typical examples of softlifting include, 'sharing' software with friends and co-workers and installing software on home/laptop computers if not allowed to do so by the license.

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[5] Catchpole, J., The Regulation of Electronic Commerce: A Comparative Analysis of the Issues Surrounding the Principles of Establishment', 2001, 9:1 *International Journal of Law and Information Technology*.

[6] WIPO, *Primer on Electronic Commerce and Intellectual Property Issues*, pp. 4, 5, available from www.ecommerce.wipo.int/primer, [accessed 4 July 2004].

[7] *See* <www.siia.net>, [accessed 4 July 2004].

Unrestricted Client Access: Unrestricted client access piracy takes place when a copy of a software program is copied onto an organization's servers and the organization's network 'clients' are allowed to freely access the software in violation of the terms of the license agreement.

Commercial Use of Non-Commercial Software: Using educational or other commercial-use-restricted software in violation of the software license is a form of software piracy. The price of this software is often greatly reduced by the publisher in recognition of the educational nature of the institutions. Acquiring and using non-commercial software hurts not only the software publisher but also the institution that was the intended recipient of the software.

Internet Piracy: Internet piracy is the uploading of commercial software (i.e. software that is not freeware or in the public domain) on to the Internet for anyone to copy or copying commercial software from any of the services like auction sites, File Transfer Protocol (FTP) sites, Internet Relay Chat (IRC) rooms, warez sites or redistributed via e-mail. Internet piracy also includes making available or offering for sale pirated software over the Internet. Examples of this include the offering of software through an auction site, Instant Messaging (IM), IRC or a warez site.

1.5. Gravity and Consequence of Software Piracy in eCommerce

On average, the software industry loses annually about USD 11 to 12 billion in revenue due to software piracy. Of the billions of dollars lost to piracy, a little less than half comes from Asia, where China and Indonesia are the biggest offenders. Piracy is also a big problem in Western Europe, where piracy losses annually range from USD two point five to three billion. Piracy rates are quite high in Latin America and in Central Europe, but their software markets are much smaller so dollar losses are considerably lower.[8]

The losses suffered through software piracy directly affect the profitability of the software industry. Because of the money lost to pirates, publishers have fewer resources to devote to research and development of new products, have less revenue to justify lowering software prices and are forced to pass these costs on to their customers. Consequently, software publishers, developers, and vendors are taking serious actions to protect their revenues.

The numerous ways in which software piracy occurs, the ease of duplication and the high quality of pirated software present significant problems to the software industry. Unlike analog products subject to illegal copying, such as audiotapes and videotapes, there is no degradation in the quality of software from copy to copy. A program that reflects unprecedented technology, years of effort and millions of development dollars can be duplicated or illegally distributed in minutes with the touch of a button.

[8] *Ibid.*

1.6. Permitted Actions in Relation to the Software

There are several exceptions to the copyright owner's exclusive rights scattered throughout the copyright law of a country. The most significant exception is the doctrine of fair use, which permits someone to use a work without the copyright owner's permission and without payment for use in certain circumstances. There is no bright-line test for determining when a particular use constitutes fair use under the law. Fair use is determined on a case-by-case basis and depends on balancing the following factors: (1) the purpose and character of the use, including whether the use is commercial or for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the size of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.

Computer programs are literary works under the copyright law of different countries, and all the provisions affecting literary works apply to computer programs, unless the contrary is stated. For example, a teacher can write part of a computer program on a black board for the purposes of instruction.

The Copyright, Designs and Patents Act of 1988 of the UK which incorporated the EC Software Directives, disclosed the following specially permitted acts for computer programs:

- DECOMPILATION OF COMPUTER PROGRAMS;
- MAKING BACK-UP COPIES OF COMPUTER PROGRAMS; AND
- MAKING COPIES OF ADAPTATIONS OF COMPUTER PROGRAMS.

These exceptions to infringement apply only to acts done by lawful users of computer programs.

2. SOFTWARE PATENTING VIS-À-VIS COPYRIGHT

2.1. A Brief History of Software Patenting

The United States has pioneered the granting of software patents. Therefore, in order to discuss the history of software patenting, we have to examine the history of US software patenting.

In the 1980s, the Supreme Court forced the US Patent and Trademark Office (USPTO) to change its position. The 1981 case of *Diamond* v. *Diehr* was the first case in which the US Supreme Court ordered the USPTO to grant a patent on an invention even though computer software was utilized. In that case, the invention related to a method for determining how rubber should be heated in order to be best 'cured'. The invention utilized a computer to calculate and control heating times for rubber. However, the invention (as defined by the claims) included not only the computer program but also included steps relating to heating rubber and removing the rubber from heat. The Supreme Court stated that, in this case, the invention was not merely a mathematical algorithm but a process for melting rubber, and hence it

was patentable. This was true even though the only 'novel' feature of this invention was the timing process controlled by the computer.[9]

In 1995, the USPTO decided it was time to develop guidelines for patent examiners that reflected the recent court decisions. After releasing draft versions of the guidelines for comment, the USPTO adopted guidelines for USPTO examiners to use to determine when a software related invention is statutory and therefore patentable.[10]

On the other hand, the European stand on software patenting is confusing and conflicting with the 1973 Convention on the Grant of European Patents, popularly known as the European Patent Convention (EPC).

It was the opinion of Cornish and Liewelyn that the exclusion of computer programs 'as such' from the scope of the EPC reflected a wide spread view in the early computer industry and among researchers in the field. They further stated that software was open to protection by trade secrets law, contract and copyright. However, particularly during the last decade, there has been rising pressure from the giants of the computer industry to strengthen all other intellectual property (IP) in the field by way of patents for inventions.[11]

In the twilight of the dot-com fireworks of 1997 to 1998, the European Commission proposed to harmonize the law on what software can be patented in Europe. The Commission relied on the Agreement on Trade Related Aspects of Intellectual Property Rights (the so-called TRIPS Agreement) requirement to extend patents to all fields of technology. However, the EC did not propose any alteration of the basic distinction in the EPC that computer programs *as such* are beyond the scope of patentable subject-matter. This distinction entails that for a computer program to be patented, it must have a 'technical effect' or 'technical character'. Examples of what constitutes a 'technical contribution' can be taken from case law of the European Patent Office (EPO):

- Merrill Lynch's Application12 (analysis of stock market data). The application program was for customers in an automated market for shares. It analysed customer orders to buy and sell against given criteria; if the criteria were satisfied, the transaction was executed automatically. The Court of Appeal held this application program to be unpatentable because the operation that resulted was a legal transaction and not a technical effect.
- Amazon 1 Click. In contrast, the EPO granted a patent to the famous 'Amazon 1 Click' (EPO 902381, USPTO 5960411)13. The patent covers

[9] Bit Law, *The History of Software Patents*, available from www.bitlaw.com, [accessed 10 July 2004].
[10] *Ibid.*
[11] Cornish, W., and Liewelyn, D., *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* London: Sweet & Maxwell, 2003, pp. 777, 778.
[12] *Merril Lynch's Application* [1989] RPC 561.
[13] Pascual, J. S. and Fernandez, R. G., *Software Patents and Their Impact in Europe*, p. 10, available from joel.editthipage.com/stories/story, [accessed 9 July 2004].

the use of Internet 'cookies'14 in order for the user to be free from writing his address and credit card every time he buys an item. This idea is obvious as it was one of the aims in mind when the 'cookies' system was created (part of the HTTP standard that is patent free).

2.2. Laws Relating to Software Patenting

2.2.1. TRIPS Agreement

Article 27(1) of the TRIPS Agreement provides the basis for software patenting. It reads as follows:

> "Subject to the provisions of paragraphs 2 and 3, patents shall be available for any invention, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.[15] Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced."

According to Article 27 of the TRIPS Agreement, Members may exclude from patentability inventions to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment subject to the condition mentioned therein. Members may also exclude from patentability:

(A) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; and
(B) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological process.

From the aforementioned provisions, supporters of software patenting base their argument on the patentability of process related computer programs.

However, the German Federal Patent Court exclusively refutes the TRIPS fallacy. It refers to the *Dispositionsprogramm* doctrine, according to which the presence or not of *controllable forces of nature* in the solution of the problem is the only usable criterion for delimiting the realm of patentable inventions.[16]

[14] 'Cookies' are a mechanism used to identify users (for example, in order to have each user downloading a web page with different preferences).
[15] "For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively" (Note 5 of the TRIPS Agreement).
[16] Available from swpat.ffii.org/analysis/trips/index.en.html, [accessed 11 July 2004].

2.2.2. The US Law

The US Patent Act is broad and general in its language when describing the appropriate subject matter for a patent. According to Section 101 of Title 35 of the US Code:

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent thereof, subject to the conditions and requirements of this title."

However, not all 'inventions' are patentable: "excluded from such patent protection are laws of nature, natural phenomena, and abstract ideas".[17] "An idea in and of itself is not patentable".[18]

As seen above, Congress has deemed appropriate subject matter for a patent: namely, processes, machines, manufactures and compositions of matter. The latter three categories define 'things' while the first category defines 'actions' (i.e. inventions that consist of a series of steps or acts to be performed).[19]

Even though most software related inventions fall under the USPTO's 1996 Final Computer Related Examination Guidelines, it is important to remember that 'software' as a class is not patentable. What is patentable are 'processes' and 'machines'. Thus, the Guidelines are framed so as to assist in determining when computer related inventions are patentable processes or machines.

2.2.3. European Law

According to the EPC's general requirements, cf. Article 52(1) to 52(3), which are reproduced in essence in the patent laws of Member States, all patentable inventions must be new, involve an inventive step and be capable of industrial application, cf. Article 52(1).

Under Article 52(2) of the EPC, *programs for computers* are defined as not being *inventions* and are thus excluded from patentability. The EPO's Boards of Appeal has held that it is fundamental that all inventions have a technical character. Similarly, Article 27(1) of the TRIPS Agreement confirms that patents shall be available for inventions in all fields of technology. Accordingly, the EPO Boards of Appeal and some courts of the Member States have held that 'computer-implemented inventions' can be considered patentable when they have a technical character, i.e. when they belong to a field of technology. Computer-implemented inventions, which meet this condition, are not considered to fall under the exclusion in Article 52(2) as they are considered not to relate to 'programs for computers as such'. In fact, the exclusion has been interpreted by the Boards of Appeal as relating to 'computer-implemented inventions' which 'have no technical character'.

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[17] *Diamond* v. *Diehr*, US Supreme Court, 450 US 175 at 185 (1981).
[18] *Rubber-Tip Pencil Co.* v. *Howard*, US Supreme Court, 87 US 498 at 507 (1874).
[19] "The term "process" means process, art, or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material"(*see* Section 100(b) of Title 35 USC).

With regard to what computer-implemented inventions can be said to have a 'technical character', the conclusion to be drawn from the recent *Controlling Pension Benefits System* case is that all programs when run in a computer are by definition technical (because a computer is a machine) and consequently able to be considered an 'invention'.

Similar considerations have been applied by the EPO Boards of Appeal to other 'non-inventions' listed in Article 52(2), e.g. 'methods for doing business', 'presentation of information' or 'aesthetic creations'. This means that these non-inventions have also been held to be patentable when they 'have a technical character'.

With regard to the representation of the (non)invention in patent claims, the Board held, in *Computer Program Product I & II*, that if a program on a carrier has the potential to produce a technical effect when loaded and run on a computer, such a program claimed by itself should not be excluded from patentability. This has been interpreted as meaning that it is possible to claim such a program by itself or as a record on a carrier or in the form of a signal (e.g. stored as a file on a disk or transmitted across the Internet).

2.3. Software Patent V. Copyright

2.3.1. Argument for Software Patenting

(I) Software technology is at least as expensive to develop as hardware technology, but it is very inexpensive to copy. While patents and contracts play a role in protecting different aspects of technology, the main mode of legal protection for software technology is copyright.[20] However, the stronger protection offered by patents is attractive to developers seeking to maximize the level of legal protection for their investments. Further, copyright is intended to protect only the expression of an invention, not the ideas (or application of ideas) underpinning an invention. In many cases of software invention, the ideas (or application of ideas) underpinning an invention are the truly inventive elements while their concrete expression in the form of program implementation is comparatively routine and trivial.

(II) A study conducted by the Intellectual Property Institute in London found that the patentability of computer-related inventions has fueled the growth of computer program industries in the US, in particular the growth of small and medium enterprises and independent software developers into larger companies.[21]

(III) Patents are important for the protection of technical inventions in general. The basic principle underlying the patent system has proven its efficiency with respect to all kinds of inventions for which patent protection has thus

[20] For example, the 1868 UK Copyrights, Designs and Patents Act stipulates that computer programs are protected under copyright law as a species of literary work.

[21] London Intellectual Property Institute, *IPI 2000: The Economic Impact of Patentability of Computer Programs*, available from swpat.ffii.org, [accessed 14 July 2004].

far been afforded in the Member States of the European Community. Patents act as an incentive to invest time and capital, which stimulates employment. Society as a whole reaps benefits from the disclosure of an invention, which brings about technological progress upon which other inventors can build upon.[22]

2.3.2. Argument for Copyright

(I) Copyright protection is automatic and vests upon the creation of the work at the time the program is written. Depending on the provisions of relevant national law, such protection may last for the life of the author plus 50 years (currently 70 years under many national laws, such as the European Community Member States and the United States of America). Patent protection is subject to strict procedures, such as examination, public disclosure and maintenance fees. The term of protection for patents is more limited: 20 years from the date of filing. Patent enforcement, however, is more extensive than that provided under copyright law.[23]

(II) Patents may strengthen the market position of big players.

(III) Computer program industries are examples of industries where incremental innovation occurs, and there are serious concerns whether patents are welfare enhancing in such industries.

2.4. Patent and Copyright Protection Complementary

The holder of a patent for a computer-implemented invention has the right to prevent third parties from using any software that implements his invention (as defined by patent claims).

On the other hand, copyright protection is accorded to the particular expression in any form of a computer program while ideas and principles, which underlie any element of a computer program and its interfaces, are not protected.

Accordingly, the same program can come under the legal protection of both patent and copyright law. Protection may be cumulative in the sense that an act involving exploitation of a particular program may infringe both the copyright in the code and a patent whose claims cover the underlying ideas and principles.

3. REGULATORY FRAMEWORK FOR CURBING PIRACY

3.1 International Legal Framework

Internationally the standards for copyright protection of software are set forth in the Berne Convention for the Protection of Literary and Artistic Works and the WIPO

[22] Available from swpat.ffii.org/papers/eubsa-swpat0202/intro/index.en.html, [accessed 14 July 2004].

[23] WIPO, *Intellectual Property: A Power Tool for Economic Growth*, pp. 210, 211, available from www.wipo.int/about_wipo/en/dgo/wipo_pub_888/index_wipo_pub_888.html, [accessed 18 July 2004.

Copyright Treaty (WCT).[24] Both agreements are administered by the WIPO and the TRIPS Agreement, which falls under the auspices of the World Trade Organization (WTO). These international agreements provide that computer programs and information content that can be copyrighted must be protected on a nondiscriminatory basis in each country that has signed the agreement(s). These agreements also set minimum standards defining and safeguarding the economic interests of creators of computer programs and information content.

A WIPO Primer stated that perhaps the most basic right granted under both copyright and related rights is the right of reproduction, which under the Berne Convention covers reproduction "in any manner or form".[25] This right is at the core of electronic commerce because any transmission of a work or an object of related rights presupposes the uploading of that work or object into the memory of a computer or other digital device. In addition, when the work or object is transmitted over networks, multiple copies are made in the memory of network computers at numerous points. It is, therefore, necessary to determine how the reproduction right applies to such copies. In 1982, at a meeting of government experts co-organized by the WIPO and the UN Educational, Scientific and Cultural Organization (UNESCO), a consensus was reached that uploading into memory should be considered as an act of reproduction. This understanding was reconfirmed in 1996 in the Agreed Statements to the WCT and the WIPO Performances and Phonograms Treaty (WPPT), which state: "[t]he reproduction right … and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of the [relevant treaty right]".[26] The appropriate application of the right to reproduction in the case of temporary copies in computer random access memory (RAM) continues to be a subject of debate at national and international levels. The key question is whether such copies always require the consent of the right holder in order to avoid infringement. Carefully tailored exceptions for such copies in certain

[24] The Treaty has been enforced since 2002.

[25] Berne Convention, Article 9(1). *See also* Rome Convention, Article 10 and TRIPS Agreement, Article 14 (providing to phonogram producers the right to authorize or prohibit the "direct or indirect" reproduction of their phonograms). The WPPT also provides to both phonogram performers and producers a broad right of reproduction, whether "direct or indirect" and "in any manner or form" (WPPT, Articles 7 and 11). For a detailed discussion of reproduction, communication and distribution rights, *see* the presentation of C. Clark, General Counsel of the International Publishers Copyright Council, at the WIPO International Conference on Electronic Commerce and Intellectual Property in September 1999, available from ecommerce.wipo.int/meetings/1999/index.html.

[26] *See* WIPO, *supra* footnote 6, p. 30.

circumstances have been recently enacted in the USA[27] and proposed by the European Commission in a Draft Directive.[28]

3.2. European Legal Framework

3.2.1 EC Software Directive

The EC Software Directive makes it mandatory for Member States to protect computer programs by copyright as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works.[29]

Member States have been directed to provide, in accordance with their national legislation, appropriate remedies against a person committing any of the following acts:[30]

(A) any act of putting into circulation a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;
(B) the possession, for commercial purposes, of a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;
(C) any act of putting into circulation, or the possession for commercial purposes, of any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program.

3.2.2. EC Copyright Directive

Article 5(1) of the EC Copyright Directive exempts temporary acts of reproduction "such as transient and incidental acts of reproduction" which are an "essential part of the technological process", from copyright infringement. This is aimed primarily at Internet Service Providers (ISPs) who merely host websites containing infringing material and/or provide the means for the passing of e-mail correspondence that might contain infringing material. The computer games lobby is concerned that the words 'such as' do not completely restrict the scope of the exception but leave it open to argument that other forms of reproduction may lead to an exemption from liability. In addition, and more importantly, the lobby is extremely concerned that this exemption from liability for ISPs cuts across the exemptions as drafted in the E-Commerce Directive.

[27] The 1998 US Digital Millennium Copyright Act (DMCA), Title II, Section 512(h) and the US Copyright Office summary available from lcweb.loc.gov/copyright/legislation/dmca/pdf, [accessed 21 July 2004].
[28] Article 5(1) of the Amended Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 97/0359(COD), Brussels, 21 May 1999.
[29] Article 1 of the EC Software Directive.
[30] Article 7 of the EC Software Directive.

3.2.3. EC

E-Commerce Directive

The EC E-Commerce Directive attempts to establish a coherent legal framework for eCommerce and to protect the public interest, i.e. the consumer by providing a framework for dealing with the establishment of providers of online services, commercial communications, electronic contracts, enforcement of rights and the liability of intermediaries. Articles 12 to 14 deal with liability of ISPs:

- Article 12 ('Mere Conduit'): provides that ISP's are not liable for information transmitted on their networks provided they do not initiate the transmission, do not select the receivers of the transmission, and do not select or modify the information in the transmission. This exemption of liability extends to the automatic, intermediate and transient storage of the information provided it is not stored for any longer than reasonably necessary;

- Article 13 ('Caching'): ISPs will not be liable for the automatic, intermediate and temporary storage of information performed for the sole purpose of making the onward transmission of the information more efficient. This exemption is aimed mainly at the data protection legislation and again, there are certain conditions with which the ISP must comply; and
- Article 14 ('Hosting'): ISPs will not be liable for hosting information provided they do not have actual knowledge that the activity is illegal and, upon obtaining such knowledge, act quickly to remove it.

All these exemptions, however, have a proviso; ISPs are liable to a prohibitory injunction, i.e. although there may be no liability in damages, they will be subject to an injunction preventing the hosting, caching or conduit of infringing information.

Now we will examine the legal framework of the UK in order to examine to what length she has incorporated the Directive and how she has implemented the Directive in a manner making her a model country.

3.2.4. Legal Framework of the UK

In the UK Copyright, Designs and Patents Act 1988 (CDPA 1988) deals with computer programs. Section 3 of this Act mentions computer program as a literary work and Section 1 of this Act describes copyright as subsisting in original literary works and other works. According to the Copyright Directive a computer program is protected by copyright as a literary work. The UK Act deviates from the Directive in its approach to exclusive rights in a program (and equally to works stored as data in a computer) by defining 'copying a work' to include storing the work in any medium by electronic means. This includes the making of copies which are transient

or incidental to some other use of the work.[31] The Directive is more specific and extensive. It requires that any permanent or temporary reproduction of a program by any means or in any form, in part or in whole, must be authorized, including loading, displaying, running, transmission and storage.[32]

Section 23 of the CDPA 1988 provides the acts mentioned in Article 7 of the Software Directive as copyright infringements and provides adequate legal remedies for such infringements in Sections 96 to 101A. In these sections, various remedies such as damages, injunction against service providers, order for deliver up, right to seize infringing copies and other materials are provided for. Section 107 stipulates criminal liability for the aforementioned acts provided by Article 7 of the Copyright Directive.

One of the most important cases from the UK is discussed directly below in order to determine the practice and interpretation of software law of the UK.

Sony Computer Entertainment v. *Paul Owen et al.*[33]: In the United Kingdom, for example, Sony Computer Entertainment brought suit against various defendants who imported 'modification chips' that could be used to circumvent copy protection and region-control technologies on PlayStation 2 discs. The facts raised were substantially identical to those in the earlier *GameMasters* decision in the USA.

The UK High Court (Chancery Division) relied on a copyright-based cause of action set out in Section 296 of the CDPA. Section 296 applies where copies of a work are issued in an electronic form that is 'copy protected' and gives rights to the distributor of the copies – as if he were the copyright owner in an action for infringement – against any person who sells a device that is "specifically designed or adapted to circumvent" copy protection and knowing that the device will be used to make infringing copies. 'Copy protected' is defined to include "any means intended to prevent or restrict copying of the work". The Court found for Sony because the copying that was to be prevented was the unauthorized loading of the game into the computer and because the codes on the discs fell within the definition of copy protection. The defendants violated Section 296 because their chips were specifically designed to circumvent Sony's copy protection technology.

3.3. Legal Framework of the United States

Federal copyright law automatically protects software from the moment of its creation. The rights granted to the owner of a copyright are clearly stated in the Copyright Act of 1976 (Title 17 of the US Code). The Act gives a copyright owner "the exclusive rights" to "reproduce the copyrighted work" and "to distribute copies ... of the copyrighted work" (Section 106). It also states that "anyone who violates

[31] Section 17(1), (2) and (6) of the CDPA, available from www.hmso.gov.uk/acts/1988/ukpga_ 19880048_en_3.htm, [accessed 22 July 2004].
[32] Cornish & Liewelyn, *supra* footnote 11, p. 766.
[33] *Sony Computer Entertainment* v. *Paul Owen et al.*, UK High Court (Chancery Division), EWHC 45 (2000).

any of the exclusive rights of the copyright owner ... is an infringer of the copyright" (Section 501), and it sets forth several penalties for such conduct. Those who purchase a license for a copy of software do not have the right to make additional copies without the permission of the copyright owner, except when it is necessary to: (1) copy the software onto a single computer in order to use the software; (2) make a backup copy "for archival purposes only", which are specifically provided in the Act; and (3) copy the software during activation of the computer in order to repair the computer (Section 117). The license accompanying the product may allow additional copies to be made so it is advised to review the license carefully. The unauthorized duplication of software constitutes copyright infringement regardless of whether it is done for sale, for free distribution or for the copier's own use. Moreover, those who copy are liable for the resulting copyright infringement whether or not they knew their conduct violated federal law. Penalties include liability for damages suffered by the copyright owner plus any profits the infringer made due to the unauthorized copying or statutory damages up to USD 150 thousand for each work infringed. The unauthorized duplication of software is also a federal crime if done "willfully and for purposes of commercial advantage or private financial gain" (Section 2319(b) of Title 18 of the US Code). Criminal penalties include fines of as much as USD 250 thousand and jail terms of up to five years.

Congress's authority to legislate concerning copyright issues derives directly from the US Constitution. Article 1, Section 8, Clause 8 of the Constitution grants Congress the power to "promote the Progress of Science and the Useful Arts, by securing for limited times to authors and inventors the Right to their respective Writings and Discoveries". Congress codified modern copyright law with the Copyright Act.[34] As written in the landmark 1991 *Feist Publications* case,[35] the purpose of copyright protection is "to assure authors the right in their original expression, (and) to encourage others to build freely upon the ideas and information conveyed by a work."[36]

Under the law, copyright protects "original works of authorship fixed in any tangible medium of expression", and grants to the copyright holder a set of exclusive rights that last for the life of the author plus fifty years.[37] These rights include the right to reproduce, distribute, perform, display or license their work.[38] Copyright infringement occurs when someone other than the holder of the copyright engages in one or more exclusive activities without the consent of the copyright holder.[39]

There are two forms of copyright infringement: direct copyright infringement and secondary copyright infringement. Secondary copyright infringement is again subdivided into two categories: contributory and vicarious copyright infringement.

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[34] Section 106 of Title 17 USC.
[35] *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, US Supreme Court, 499 US 340 (1991).
[36] *Ibid.* at 350.
[37] Section 501(a) of Title 17 USC.
[38] Section 106 of Title 17 USC.
[39] *Ibid.*

To validate a case of direct copyright infringement, a plaintiff must initially show proof of ownership of a valid copyright and copying by the defendant.[40] The copying requirement is satisfied by either direct evidence of copying or by showing that the defendant had access to the copyrighted work and that the works in question are substantially similar to the originally copyrighted work.[41] Once these initial requirements are satisfied, the plaintiff must prove that the defendant used the copyrighted work in a way that violated one of the copyright holder's exclusive rights described in Section 106 of Title 17 of the US Code. A finding of direct copyright infringement does not require proof of knowledge or intent to infringe but only proof that the defendant's activities violated one of the copyright holder's exclusive rights.[42] Secondary copyright infringement is applied in instances in which the defendant did not personally engage in the violating activity but still bears some responsibility for the infringement.[43] As mentioned before, there are two categories of secondary copyright infringement: contributory and vicarious copyright infringement.[44] A defendant is liable for contributory copyright infringement if "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another".[45] A defendant is liable for vicarious copyright infringement where the defendant has the right and ability to control or police the infringer's acts and receives a direct financial benefit from the infringement.[46]

There is no mention of secondary copyright infringement in the Copyright Act. Concerning the legal authority underpinning the concept of secondary copyright infringement, the Supreme Court, in *Sony Corp.* v. *Universal City Studios*[47], wrote the following: "the absence of express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activities. Vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold an individual liable for the actions of another". [48]

The doctrine of fair use is the most common affirmative defense to a finding of copyright infringement.[49] This limited doctrine allows individuals to use copyrighted

[40] *Howard* v. *Sterchi*, US Court of Appeals for the 11th Circuit, 974 F.2d 1272 at 1275 (1992).
[41] *Ibid.*
[42] Section 501(a) of Title 17 USC.
[43] *Shapiro, Bernstein & Co.* v. *H. L. Green Co.*, US Court of Appeals for the Second Circuit, 316 F.2d 304 at 308 (1963).
[44] *Gershwin Publishing Corp.* v. *Columbia Artists*, US Court of Appeals for the Second Circuit, 443 F.2d 1159 at 1162 (1971).
[45] *Ibid.*
[46] *Ibid.* p. 1163.
[47] *Sony Corp.* v. *Universal City Studios,* US Supreme Court, 464 US 417 (1984).
[48] *Ibid.* p. 435.
[49] B. Lehman, *Intellectual Property and the National Information Structure: The Report of the Working Group on Intellectual Rights*, September 1995, p. 128.

works for certain specific purposes without the consent of the copyright holder.[50] Within the limits of fair use case law, the fair use doctrine states that the use of a copyrighted work in scholarly papers, in news reports, in education and in other similar situations does not constitute copyright infringement.[51] Section 107 of Title 17 of the US Code lists four factors used in determining fair use. The four factors are: (1) the purpose and character of the use, including whether the use is commercial in nature; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

It is useful to discuss the following important cases from the US in order to realize the implementation of the aforementioned law in practice and the judicial trend of considering the problem of curbing software piracy in eCommerce.

In *Playboy Enterprises Inc.* v. *Frena*,[52] the defendant was an operator of a computer bulletin board service (BBS) that, unknown to the defendant, distributed unauthorized copies of Playboy Enterprises, Inc.'s (PEI) copyrighted photographs.

Among the many pictures stored on Frena's BBS, 170 were copies of Playboy's copyrighted photographs. Frena admitted that the materials were displayed on the BBS and that he never received consent from Playboy. However, Frena argued that he did not personally upload any of the infringing pictures onto the BBS (his subscribers had uploaded the images) and that he removed the infringing pictures as soon he became aware of the matter.

Using these facts, the District Court found Frena guilty of copyright infringement. In making its determination, the Court analyzed the elements needed for copyright infringement as follows. In order to establish a *prima facie* case of copyright infringement, the plaintiff must show ownership of the copyright and 'copying' by the defendant. In this case there was no question that Playboy owned the copyrights on the photographs due to the fact that at trial Frena had offered no evidence to rebuff Playboy's copyright documentation. As for copying, the Court noted that since evidence of copying is rarely found, copying could be inferentially proven by showing that defendant Frena had access to the copyrighted work, that the work was substantially similar to the copyrighted work, and that one of the rights statutorily guaranteed to copyright owners was infringed upon by the defendant's actions. In this case, the elements of access and similarity were fulfilled since Playboy sells three point four million copies of its magazine per month in the United States, and the pictures were essentially exact copies of the copyrighted photographs. The only remaining issue was whether the defendant's actions infringed upon one of the copyright holder's exclusive rights.

The Court held that Frena's actions had infringed Playboy's exclusive right to distribute the works and the exclusive right to display the works. Concerning the

[50] *Ibid.*
[51] *Ibid.,* p. 73.
[52] *Playboy Enterprises, Inc.* v. *Frena*, US District Court for the Middle District of Florida, 839 F. Supp. 1552 (1993).

right to distribute, the Court held that Frena had unquestionably supplied a product containing unauthorized copies of a copyrighted work. As for display rights, the Court held that Frena's display of the copyrighted materials to his subscribers constituted a public display even though his subscribers were limited in number.

Frena defended his use as within the scope of the fair use exception to copyright infringement. His argument, however, fell on deaf ears. The Court found that Frena's actions were commercial in nature and of the sort that if they were to become widespread would result in a substantially adverse impact on the potential market for or value of the plaintiff's work and therefore were not within the fair use exception.

But the principles settled in *Plaboy* were reversed in *Religious Technology Center* v. *Netcom On-Line*[53]. In this case, copyright holders brought infringement action against an operator of a computer bulletin board service (BBS) and an Internet access provider and sought to hold the defendants liable for copyright infringement committed by BBS subscribers. The Internet access provider filed a motion for a summary judgment, the BBS operator filed a motion for a judgment on the pleadings and the copyright holders filed a motion for a preliminary injunction. The District Court, under the leadership of US District Court Judge Ronald M. Whyte, held that: (1) the Internet access provider was not directly liable for copies that were made and stored on its computer; (2) fact issues as to whether access provider had knowledge of infringing activity precluded summary judgment on contributory infringement claim; (3) the Internet access provider did not receive direct financial benefit from the infringing activity necessary to hold it vicariously liable; (4) fact issues precluded summary judgment on the Internet access provider's fair use defense; (5) the bulletin board operator could not be held liable for direct infringement or vicarious liability; (6) the copyrights holders' allegations were sufficient to invoke contributory infringement on the part of the bulletin board operator; and (7) the copyright holders were not entitled to preliminary injunction. Motions denied.

3.4. International Standard Setting

We have discussed some basic differences between US law and EC law (which includes UK law) in respect of software protection through copyright law. It is an established fact that jurisdiction, choice of law and enforcement issues in eCommerce are complicated and difficult. To address these issues, a global, unified standard in respect of determining the exclusive rights of authors of software, the liability of ISPs and the scope of fair use is needed.

[53] *Religious Technology Center* v. *Netcom On-Line,* US District Court for the Northern District of California, 907 F. Supp. 1361 (1995).

4. COMPATIBILITY WITH HUMAN RIGHTS

4.1. Brief Introduction to the Interface

Human rights and intellectual property law were strangers for many years. Then, on 9 November 1998, a panel discussion on intellectual property and human rights[54] took place in Geneva to mark the 50th anniversary of the 1948 Universal Declaration of Human Rights (UDHR). The World Intellectual Property Organization and the Office of the United Nations High Commissioner for Human Rights (OHCHR) organized the discussion. In that discussion, panelists explored the complementary nature of intellectual property rights and international human rights standards.

Scholars found two distinct approaches to the relationship of human rights and intellectual property.[55] The first approach considers human rights and intellectual property as being in fundamental conflict.[56] The scholars advocating this approach argued that strong intellectual property protection undermines human rights and is therefore incompatible with a broad spectrum of human rights obligations, especially in the area of economic, social and cultural rights. The prescription that proponents of this approach advocate for resolving this conflict is to recognize the normative primacy of human rights law over intellectual property law in areas where specific treaty obligations conflict.[57]

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[54] WIPO, *Intellectual Property and Human Rights: A Panel Discussion to Commemorate the 50th Anniversary of the Universal Declaration of Human Rights*, WIPO Publication No. 762(E), 1999.

[55] Helfer, L., *Human Rights and Intellectual Property: Conflict or Co-existence?*, available from ssrn.com/abstract=459120, [accessed 1 August 2004].

[56] *See*, for example, Sub-Commission on the Protection and Promotion of Human Rights, *Intellectual Property Rights and Human Rights*, resolution 2000/7, E/CN.4/Sub/2/2000/L.20, preambular paragraph 11, stating that "actual or potential conflicts exist between the implementation of the TRIPs Agreement and the realization of economic, social and cultural rights" (cited in *ibid.*)

[57] *See ibid.*, paragraph 3, emphasizing "the primacy of human rights obligations over economic policies and agreements". Statements by legal commentators and non-governmental organizations (NGOs) also advocate the primacy of human rights over economic agreements, including those relating to intellectual property rights. Notably, these assertions of primacy are not limited to *jus cogens* or peremptory norms, which are hierarchically superior to other international law obligations (*see*, *for example*, Howse, R. and Mutua, M., *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, *Policy Paper* (International Center for Human Rights and Democratic Development, 2000) p. 6, stating that "[h]uman rights, to the extent they are obligations erga omnes, or have the status of custom, or of general principles, will normally prevail over specific conflicting provisions of treaties such as trade agreements" and Elliot, R., *TRIPS and Rights: International Human Rights Law, Access to Medicines, and the Interpretation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights*, Canadian HIV/AIDS Legal Network and AIDS Law Project, South Africa, November 2001, p. 2, available from www.aidslaw.ca, asserting that because "states' binding legal obligations to realize human rights have primacy in international law",

The second approach to the relationship of human rights and intellectual property sees both areas of law as being concerned with the same fundamental question: defining the appropriate scope of private monopoly power to give authors and inventors a sufficient incentive to create and innovate while ensuring that the consuming public has adequate access to the fruits of their efforts. Although in disagreement over how to balance incentives on the one hand and access on the other, this school views human rights law and intellectual property law as being essentially compatible.[58]

One of the proponents of the second approach opined that international human rights instruments, in fact, complement intellectual property law: e.g. Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulates that everyone has the right "[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic protection of which he is the author" and Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) prescribes that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice" while Article 19(3) of the same provides that "[t]he exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights and reputation of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals".

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obligations in TRIPS "must be recognized as not binding to the extent there is a conflict with [states'] human rights obligations") (all of the above cited in Helfer, *supra* footnote 55).

[58] *See*, for example, *Intellectual Property and Human Rights: Report of the Secretary-General*, ESCOR Sub-Commission on the Promotion and Protection of Human Rights, 52nd Session, Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2001/12, 2001, p. 8, submission by the WTO asserting that existing international agreements permit states sufficient room to balance intellectual property and human rights standards, but noting that "[h]uman rights can be used – and have been and are currently being used – to argue in favour of balancing the system either upwards or downwards by means of adjusting the existing [intellectual property] rights or by creating new rights". *See also* World Health Organization, *Globalization, TRIPs and Access to Pharmaceuticals*, WHO Policy Perspectives on Medicines No. 3, WHO/EDM/2001.2, March 2001, p. 5, asserting that "[a]ccess to essential drugs is a human right" but urging states to using existing "safeguards" within TRIPS to "enhance the affordability and availability" of patented medicines and *The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner*, E/CN.4/Sub.2/2001/13, 27 June 2001, p. 5, stating that "[t]he balance between public and private interests found under article 15 [of the ICESCR] – and article 27 of the Universal Declaration – is one familiar to intellectual property law" but asserting that the key question "is where to strike the right balance" (all of the above cited in Helfer, *supra* footnote 55).

Though it seems that the aforementioned provisions of the two international Covenants conflict to some extent, at the same time, it is evident that they both strive to protect the rights of authors as well as the public interest.

Dr. Peter Drahos opined that the international document that perhaps constitutionalizes the human rights regime is the UDHR.[59] He further stated that the UDHR does not expressly refer to intellectual property rights; however, Article 27(2) states that "[e]veryone 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, Article 27(1) states that "[e]veryone 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". Article 27, thus, carries with it a tension familiar to intellectual property law: the tension between rules that protect the creators of information and those that ensure the use and diffusion of information.[60] The recognition of the interests of authors in the UDHR is complemented by the proclamation in Article 17(1) of a general right of property. This Article states that "[e]veryone has the right to own property" and Article 17(2) states that "[n]o one shall be arbitrarily deprived of his property". The implication of Article 17(2) is that states do have a right to regulate the property rights of individuals but must do so according to the rule of law.

On 17 August 2000, in paragraph 1 of its resolution 2000/7, the Sub-Commission on the Promotion and Protection of Human Rights declared intellectual property rights as human rights, "subject to limitations in the public interest".[61]

4.2. Human Rights and Copyrights

As provided earlier, Article 19 of the ICCPR provides for freedom of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of choice. Generally, copyright seems to be an impediment to this right. It is a difficult task to strike a balance between the exclusive rights of the copyright owner and the right to freedom of expression. In order to see how this balance has been struck, international copyright laws will be examined.

4.2.1. International Copyright Laws

If we carefully examine the international laws on copyright such as the Berne Convention, the TRIPS Agreement and the WIPO Treaties we would find that the Member States party to these are relentlessly trying to strike a balance between these two apparently conflicting notions.

[59] Dr. P. Drahos, The Universality of Intellectual Property Rights: Origins and Developments, in WIPO, *supra* footnote 54.
[60] *Ibid.*
[61] Wendland, W., *Intellectual Property and Human Rights*, presented for the UN Committee on Economic, Social and Cultural Rights in Geneva on 27 November 2000.

(a) The Berne Convention

Article 2(8) of the Berne Convention states that "[t]he protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information". The basic aim behind not giving copyright protection to items of press information is to ensure the right to information for people.

So, the right to freedom of expression is reflected in the provisions of the Convention to the same extent.

Articles 10 and 10*bis* of the Berne Convention impose limitations on the author's exclusive rights to exploit his work in order to meet the needs of the "public for information".[62]

If we consider the text of Article 10, we would find that the Convention puts three limitations on the licence to quote. First, the work from which the extract is taken must have been lawfully made available to the public. Unpublished manuscripts or even works printed for a private circle may not, be freely quoted from; quotations may only be made from a work intended for the public in general. This provision applies to works available under compulsory licence.

Second, quotations must be "compatible with fair practice". This concept, introduced at the Stockholm Revision (1967), appears a number of times in the Convention. It implies an objective appreciation of what is normally considered admissible. The courts are to determine fair practice or malafide intention by considering the size of the extract and where it is used and, particularly, the extent to which, if any, the new work, by competing with the original work, is detrimental to sales and circulation, etc.

Third, quotations must only be to the extent "justified by the purpose". This is also to be determined by the courts. For example, the writer of a work of literature or history who illustrates his theme with few quotations cannot be blamed or sued; on the other hand, if he uses extracts from others' works in bad faith and without any relevance to his subject courts may rule the quotation unlawful.[63]

The aforementioned considerations illustrate the legal effort to balance freedom of expression and author's exclusive rights to exploit his intellectual creations.

One criticism of the Berne Convention is that Article 19 provides that "[t]he provision of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union".

Human rights proponents claim that the Berne Convention should set the maximum standard of protection in order to preserve the right to freedom of expression.

(b) The TRIPS Agreement

Paragraph 2 of Article 9 of the TRIPS Agreement provides that "[c]opyright protection shall extend to expressions and not to ideas, procedures, methods of

[62] WIPO, *Guide to the Berne Convention*, 1978, p. 58.
[63] *Ibid.*, p. 59.

operation or mathematical concepts as such". This provision is conducive to freedom of expression because only expressions of literary works are protected and not ideas, which are necessary to seek, receive and impart information.

Paragraph 1 of Article 10 of the TRIPS Agreement[64] protects computer programs as literary works under the Berne Convention. Therefore, the aforementioned provisions of the Berne Convention are applicable to the computer programs also. This entails that, under specific circumstances provided in the Convention, the exclusive rights of the author of the computer program could be derogated from.

Article 13 of the TRIPS Agreement provides that "[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".[65] By this provision, the TRIPS Agreeemt obliges Members to impose limitations on exclusive rights. Though the language is not very clear or specific, we find a week effort on the part of the TRIPS Agreement to protect freedom of expression.

The main criticism of the TRIPS Agreement is that it provides a minimum standard for Members and sets no limit for imposing maximum intellectual property protection. Indeed, ever since the TRIPS Agreement entered into force, the United States and the EC have negotiated so-called 'TRIPS plus' bilateral agreements with many developing countries. These treaties contain intellectual property rules that impose higher standards of protection than the TRIPS Agreement requires. The UN High Commissioner for Human Rights and the World Health Organization (WHO) have voiced strong objections to TRIPS plus bilateral agreements on human rights grounds.[66] Together with the particularization of soft law norms,[67] these objections may, for the first time, begin to impose a ceiling on the accelerated, upward drift of intellectual property standards over the past few decades.

(c) WIPO Copyright Treaty

The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty are together popularly known as the 'Internet Treaties'. In the preamble of the WCT are the fundamental objectives of the Treaty. The preamble emphasizes the significance of copyright protection as an incentive for literary and artistic creation

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[64] Paragraph 1 of Article 10 of the TRIPS Agreement states that "[c]omputer programs, whether in source of object code, shall be protected as literary works under the Berne Convention (1971)".

[65] *See*, *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, WIPO Publication No. 223 (E), 1997, p. 21.

[66] *Ibid.*, note 70.

[67] Commission on Human Rights resolution 2001/33 of 23 April 2001, Commission on Human Rights resolution 2002/32 of 22 April 2002, and Commission on Human Rights resolution 2003/29 of 22 April 2003. *See also* the Statement on Human Rights and Intellectual Property by the Committee on Economic, Social and Cultural Rights, E/C.12/2001/15, 14 December 2001, paragraphs 4 and 11.

and recognizes the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.

This clearly shows the contracting parties' intention to achieve a balance between the author's exclusive rights to exploit his intellectual creation and the larger public interest.

Article 10 of the WCT is an optional provision providing that contracting parties may incorporate in their national legislation limitations or exceptions to the author's rights in certain special cases.

The aforementioned provisions indicate that whilst copyright generally comprises a set of exclusive rights, there are, on occasion, opportunities to modify them by allowing free use of copyrighted works or by use in exchange for fair compensation; however, all such modifications are subject to a three-step test provided by Article 13 of the TRIPS Agreement, i.e. such modifications must be for special cases, must not conflict with the normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author. This is seen, for example, in the recently adopted European Directive on Copyright and Related Rights in the Information Society of May 2001.

4.3. Human Rights and Software Patenting

Article 15(1)(c) of the ICESCR provides that:

> "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."

From this provision it can be derived that in order for intellectual property rights to be consistent with human rights norms, the following conditions must be met:[68]

(i) Intellectual property rights must be consistent with the understanding of human dignity in the various international human rights instruments and the norms defined therein;
ii) Intellectual property rights related to science must promote scientific progress and access to its benefits;
(iii) Intellectual property regimes must respect the freedom indispensable for scientific research and creative activity;
(iv) Intellectual property regimes must encourage the development of international contacts and cooperation in the scientific and cultural fields.

The European Union provides one potential model relevant to the first point. Article 53(a) of the European Patent Convention specifically stipulates that patents should not be granted for inventions "the publication or exploitation of which would be contrary to '*ordre public*' or morality". Several provisions of a recent Directive of

[68] Chapman, A. R., 'A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science', in WIPO, *supra* footnote 54, p. 138.

the European Parliament and of the Council on the legal protection of biotechnological inventions reiterate this principle. The Directive also excludes inventions from patentability, which offend human dignity and ethical and moral principles recognized in Member States.[69]

In order to obtain a patent, the inventor must disclose the invention. This condition ensures the dissemination of information, which enriches the store of publicly available knowledge and promotes further innovation by other inventors. The inventor receives exclusive rights in lieu of an extensive dissemination of the inventive steps by which society at large benefits because the protected invention can then be used as a basis for further creative and inventive works.[70] Article 29(1) of the TRIPS Agreement requires that an application for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by others. The resulting information, which is stored and classified in patent documentation, is accessible to anyone, including persons or entities in countries where a patent has not been sought.[71] Therefore, in order to obtain a patent on software, which fulfills the criteria of a patent, the inventor must disclose his invention, which would be the basis of further creative and inventive works.

Most industrialized countries support that strong intellectual property provisions promote growth and a strong domestic economy. Developing countries are against the stringent application of patent law. Their opposition is based on three factors: (1) the benefits of an intellectual property system tend to be long-term and tenuous; (2) in the short-term, intellectual property protection increases the cost of development since patents are awarded primarily to foreign multinational corporations and the resulting payments for the use of these patented technologies primarily go to the same; and (3) few of these countries have the requisite infrastructure to uphold strong patent systems. Thus, developing countries sometimes accuse former colonial countries and multinational corporations of seeking to impose 'technological colonialism'.[72]

However, software patenting would be rather convenient for a developing country like Bangladesh. This country has more than 200 software houses and data-entry centers and numerous computer shops. At present, there are around 20 to 30 Bangladeshi software developers with foreign clients, some of which are 100 per cent export oriented. Several years ago, the government of Bangladesh identified

[69] *See* paragraphs 37 to 40 (concerning the legal protection of biotechnological inventions) of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998.
[70] Wendland, *supra* note 61, p. 5.
[71] Secretariat of the WTO, *Protection of Intellectual Property under the TRIPS Agreement*, available from www.wto.org, [accessed 9 August 2004].
[72] Carroll, A. E., 'A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Comment: Biotechnology and the Global Impact of U.S. Patent Law: Not Always the Best Medicine', 1995, 44 *American University Law Review*, pp. 2464–2466.

software as having important export potential. Currently, the total amount of exports in software and IT-services is estimated at a maximum of USD 30 million per year.[73]

4.4. Scope of Getting Right Balance

An objective of intellectual property protection is to promote long-term public interest by providing exclusive rights to right holders for a limited duration of time. After the expiration of the term of protection, protected works and inventions fall into the public domain and anyone is free to use them without prior authorization by the right holder.[74] An important balance between intellectual property rights and the public interest is a careful definition of protectable subject matter. For example, copyright protection does not cover any information or ideas contained in a work; it only protects the original way that such information and ideas have been expressed in a work.[75] As regards patents, the basic conditions imposed in the TRIPS Agreement are that for an invention to be patentable, it must be new, involve an inventive step and be capable of industrial application.[76] Moreover, the Agreement recognizes the importance of ethical and other considerations by allowing a country, even where an invention fulfills the normal conditions of patentability, to refuse to grant a patent if the commercial exploitation of the invention is prohibited on grounds of public order or morality, including if its exploitation might be dangerous to life or health or seriously prejudicial to the environment.[77] A computer program related to diagnostic, therapeutic and surgical methods for the treatment of humans or animals may be excluded from patentability.[78] The most important point to be considered here is that the grant of an intellectual property right does not prevent the possibility for governments to regulate production and the use and distribution of products on public policy grounds, such as concerns on public order, morality, health or environment.[79]

The TRIPS Agreement provides a fair amount of flexibility to Member Countries to adjust the level of protection by providing limitations and exceptions to exclusive rights.[80] In addition, the Agreement and the Conventions incorporated in it allow for numerous specific limitations and contain provisions on compulsory licenses.

An important part of intellectual property policy, as described by the Secretariat of the WTO, is that governments should take appropriate measures in other areas of

[73] Tjia, P., The Software Industry in Bangladesh and its Links to The Netherlands, available from www.ejisdc.org, [accessed 9 August 2004].
[74] Secretariat of the WTO, *supra* footnote 70.
[75] Paragraph 2 of Article 9 of the TRIPS Agreement.
[76] Paragraph 1 of Article 27 of the TRIPS Agreement.
[77] Paragraph 2 of Article 27 of the TRIPS Agreement.
[78] Secretariat of the WTO, *supra* footnote 70.
[79] This is categorically stated in Article 17 of the Berne Convention, which has been incorporated into the TRIPS Agreement.
[80] *See* Articles 13, 17, 26(2) and 30 of the TRIPS Agreement.

economic and social policy that enable society to benefit from the intellectual property system and to prevent its abuse. Article 8 of the TRIPS Agreement, entitled 'Principles', recognizes that "[m]embers may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement". Therefore, the members are at liberty to protect public health and nutrition, and to promote the public interest in formulating or amending their respective IP laws within the ambit of the TRIPS Agreement.

There are arguments that the patent system could be detrimental to: scientific progress and access to its benefit, realizing the right to cultural participation, right to health, right to food, etc.[81] But, there is no apparent opposition by human rights activists to the measures described in the previous chapters for curbing software piracy in eCommerc.

5. CONCLUSION AND RECOMMENDATIONS

With regard to software, order, payment and delivery can take place online. Here lies the importance of software in eCommerce and the ability to raise the immense potential of software transactions in eCommerce. At the same time, software can be infringed in multiple ways with grave consequences in the borderless world of eCommerce and within a short time. Jon O. Newman, a US Circuit Judge, envisioned this situation in his judgment in *Universal City Studios, Inc.* v. *Corley*[82] by stating that

> "In principle, the digital world is very different. Once a decryption program like DeCSS [Decryption Content Scramble System] is written, it quickly can be sent all over the world. Every recipient is capable not only of decrypting and perfectly copying plaintiffs' copyrighted DVDs, but also of retransmitting perfect copies of DeCSS and thus enabling every recipient to do the same. They likewise are capable of transmitting perfect copies of the decrypted DVD. The process potentially is exponential rather than linear."

Today, software is primarily protected by copyright law. The TRIPS Agreement makes it obligatory for contracting parties to grant copyright protection to computer programs. Software can also be protected by patent law, subject to fulfilling certain conditions such as being related to a machine or process or having a technical effect. Trade secrets law also grants certain protection to software.

Strong intellectual property protection for software is an important component of any nation's economic growth and development. Empirical and anecdotal evidence clearly show the enormous economic and social benefits of a legitimate,

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[81] Chapman, A. R., *Approaching Intellectual Property as a Human Right: Obligation Related to Article 15(1)(c)*, United Nations Economic and Social Council, E/C.12/2000/12, 3 October 2000.

[82] *Universal City Studios, Inc.* v. *Corley*, US Court of Appeals for the Second Circuit, 273 F.3d 429 (2001).

thriving software industry where software is effectively protected by a nation's laws and law enforcement agencies. Despite obvious economic and social benefits, the development, distribution and marketing of domestically produced software remains confined to a small group of nations. This is due in large part to the failure of many nations to encourage their residents, entrepreneurs and businesses to develop, distribute and market software through enactment and enforcement of strong intellectual property protections for computer software.

In order to protect software from being infringed or pirated, WIPO Member States can adopt the following steps:

1. use only legal software in government agencies and state-owned enterprises;
2. budget the funds needed to license legal software;
3. implement accountable software asset management practices;
4. make effective enforcement efforts against all forms of software piracy a reality by complying with the obligations of the TRIPS Agreement; and
5. ensure that computer software is no less protected on the Internet than on the street by promptly joining the WIPO Copyright Treaty, enacting legislation to meet the Treaty's obligations and effectively enforcing those laws without undue delay.[83]

To fight software piracy it could be effective to use the Certified Software Manager (CSM) and the Software Asset Training Program that are now available in Australia, Canada, China, Hong Kong, New Zealand, Singapore, and the United States.

Intermediaries should be held liable for direct copyright infringements when intervening conduct on the part of intermediaries is found. National legislatures should explicitly provide for such in their copyright law.

The WIPO can take initiatives to fix the liability of intermediaries by encouraging Member States to enter into treaties like the WCT.

It is for national legislatures, which can legislate necessary copyright law amendments, to solve file-sharing problems created by Kazaa BV, Grokster, etc.

The Member States of the WIPO should introduce appropriate Rights Management Information[84] as has been introduced by the USA[85] and EC Countries[86]. Member States should provide in their respective national legislation appropriate protection for Copyright Management Information (CMI) with specific exception for law enforcement, intelligence and other government activities.

In respect of balancing human rights and intellectual property rights, the comment made by the WTO Secretariat is significant and should be used as a guide for the WIPO Member States. The comment reads as follows:

[83] *Ibid.*
[84] Article 12 of the WCT.
[85] Section 1202 of the DMCA.
[86] Article 7 of the EC Copyright Directive.

> "An optimal balance within IP system at the national or multinational level can be reached by properly determining the definition of protectable subject- matter, scope of rights, permissible limitations and term of protection. This balance is constantly developing both at the national and international level in response to economic and technological as well as political developments."[87]

There is no possibility that software piracy will be eliminated in the foreseeable future. Many countries have made efforts to improve intellectual property protection in computer software. However, the high rates of software piracy and dramatic losses to software developers throughout the world demonstrate that much work remains. There is evidence that continuing education and enforcement efforts can and do make a difference. In the United States, for example, the level of piracy has been reduced from 48 per cent in 1989 to 25 percent in 1999. Thus, decreasing software piracy rates requires the combined efforts of policy-makers, software developers and publishers, businesses, journalists and individuals. As long as software piracy remains, there will be fewer jobs, less research and development, increased costs and lower standards of living.[88]

[87] Secretariat of the WTO, *supra* footnote 71.
[88] SIIA's Report on Global Software Piracy 2000, available from www.siia.net, [accessed 10 August 2004].

ARE STRONGER INTELLECTUAL PROPERTY RIGHTS AN OBSTACLE OR A CONDITION FOR INTERNATIONAL TECHNOLOGY TRANSFER?

An Analysis on the Effects of the Trips Agreement

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Autumn 2004

1. INTRODUCTION

The purpose of this thesis is to investigate what effect the adoption of the TRIPS Agreement and the strengthening of intellectual property rights have on technology transfer to developing countries. There are two main questions to be answered in this thesis: 1) What effect does the TRIPS Agreement have on technology transfer? Is this agreement the right solution for transfer of technology to developing countries, or does it make it harder for them to get access to technology? 2) Do intellectual property rights as such promote or restrain technology transfer to developing countries?

The issue of intellectual property rights, technology transfer and developing countries covers many aspects. This essay focuses on the TRIPS Agreement's effect on technology transfer to developing countries and on the comprehensive impact of intellectual property rights on internalized and externalized channels for technology transfer.

There are more than 80 international instruments that contain provisions on technology transfer. Additionally there are sub regional and bilateral agreements and national laws on the subject.[1] Only the most important agreements and instruments have been included for the purposes of this thesis.

The thesis is both descriptive and analytical. Research has been carried out at the Raoul Wallenberg Institute human rights library and on the Internet. The thesis is primarily based on books and articles. Technology transfer is an economic transaction and therefore economic studies on the issue have been analyzed. Documents from the World Trade Organization (WTO) bodies and material from

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[1] Compendium of International Arrangement on Transfer of Technology: Selected Instruments, preface, p. 3. available from www.unctad.org/en/docs/psiteipcm5.en.pdf, [accessed February 2005].

the United Nations Conference on Trade and Development (UNCTAD) have also been used.

2. TRANSFER OF TECHNOLOGY

What is transfer of technology and how does it occur? These two questions will be discussed in this chapter. The historical background of technology transfer to developing countries will also be presented.

2.1. Introduction

The concept of technology transfer includes quantities of complicated transactions and therefore it is useful to give a summary definition on the subject. The following definition, found in the Oxford Dictionary of Business, defines the term technology transfer as:

> "the transfer of technological knowledge to a third party, which often occurs when a patent holder grants a license to another firm to use a technology, process, or product. In many instances this transfer takes place between countries, when a firm establishes an overseas subsidiary or grants a license to a local producer. It is therefore a means by which countries gain new technology or update their existing technological base, enabling them to build up their industrial infrastructure".[2]

This gives a comprehensive description of the subject but it is important to mention that there is no universally agreed definition of technology transfer.[3] Different definitions are found in international instruments that contain provisions on technology transfer and there are several scholars who have provided their own definitions of the term. For example, Keith Maskus who has done several studies on transfer of technology sees transfer of technology as "any process by which one party gains access to a second party's information and successfully learns and absorbs it into his production function".[4] While there is no exact definition, scholars have agreed upon the fact that a technology transfer definition clearly should state that the technology transferred must be absorbed in the country.[5]

There has been nothing stipulated about the definition of technology from a general point of view. Definitions of technology are established in international instruments covering technology transfer. For instance, in the United Nations

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[2] A Dictionary of Business, Oxford University Press, 2002. Oxford Reference online, Oxford University Press. Available from www.oxfordreference.com/views/GLOBAL.html, [accessed February 2005].

[3] D'Amato, A. and Long, D. E. (eds.), *International intellectual property law* London: Kluwer Law International, 1997, p. 41.

[4] Maskus, K., 'Encouraging international technology transfer', *UNCTAD/ICTSD Capacity building project on intellectual property rights and sustainable development*, December 2003, p. 3. Available from www.iprsonline.org/resources/technologytransfer.htm, [accessed February 2005].

[5] D'Amato, A. and Long, D. E., *supra* footnote 3, p. 41.

Conference on Trade and Development (UNCTAD) code of conduct, technology is described as "systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service".[6]

2.2. Channels for Transfer of Technology

2.2.1. Market-mediated Mechanisms

Transfer of technology occurs through several channels, but there are a number of channels that are considered to be the most important. Keith Maskus divides these channels in two groups, market-mediated mechanisms, which imply that a formal transaction has occurred, and non-market mechanisms, which occur without any transaction.[7]

Keith Maskus also describes market–mediated mechanisms as intentional technology transfer.[8] An example is *trade in goods and services* where capital goods such as chemicals, machines and software are exported, and by being put into the production increases the productivity. Another important channel is *foreign direct investment* (FDI), which takes place when multinational enterprises (MNEs) transfer technological information to their subsidiaries in other countries. The third channel is *licensing of technology*, which occurs when a firm gives permission to another firm, unrelated or within the firm, to use its technology that is protected by intellectual property rights. The licensing can also be non-voluntary, which will be the case if a government decides to grant a compulsory license. Finally there is the *joint venture arrangement*, which is the cooperation between companies who contribute with different assets to carry out a mutual plan of action.[9]

All these mechanisms work interdependently since companies may want to use different mechanisms in their aspiration to get the highest profit possible.[10]

2.2.2. Non-market Mechanisms

The non-market mechanisms occur without any formal agreement and often take place with no compensation to the patent owner. Developing countries have frequently used these channels to get access to technology since they often lack the economic capacity to buy intellectual property rights.

An example of non-market mechanisms is *imitation*, which is when a firm uses the technological secrets or product design of another firm without compensating the owner. A form of imitation is counterfeiting, which is to make a competing product under another's trademark. Maskus asserts that counterfeiting is a way to use a recognized trademark and not an effective mechanism for absorbing technological

[6] UNCTAD Series on Issues in International Investment Agreements, *Transfer of Technology* (United Nations, New York and Geneva, 2001) p. 5.
[7] Maskus, K., *supra* note 4, p. 15.
[8] Maskus, K., *Intellectual Property Rights in the Global Economy* (Institute for International Economics, Washington DC, 2000) p. 137.
[9] Maskus, K., *supra* footnote 4, p. 15–16.
[10] *Ibid.*

information. Therefore counterfeiting is not an important channel for technology transfer.[11] Similar to imitation is *reverse engineering,* which is to dismantle a product, for instance an engine, analyze its composition and create a competing product. This procedure is more complicated and usually more costly than imitation.[12]

A further example is for rival firms to *study patent applications*, learn from them, and to create products or processes that do not violate the application. There have been discussions whether or not this form of technology transfer is a good alternative since the know-how necessary for operation is not included in the patent application. Engineers from other firms may have difficulties understanding the technological information if the know-how is missing, with the result that the transfer will not be particularly successful. A final example is *temporary migration* by technical personnel, students and scientists from developing countries to universities and conferences in developed countries, which later return home with new skills.[13]

All channels for technology transfer mentioned above are linked to *technology spillovers.* These are benefits such as increased productivity, cost reduction and enhanced product quality, which does not necessarily only go to the technology owner. A company may have to introduce its know-how to its suppliers and this information could spill over and be absorbed by competing companies using the same supplier.[14]

Non-market mechanisms of course increase technological knowledge but it is questionable if that knowledge is enough to make effective use of new inventions. As mentioned above, the patent document does not contain all the knowledge that is necessary for the working of the invention, and for the invention to be put into practice. It is therefore necessary to buy the exclusive rights, the know-how or the permission to use the invention to achieve the best possible results. A patent symbolizes an exclusive right granted and which allows the inventor to decide to what extent others can use, sell or make the invention. Without authorization from the patent owner, others cannot use the invention.[15]

On the other hand, these channels have throughout the years played an important part in the industrialization of countries. The developed countries deliberately used scarce or no patent laws when they went through their industrialization process. An example is Switzerland, which allowed patenting inventions abroad but because they did not have any patent laws, copying of foreign inventions could occur in Switzerland without any consequences. Many developed countries did not introduce patents for pharmaceuticals and chemical substances until the last period of the 20th century. For instance, France and West Germany did

[11] *Ibid*, p. 17−18
[12] Maskus, K., *supra* footnote 8, p. 136.
[13] Maskus, K., *supra*foot note 4, p. 17−18.
[14] *Ibid*, p. 19−20.
[15] WIPO *Intellectual Property Handbook: Policy, Law and Use*, Geneva: WIPO, 2001, p. 17, 172.

not introduce patent protection for these products until 1967 and chemical substances were not protected in the Nordic countries until 1968.[16]

The nowadays-developed countries also used reverse engineering and imitation and other forms of copying to increase their technological knowledge. The global strengthening of intellectual property rights conveys that these mechanisms will be restricted, making it more difficult for developing countries to catch up.[17] The developing countries today are thus restricted from using the same channels for technology transfer as the developed countries did in the beginning of their development.

Although imitation is regarded as illegal and wrong, these mechanisms can create incentives to innovate. To copy a CD will probably not lead to increased learning and innovation, but reverse engineering, for instance, demands knowledge to understand the composition of a product. This process accordingly leads to increased technological knowledge that can create incentives to innovate.

2.3. Transfer of Technology on the International Agenda

2.3.1. Drafting a Code of Conduct

Since the 1970s, there has been recurring international debate regarding the promotion of technology transfer to developing countries. The United Nations General Assembly adopted in 1974 a Declaration on the Establishment of the New International Economic Order (NIEO). The adoption of this declaration emphasized the developing countries vulnerability towards crises in the world economy at that time. The declaration stated that the future success of the international community was dependent on all countries and that cooperation between them was a mutual goal and also a duty. The NIEO established as one of its principles the promotion of transfer of technology to developing countries and asserted that those countries should get access to modern science and technology in order to help them develop.[18]

The principle was further stated in the General Assembly's resolution on the Programme of Action for the Establishment of a New International Economic Order, which asserted that all efforts should be made to develop a code of conduct for technology transfer.[19] Negotiations on an international code of conduct started in the 1970s under the United Nations Conference on Trade and Development (UNCTAD) but ended in 1985 due to disagreements between the parties. The developing

[16] Khor, M., *Intellectual Property, Biodiveristy and Susatinable Development; Resolving the difficult issue*, Penang, Malaysia: Third World Network, 2002, p. 205−206.
[17] Correa, C. M., *Intellectual Property Rights, the WTO and Developing Countries*, Penang, Malaysia: Third World Network, 2000, p. 19.
[18] Declaration on the Establishment of a New International Economic Order, Resolution 3201 (S-VI), *United Nations Dag Hammarsköld library,* 1 May 1974, available from www.un.org/Depts/dhl/resguide/reins.htm, [accessed February 2005].
[19] Programme of Action on the Establishment of a new International Economic Order, Resolution 3202 (S-VI), 1 May 1974, available from www.oup.co.uk/pdf/bt/cassese/cases/ part3/ch18/ 1703.pdf, [accessed February 2005].

countries wanted to exclude clauses in technology licensing agreements, which could be used to take advantage of their weaker positions in the negotiations. The most important issue for the developed countries during the negotiations was competition. They wanted any clauses that unnecessarily limited effective competition to be adjusted.[20]

Due to the increased role of transnational corporations (TNCs) in the 1970s the United Nations Economic and Social Council (ECOSOC) ordered a "Group of Eminent Persons" to evaluate TNCs impact on development. The work of the group lead to the establishment of the United Nations Centre on Transnational Corporations (UNCTC), the objectives of which were to enhance the understanding of the effects of TNCs in developing countries, to secure international arrangement on TNCs and to increase all countries ability to negotiate internationally. The work of the UNCTC included among other things, studies on FDI and technology transfer to developing countries. The primary task of the UNCTC was to create a Code of Conduct on Transnational Corporations but the code was never completed since the negotiators failed to reach consensus and in 1993 the UNCTC was dissolved and its work transferred to UNCTAD.[21] It was never clearly established if the UNCTAD and the UNCTC codes of conduct were to be legally binding for the parties, presumably, this was never the intention of the developed countries.[22]

The creation of a code of conduct also became an issue during the negotiations on the Law of the Sea and attempts were made to revise the Paris Convention for the Protection of Industrial Property in favour of the developing countries. These efforts were not successful because the developed countries considered it wrong to share their technology, while the developing countries expressed a contrary opinion.[23]

The importance attached by developing countries to industrialize by gaining access to technology was formulated in the World Intellectual Property Organization (WIPOs) Licensing Guide for Developing Countries, which was adopted in 1977.[24] The developing countries aspirations were repeated in the preamble of WIPO's Model Law for Developing Countries on Inventions that was drafted in 1979. The Model Law suggested that a transfer of technology patent should be established so it

[20] UNCTAD Series on Issues in International Investment Agreements, *supra* footnote 6, p. 22, 52.
[21] UNCTC, available from www.unctc.unctad.org/html/home.html, [accessed January 2005].
[22] Day Wallace, C., *The Multinational Enterprises and Legal Control-host state sovereignty in an era of economic globalization*, The Hague: Kluwer Law International, 2002, p. 1086.
[23] Blakeney, M., *Trade Related Aspects of Intellectual Property Rights; A Concise Guide to the TRIPS Agreement*, London: Sweet and Maxwell, 1996, p. 159.
[24] WIPO's Licensing Guide for Developing Countries reads: "Industrialisation is a major objective of developing countries as a means to the attainment of higher levels of well-being of the peoples of such countries. The advancement of science and the development of technological base are essential conditions of industrial growth. The development of a technological base in a developing country depends on the existence of indigenous technical capacities and the acquisition of selected technology from abroad." WIPO's Licensing Guide for Developing Countries, *WIPO Publication no. 620(E),* (1977).

would be more attractive for patent owners to work[25] their inventions in developing countries.[26]

These events confirm that the importance of technology transfer to developing countries was recognized, but critical divergences that existed between the states made it difficult to reach a mutually acceptable solution on the issue.

Until the 1980s attention was focused on the companies and on the technology transfer process. Although the transfer of foreign technology is still regarded as important, the focus now has shifted towards the recipient country's capacity to absorb and adapt technology. This change is due to country experiences, which have shown that the capacity to absorb technology is of crucial importance for the technological development of countries, and it is now generally admitted that technology transfer from abroad should be regarded more as a complement to this process.[27]

2.3.2. Multilateral Environment Agreements (MEAs)

Despite the failure to reach agreement in the negotiations of an international code of conduct, the question concerning technology transfer to developing countries remained in the international debate, as exemplified by the multilateral environment agreements (MEAs) concluded in the 1990s containing provisions on technology transfer. These agreements recognize the necessity of transferring environmentally sound technologies (ESTs) to developing countries, which they need in order to attain sustainable development.

The United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, held in 1992 in Rio de Janeiro resulted in the adoption of five environmental agreements. One of them was Agenda 21, which is a non-binding programme of global action for sustainable development. Agenda 21 establishes in Chapter 34 that the availability of technological information and transfer of ESTs are essential for sustainable development in developing countries.[28] Chapter 34 also contains provisions on activities for the promotion of transfer of ESTs, but also states that the terms for transfer of technology shall be mutually

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[25] The working of a patent generally implies the making of a patented product or the use of a patented process by the patent owner or the owner of the license. It has also been argued that importation of products is sufficient to fulfil the working requirement. WIPO *Intellectual Property Handbook*, *supra* footnote 15, pp. 35−36.

[26] Blakeney, M., *supra*foot note 23, p. 15, 157.

[27] Roffe, P. and Tesfachew, T., 'Revisiting the technology transfer debate: lessons for the new WTO Working Group'. *BRIDGES, ICTSD, Vol. 6, no.2*, February 2002. Available from www.iprsonline.org/resources/technologytransfer.htm, [accessed February 2005].

[28] A definition of ESTs is found in paragraph 34.1: "environmentally sound technologies protect the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their wastes and products, and handle residual wastes in a more acceptable manner than the technologies for which they were substitutes". Article 34.2 defines ESTs in the context of pollution: "'process and product technologies' that generate low or no waste, for the prevention of pollution. They also cover 'end of the pipe' technologies for treatment of pollution after it has been generated."

agreed upon and that the need to protect intellectual property rights shall be considered. Another agreement that was adopted during the Earth Summit was the United Nations Framework Convention on Climate Change (UNFCCC), which in Article 2 states the objective of stabilizing the concentration of greenhouse gases in the atmosphere. This agreement also includes a provision that promotes transfer of ESTs to developing countries.[29]

An additional agreement that was signed was the Convention on Biological Diversity (CBD), which in Article 1 states among its objectives the conservation of biological diversity, the sustainable use of its components and fair sharing of the benefits from the use of genetic resources, including access to genetic resources and transfer of relevant technology. The Article further asserts that all rights over those resources and technologies must be taken into account.[30] Article 16 of the Convention holds that access to and transfer of technology are essential for sustainable development and that transfer of technology to developing countries "shall be provided and/or facilitated under fair and most favourable terms".[31]

The aftermath of the Earth Summit led to the adoption of the Kyoto Protocol, which was signed in 1997. The aim of the protocol is to reduce greenhouse gases in industrialized countries by 2012. This protocol also contains an obligation to promote, facilitate and finance technology transfer to developing countries.[32]

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[29] UNFCCC states in Article 4.5 that countries "shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties."

[30] CBD Article 1.

[31] Article 16.1 of the CBD reads: "1. Each Contracting Party, recognizing that technology includes biotechnology, and that both access to and transfer of technology among Contracting Parties are essential elements for the attainment of the objectives of this Convention, undertakes subject to the provisions of this Article to provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment." Article 16. 2 reads: "Access to and transfer of technology referred to in paragraph 1 above to developing countries shall be provided and/or facilitated under fair and most favourable terms, including on concessional and preferential terms where mutually agreed, and, where necessary, in accordance with the financial mechanism established by Articles 20 and 21. In the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights . . .".

[32] Kyoto Protocol Article 10(c): All parties shall: "cooperate in the promotion of effective modalities for the development, application and diffusion of, and take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies, know-how, practices and processes pertinent to climate change, in particular to developing countries . . .".

2.3.3. The Adoption of the TRIPS Agreement

The Uruguay Round held by the General Agreement on Tariffs and Trade (GATT) took place from 1986 to 1994 and resulted in the Agreement Establishing the World Trade Organization (the WTO Agreement). At the same time several additional agreements were adopted as annexes to the WTO Agreement. These agreements were among others, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMS), and the Agreement on Technical Barriers to Trade (TBT), which all contain provisions that affect technology transfer to developing countries.[33]

Through an initiative by the industrialized countries and especially by the United States, intellectual property rights and trade became an issue under the Uruguay Round. The negotiations during the Round led to the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which was signed in 1994 together with the WTO Agreement and its annexes.[34]

The TRIPS Agreement covers all forms of intellectual property rights, such as copyright and related rights, trademarks, geographical indications, industrial designs and patents. It is a minimum standard agreement and accordingly the member countries are allowed to use stronger intellectual property rights protection in their national laws.[35] An important aspect of the Agreement is that it contains provisions concerning enforcement of intellectual property rights, which allows the right holder to take actions against infringement.[36] Additionally it is regulated that disputes under the Agreement shall be forwarded to the WTO dispute settlement procedure. A procedure under the WTO Dispute Settlement Body (DSB) begins with consultation under the Dispute Settlement Understanding (DSU), and if the parties cannot reach conciliation, the complainant member can ask the DSB to establish a panel to resolve the matter. If the DSB panel finds that a member has not complied with the

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[33] *See* for instance GATS Article IV (1) (a) that states that negotiation which would increase the participation of developing countries in world trade should aim at "the strengthening of their domestic services capacity and its efficiency *inter alia* through access to technology on a commercial basis".
In the preamble to the TBT it is stated that members: "Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries" and TBT Article 11 states that members shall grant to developing countries technical assistance on mutually agreed terms, and that priority shall be given to the needs of the least-developed country members.

[34] Blakeney, M., *supra* footnote 23, p.1–3, 6–7.

[35] TRIPS, preface and Article. 1 ". . . Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement."

[36] Article 41.1 stipulates, "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements . . .".

rules of the Agreement, this member must follow the DSBs recommendations. If the member does not follow the recommendations, the complainant member can be authorized by the DSB to use trade sanctions against the member, which has failed to comply with the recommendations.[37]

All member countries to the WTO must adjust their national intellectual property right laws in order to correspond with the provisions of the TRIPS Agreement. The effect of this implementation is that the protection of intellectual property rights in many WTO member states will be enhanced. The increased global strengthening is also due to the pressure from the United States on many countries to increase their intellectual property rights protection and the regional trade agreements with provisions on intellectual property rights. Examples are the bilateral investment treaties (BITs) established by the United States, the North American Free Trade Agreement (NAFTA) and the agreements between the European Union and other countries.[38]

During the TRIPS negotiations, the developing countries expressed concern about the effects that the strengthening of intellectual property rights could have on technology transfer and prices of pharmaceutical and agricultural products.[39] This concern was due to the fact that the TRIPS Agreement would make it possible for the member countries to threaten producers of counterfeited products with trade sanctions. Imitation has been widely used by developing countries as a means to get access to technology. Strengthened intellectual property rights, as conveyed by the TRIPS Agreement, would restrict this channel for technology transfer since countries must increase their enforcement of intellectual property rights. The intellectual property rights owner can further exclude others from using, selling and importing the product and can impose high prices, which thus diminishes access to technology.[40] The developed countries asserted that stronger intellectual property rights would make investing in developing countries more attractive to companies.[41]

At the fourth WTO Ministerial Conference held at Doha, Qatar from 9 to 14 November 2001, the issue of technology transfer was discussed. During the conference, a Working Group was established to investigate the relationship between trade and transfer of technology. The Working Group examined how to increase technology transfer to developing and least-developed countries and made recommendations that were reported at the Fifth Session of the Ministerial Conference, which was held at Cancún, Mexico, from 10 to 14 September 2003.[42]

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[37] Matthews, D., *Globalising Intellectual Property Rights, the TRIPS Agreement*, New York: Routledge, 2002, p. 88.
[38] Maskus, K., *supra* footnote 8, p. 1−2, 4-5.
[39] Gervais, D., *The TRIPS Agreement, Drafting History and Analysis*, London: Sweet and Maxwell, 2003, p. 14.
[40] UNCTAD Policy Discussion Paper, *UNCTAD-ICTSD Project on IPRs and Sustainable Development*, 2003, p. 14 and pp. 85−86 available from www.iprsonline.org/unctadictsd/projectoutputs.htm, [accessed February 2005].
[41] Matthews, D., *supra* footnote 37, p. 109.
[42] WT/MIN(01)/DEC/1, para. 37.

Recommendations from the developing countries presented during the conference emphasized, among other things that the focus should be on an examination of the WTO provisions related to technology transfer with a view to making them operational and meaningful. The developed countries for their part asserted the danger in coercing the private sector to give away its technology since this could diminish technology transfer by companies.[43]

The Doha Ministerial Decision on Public Health affirmed that the provisions of Article 66.2 of the TRIPS Agreement, which calls upon the member countries to transfer technology, are mandatory and this was reaffirmed in the Doha Ministerial Decision on Implementation-Related Issues and Concerns. This decision further established that the TRIPS Council should put in place a mechanism for ensuring the monitoring and full implementation of the Article. It was also decided that developed-country members should, prior to the end of 2002, hand in detailed reports on the practical functioning of Article 66.2, which were to be reviewed in the TRIPS Council and be updated by members annually.[44] Given that some of the developed country reports had been submitted just prior to or in the course of the countries meetings at the end of 2002, it was decided that the country delegations should get the opportunity to comment on them during the meeting on 18–19 February 2003. Consultations during this meeting led to the adoption of a draft decision on the implementation of Article 66.2 of the TRIPS Agreement by the Council.[45] This decision clarified the obligations conferred on the developed countries under Article 66.2 and is an important step towards the full implementation of the Article.

3. THE ROLE OF INTELLECTUAL PROPERTY RIGHTS

The awareness and importance of intellectual property rights have increased rapidly during recent years. This is due to increased technological development, which is strongly connected with the existence of intellectual property rights. Advanced modern technology has become global and more available. Another significant reason is the economic value of intellectual property rights; in particular the economic power of patents and trademarks has grown quickly.[46]

Intellectual property rights are traditionally viewed as compensation to inventors and as an important incentive for innovation. It is often argued that intellectual property rights promotes FDI and other forms of technology transfer since companies may be reluctant to transfer technology to countries with weak intellectual property rights protection. Because there is no effective protection system available for their technological information, companies fear that they could

[43] Cancún WTO Ministerial 2003, briefing note.
[44] WT/MIN(01)/DEC/2, 20 November 2001, para 7.
WT/MIN(01)/17.
[45] IP/C/M/39.
[46] Koktvedgaard, M. and Levin, M., *Lärobok i immaterialrätt*, Stockholm: Norstedts juridik, 2002, p. 21, 28.

loose control over technology transferred to these countries. Imitation can take place in countries with weak intellectual property rights since the imitator does not fear sanctions for infringement.[47]

Intellectual property rights offer an incentive to inventors to create new information, who otherwise may not be willing to put in the time and effort without receiving financial reward. If information were freely accessible the inventive process would probably decline because inventors would not receive compensation for their efforts. In particular, research and development would be difficult to undertake due to the large financial commitment required.

An important aspect, when discussing the role of intellectual property rights, are provisions protecting invention found in international human rights instruments. Protection for intellectual property as a human right is found in the United Nations Universal Declaration of Human Rights (UDHR) Article 27.2 and in the International Covenant on Economic Social and Cultural Rights (ICESCR) Article 15(1c).[48] The ICESCR and UDHR also contain provisions on the sharing of scientific development and participation in cultural life.[49] Accordingly, there must be a balance between these rights since they both have received protection. The interest of society to benefit from technological progress must be considered together with the creators' interest to receive protection for his creations.

The owner of an intellectual property right receives the exclusive right to decide to what extent others can commercially use the creation, but this right is limited. The established limitations on intellectual property rights create the balance between society and the owner of the exclusive right.

An important limitation is the time limit. For instance, copyright protection exists during the life of the author and 50 years after death and patents are protected 20 years after the filing date. Another limitation to the exclusive right, which is especially important in this context, is compulsory licenses, which are licenses authorized by a government to itself or third parties without the consent from the patent owner. Article 5A(2) of the Paris Convention allows each member country to grant compulsory licenses in cases where the abuse might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work the

[47] UNCTAD Policy Discussion Paper, *supra* footnote 40, p. 33, 86.

[48] UDHR Article 27.2 reads: "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". ICESCR Article 15(1c) has almost the same wording: "The State Parties to the present Covenant recognize 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".

[49] UDHR Article 27(1) reads: "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". ICESCR Article 15(1) reads: "the state parties to the present covenant recognize the right of everyone: a) to take part in cultural life" and b) "to enjoy the benefits of scientific progress and its applications".

invention. Compulsory licenses can also be granted on the grounds of public interest, for instance health issues and public welfare.[50]

4. THE TRIPS AGREEMENT AND TECHNOLOGY TRANSFER

The TRIPS Agreement contains provisions that promote transfer of technology but concerns have been expressed regarding the agreements ability to really encourage technology transfer to developing countries. This issue will be analyzed in this chapter.

4.1. General remarks

To begin with, there are some important points that need to be emphasized. The first observation has to do with the implementation procedure of the Agreement. The developed country members of the WTO were (Article 65 of the TRIPS Agreement) given a transitional period of one year before they had to apply the provisions of the Agreement. TRIPS thus entered into force for developed countries on 1 January 1996 and developing countries had an additional four-year period to comply. Developing countries, obliged by the Agreement to extend product patent protection to areas of technology that was not protected in those countries on the date of application, had until 1 January 2005 to apply the agreement to those products. In Article 66.1 least-developed countries were given a transitional period until 1 January 2006, but were required to apply the provisions in Articles 3, 4 and 5 which provide rules on national treatment and most-favoured nation treatment. At the Doha Ministerial Conference, it was decided that the transitional period for least-developed countries should be extended until 2016 regarding patent protection for pharmaceutical products.[51] Accordingly, the final effects of the Agreement are obviously difficult to tell at this point since the implementation procedure is not entirely completed.

What also should be taken into consideration is that the effect of the Agreement may not be as significant as anticipated since many countries improved their intellectual property laws prior to 1995, which occurred partly through pressure from the US. Additionally, there are other international agreements which are also responsible for the enhanced protection of intellectual property rights. Another important aspect is that the consequences of the Agreement certainly will be varied because countries have reached different levels of economic and technological development.[52]

[50] WIPO*, Intellectual Property Handbook, supra* footnote 15, p. 35.
[51] WT/MIN(01)/DEC/2, *supra* footnote 44.
[52] Correa, C. M., *supra* footnote 17, p. 24, 27.

4.2. TRIPS Provisions on Technology Transfer

There are provisions in the TRIPS Agreement that promote technology transfer and others that indirectly affect the process of technology transfer.

In the preamble to the TRIPS Agreement it is recognized that development is related to intellectual property rights and that least-developed countries have special needs that must be considered to enable them to create a technological base. The fifth preambular paragraph states that members recognize "the underlying public policy objectives of national systems for the protection of intellectual property rights, including development and technological objectives" and in the sixth paragraph it is provided that the members recognize "the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base". These statements point out the need to pay special attention to the needs and objectives of the developing countries. The preamble holds that there should be a balance between the interests of the developed and the developing countries, between intellectual property and free trade and between the owners of the rights and the interests of the society. The interests of the intellectual property rights owner should not be regarded as contrary to the interests of society because intellectual property rights protection has a positive effect on the creativity and on the diffusion of creations. The preamble is an important part of the Agreement and is regarded as one of the principles that the WTO panels should consider if they find the interpretation of the provisions unclear.[53]

Article 7 states as one of the Agreement's objectives that intellectual property rights should contribute to the promotion of technology transfer. It reads "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".

This provision stipulates important principles of the intellectual property rights system, for instance the role of intellectual property rights in the promotion of innovation and the transfer of technology. These principles are to be used to determine the balance between rights and obligations. The provision can be used to claim an exception to an intellectual property right if the owner has not observed the right to benefit from social and economic welfare. It could also be utilized to limit the protection and enforcement of an intellectual property right, which does not promote the transfer and dissemination of a technology or the promotion of innovation.[54]

Article 8.1 states that members may "adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance

[53] Gervais, D., *supra* footnote 39, pp. 80–81
[54] *Ibid*, pp. 116–117.

to their socio-economic and technological development". Article 8.2 holds further that appropriate measures "may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology". These principles give the member states the right to use measures to protect public health and to prevent the abuse of intellectual property rights, but the effect of these provisions could be limited since both contain the obligation that the measures adopted must be "consistent with the provisions of this Agreement". This means that exceptions that are not specifically anticipated already in the Agreement will not easily be recognized. The principles are instead to be regarded as a ground for explaining actions carried out under Articles 30, 31 and 40.[55]

Article 40 contains provisions to prevent anticompetitive practices in contractual licences. Article 40.1 reads "Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse affects on trade and may impede the transfer and dissemination of technology". The practices and conditions are not specified in the Agreement, as such the Article could be interpreted broadly.[56] Article 40.2 allows members to specify in their national laws: "licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market". The members may further adopt "appropriate measures to prevent or control such practices", if they are consistent with the TRIPS Agreement.

Red in the context of Article 40.2, Article 40.1 gives the member countries permission to adopt measures to prevent or control licensing practices, which other member countries must respect. However, this permission is limited to some licensing practices or conditions which restrain competition and which may have adverse affects on trade and may impede the transfer and dissemination of technology. This interpretation means that Article 40 is only applicable to practices that could damage competition. The damage must thus be the result of a hindrance on competition and must either have had an adverse effect on trade or have been an impediment to the transfer and dissemination of technology.[57]

Article 66.2 contains a direct request to the member countries to provide incentives to enterprises for promoting technology transfer. It reads "Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base". The governments have accordingly, under the TRIPS Agreement, the responsibility to take the first step in the process of promoting technology transfer. As mentioned in chapter two it was affirmed in the Doha

[55] *Ibid*, p. 121.
[56] *Ibid*, p. 281.
[57] UNCTAD-ICTSD, 'Resource Book on TRIPS and Development: An Authoritative and Practical Guide to the TRIPS Agreement', 2003, p. 19–20 available from www.iprsonline.org/unctadictsd/ResourceBookIndex.htm, [accessed February 2005].

Ministerial Decision on Public Health that this provision is mandatory. Noteworthy is that the Article only mentions promotion of technology transfer to the least-developed countries and not to the developing countries.

In Article 67 it is stated that developed countries shall offer technical assistance to developing and least-developing countries, it reads "developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel". Contrary to Article 66.2 this Article mentions technical support to both the developing countries as well as the least-developed countries, but also states that technical and financial cooperation shall be provided on "mutually agreed terms".

4.3. Implementation Issues and Concerns

One of the developing countries' main concerns regarding the adoption of the TRIPS Agreement was that it could lead to decreased access to technology. They feared that the global strengthening of intellectual property rights would make it harder for them to gain access to modern technology created in industrialized countries. Technology transfer channels such as imitation and compulsory licences would be restricted. Developing countries have expressed the necessity of increased access to technology from these countries and have claimed that the provisions in the TRIPS Agreement on technology transfer are too weak. They have questioned the implementation part of the Agreement regarding Article 66.2 that calls upon the developed countries to provide incentives for the transfer of technology and of Article 67 that deals with technical assistance.[58]

In 2001 the British government established a Commission on Intellectual Property Rights (CIPR), which was mandated to investigate how intellectual property rights could function in a better manner for developing countries. The report of the Commission was completed on 12 September 2002. The report discussed among other things the issue of technology transfer to developing countries. The report asserts that intellectual property rights have important effects on the promotion of invention in developed countries. It further asserted that it is fundamental for developing countries to develop indigenous technological capacity because these countries would then increase the ability to reduce poverty and improve the economy. To increase indigenous technological capacity is also important for technology transfer since technological capacity at the national level determines how well technology transfer can take place in practice. The report

[58] Correa, C. M, 'Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries, *Third World Network*, 2001, p. 3, 11 available from www.iprsonline.org/ resources/technologytransfer.htm#2001.

points out that access to technology is highly important for development. According to the report, the central question remaining is whether intellectual property rights can increase or prevent access to technology by developing countries.[59]

The report establishes that developed countries have not successfully implemented Article 66.2 of the TRIPS Agreement and it does not seem that they have taken any extra measures to encourage technology transfer. A problem with the above-cited Article is that it only refers to least-developed countries and not to developing countries, a delimitation that appears far too restrictive. The least-developed countries also have less capacity to absorb technology. The report emphasizes that the private sector owns most of the available technology, whereas the TRIPS Agreement is oriented at governments for implementation. Since the TRIPS Agreement deals mainly with the protection of intellectual property rights, it is not an agreement with technology transfer as its primary purpose. The Commission considers for these reasons that provisions on technology transfer to developing countries should be established in another instrument than the TRIPS Agreement.[60]

4.4. Is the TRIPS Agreement an Effective tool for Technology Transfer to Developing Countries?

4.4.1. TRIPS Provisions Problematic

The TRIPS Agreement has been criticized as being insensitive to the needs of developing countries and it has been questioned whether this is the right instrument for placing provisions on technology transfer. It has been argued that there are solutions that are more appropriate for technology transfer than within the WTO framework.

The provision that speaks most directly to technology transfer in the TRIPS Agreement is Article 66.2. The Article requests the developed countries to provide incentives to enterprises and institutions in their territories for the promotion of technology transfer to least-developed countries. Several aspects of this Article have been criticized.

As mentioned above, the Article was criticized in the CIPR report for excluding a reference to developing countries. This point has also been made by writers specializing in the field. According to Keith Maskus, Article 66.2 imposes a positive obligation upon developed countries to provide incentives to encourage technology transfer to least-developed countries. The problem is that this provision does not give rise to any rights or obligations to developing countries. An additional problem is that the Article does not mention intellectual property rights at all. The developed countries can therefore choose which incentives they want to give, which may not necessarily be linked to intellectual property rights. Maskus asserts that the Article implicitly contains an "effectiveness test" since the purpose of the Article will not be

[59] Commission on Intellectual Property Rights (CIPR) Final Report, September 2002, pp. 11–12.
[60] *Ibid*, p. 26.

fulfilled if it is not used effectively. The Article states that the incentives shall be provided for the least-developed countries "in order to enable them to create a sound and viable technological base". According to Maskus, this means that effectiveness is expected from both the developed countries and the least-developed countries.[61]

Carlos Correa has emphasized several problematic aspects of the TRIPS Agreement. For instance, the preamble recognizes the needs of the least-developed countries in order to enable them to create a technological base but does not mention the term technology transfer.[62] As mentioned above, the preamble to the TRIPS Agreement is important since the WTO panels shall consider it if there are uncertainties regarding the interpretation of the Agreement.

In Article 7 of the Agreement it is stated that intellectual property rights should contribute to the promotion of transfer of technology. Correa points out that instead of the term "shall" the word "should" is used. He also observes that in Article 8, which states that member countries may adopt measures, for instance, to protect public health, goes on to state that such measures should be taken only if they are consistent with the provisions of the Agreement. Article 29 deals with the conditions for patent applications, which includes disclosure of the granting of a patent. It is often argued that by studying patent applications companies in developing countries could get access to technology created in the developed countries. Correa is sceptical about this channel as a vehicle for transfer of technology because there is no evidence that companies in developing countries are able to effectively use these applications. Often companies in developing countries do not have the technical expertise necessary to analyse patent applications and the ability to invent new products. The fact that patent agents often provide the minimum information required to get the patent granted also makes it harder to acquire technology from patent applications. Correa also points out the problem that the know-how, which is necessary for the working of the patent, is not included in the patent document. Correa draws the conclusion that the objective of the TRIPS Agreements is to protect technologies and that the Agreement was not designed for the purpose of promoting technology transfer to developing countries. The adequate solution to technology transfer is accordingly not within the TRIPS Agreement; instead it is necessary to consider other alternatives.[63]

A further problem with the TRIPS Agreement is the lack of definitions for technology transfer components. Neither the terms technology nor technology transfer is defined in the Agreement, which creates uncertainties on their real meaning with respect to the TRIPS Agreement. An additional problem is that technology transfer channels are not mentioned in the Agreement. The application of

[61] Maskus, K., *supra* footnote 4, p. 2.
[62] Correa, C. M., 'Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?', *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime – a Law and Economics Conference,* 4-6 April 2003, Duke University School of Law, Durham, North Carolina, available from www.law.duke.edu/trips/.
[63] *Ibid.*

the technology transfer provisions would be facilitated if technology transfer channels, such as for instance FDI and licensing, were included and explained.

4.4.2. Compulsory Licensing under the TRIPS Agreement

Provisions on compulsory licensing are included in the Paris Convention and the TRIPS Agreement.[64] Article 31 of the TRIPS Agreement holds that the government or third parties authorized by the government can use a patented invention without the permission of the right holder if certain provisions in the Article are respected. What should be mentioned is that the TRIPS Agreement does not determine the grounds on which governments can grant compulsory licences, but leaves it to each member to decide.[65]

The Article stipulates certain conditions that have to be fulfilled for the use of the patent without the authorization of the patent owner. For instance, the proposed user must have tried to obtain authorization from the patent owner. The licence obtained is to be non-exclusive, and the patent owner shall be paid adequate remuneration.[66] As mentioned, Article 8 of the Agreement permits member countries to use measures necessary to protect public health and prevent the abuse of intellectual property rights that adversely affect transfer of technology. This provision can be invoked as a ground for allowing compulsory licences.

Contrary to the Paris Convention, the TRIPS Agreement does not specifically allow the member countries to grant compulsory license in cases of non-working of the patent. There are countries, which require local working for the granting of the patent. The main purpose asserted for this requirement is that technology transfer will occur more effectively if the invention is also worked in the country granting the patent. However, technology transfer will be more effective if the transaction is carried out between voluntary parties since compulsory licenses do not include know-how.[67]

During the negotiations on the TRIPS Agreement the US and other developed countries wanted to exclude the possibility of using compulsory licenses in cases of non-working, which led to a diplomatic solution as established in Article 27.1 of the TRIPS Agreement.[68] This Article establishes the criteria of patentability and prohibits discrimination based on whether the invention is locally produced or imported. It reads “patents shall be available and patent rights enjoyable without

[64] The TRIPS Agreement is only applicable between countries that are parties. If only one of two countries is party to the TRIPS Agreement it is not applicable. (Vienna Convention on the Law of the Treaties, Article 30.4(b). If both countries are parties to the Paris Convention and the TRIPS Agreement, the TRIPS Agreement will displace the Paris Convention since it is the latest treaty. (Article 30.4 (a), Article 30.3 Vienna Convention of the law of the treaties).
UNCTAD-ICTSD Resource Book on TRIPS and Development, pp. 33−34.
[65] WIPO, *Intellectual Property Handbook*, *supra* footnote 15, p. 35
[66] The TRIPS Agreement, Article 31(b), 31(d), 31(h).
[67] WIPO *Intellectual Property Handbook*, *supra* footnote 15, pp. 35−36.
[68] Correa, C. M., *supra*foot note 62.

discrimination as to the place of invention, the field of technology and whether products are imported or locally produced".

The interpretation of this provision has been divergent and has revealed the differences between the WTO members' interpretation of their rights and obligations under the TRIPS Agreement. The Article has been interpreted to prohibit local working requirements but this is by no means an interpretation that is unanimous. Carlos Correa concludes that the preamble, Article 7 and Article 8 establish that the promotion of technology transfer is an objective of the TRIPS Agreement, and that this promotion could be guaranteed to some extent through compulsory licences granted for non-working.[69] Compulsory licences can thus function as a channel for technology transfer. If this possibility to transfer technology were limited, it would mean that the objective of the Agreement was not considered. Interpreted as prohibiting compulsory licensing in cases of non-working, the TRIPS Agreement would make it more difficult for developing countries to get access to technology.

The issue of non-working under the TRIPS Agreement was brought up in 2001 when the US filed a complaint against Brazil under the WTO Dispute Settlement Body (DSB). The complaint concerned Article 68 of Brazilian industrial property law, which required that a patented invention must be worked in the country otherwise the invention shall be subject to compulsory license. The Article also states that compulsory licences shall be granted if a patented invention was not manufactured in Brazil or if the patented process was not used in Brazil. The Article further required that if the patent owner decided to work the invention only by import, parallel import of the invention would be allowed. The process began in 2000 when the US approached Brazil with a request to discuss the issue, but the parties could not agree upon a mutually acceptable solution. The US thus requested that a panel should be set up under the DSB regarding the compatibility of Brazilian law and the provisions in the TRIPS Agreement. The US asserted that Article 27.1 prohibited local working requirements and that Article 28[70] could be invoked to prevent third parties from selling or importing a product without the owner's consent. The Brazilian law, according to the US, was not in conformity with these provisions and was discriminatory towards US owners of patents filed in Brazil.[71]

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[69] Correa, C. M., *supra* footnote 17, p. 90–91.

[70] Article 28 reads: "1. A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process. 2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts."

[71] Raghavan, C., 'US seeks dispute panel against Brazil over patents', *Third World Network*, 19 January 2001, available from www.twnside.org.sg/title/seeks.htm, [accessed February 2005].

Brazil for its part held that Article 68 was consistent with the provisions of the TRIPS Agreement. It asserted that the US claim would have a negative impact on other developing countries that were implementing the TRIPS Agreement. The US had additionally not been able to present any damages caused by the Brazilian provision. Brazil contended that Article 204 and 209 of the US patent code was actually similar to the Brazilian law. The US patent law demands that small business firms and universities were to manufacture their invention in the US and required local working of inventions that were owned by the government and its agencies.[72]

The pharmaceutical companies influenced the US complaint and received criticism since Brazil had used its law to acquire HIV/AIDS retroviral for patients. The US finally withdrew the complaint on the condition that Brazil would not proceed with their complaint regarding the US patent law. The parties also agreed that Brazil should approach the US before they invoked their provisions concerning compulsory licences. The settlement was well received by the international community but it was observed that the obscurity of the provisions in the TRIPS Agreement eventually would lead to similar disputes.[73]

This example demonstrates the divergent interpretations of the TRIPS provisions by the member countries. The text of the Agreement undoubtedly needs to be clarified in order to prevent similar conflicts in the future. It is also an example of how the developed countries are trying to interpret the TRIPS Agreement in favour of their own interest, not considering the problems and needs of the developing countries.

4.5. Transfer of Environmentally Sound Technologies (ESTs)

Developing countries need technology to improve their industry and their technological base, but the access to technology is crucial for other reasons as well. An example is the need of developing countries to get hold of ESTs, which they must acquire to be able to meet obligations stated in MEAs. The developing countries called attention to this issue during the Earth Summit and asserted that stricter intellectual property rights would impede the availability of ESTs.[74] The developing countries' concerns were observed in Chapter 34 of Agenda 21 that stipulated the necessity of the transfer of ESTs to developing countries for sustainable development. This Chapter also holds that the need to protect intellectual property rights shall be considered and that the terms for the transfer of such technology should be mutually agreed upon. The establishment of the TRIPS Agreement strengthened the international intellectual property rights system, which is a movement in the opposite direction of the wishes of developing countries.

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[72] *Ibid.*

[73] Raghavan, C., 'US to withdraw TRIPS dispute against Brazil', *Third World Network*, 25 June 2001. Available from www.twnside.org.sg/title/withdraw.htm, [accessed February 2005].

[74] Khor, M., *supra* footnote 16, p. 87.

The concerns of developing countries are justified. An example of the problems developing countries experience is their difficulty to receive substitutes for chlorofluorocarbons (CFCs) under the Montreal Protocol. Member countries to the Montreal Protocol are obliged to find a substitute for this chemical, which destroys the ozone layer, by the year 2000. Developing countries were given an adjustment period until 2010 to phase out this substance. Article 10 of the Agreement calls upon the parties to transfer environmentally safe substitutes and technologies to developing countries.[75]

The relevant substitutes to CFCs are HFC 134a and hydrocarbon, which are protected by patents and trade secrets owned by a few firms in the developed countries. India wanted to exchange its use of CFCs to HFC 134a, which was regarded as the best replacement, but had difficulties in getting access to the technology. The TNCs that were in possession of the patents demanded either very high royalties or that India would agree not to export or sell the substance locally. Indian companies did not accept these requirements since calculations showed that the price for the patents was excessive.[76]

Indian companies have had further difficulties acquiring the substance FM 200, a replacement for halon, which is used in fire extinguishers among other things. A US company owns the patent, which is licensed on certain conditions, for instance, that US agencies must perform the final approval of the product. Additionally, the patent owner required that a joint venture arrangement should be established which they would control. Indian companies only wanted to buy the technology and produce the substance locally. This together with the excessive license price made it impossible for India to meet the demands of the US companies, and India thus has to rely on imported FM 200.[77]

The examples above illustrate the complexity of problems surrounding the transfer of technology. The developing countries agreed to sign environmental agreements and change their laws and practices to adjust to the established provisions. In return it is stated that the developed countries should transfer technology and assist the developing countries in their process towards development, but this is something that the these countries and the TNCs are having difficulties living up to. A significant problem is that the governments are the ones that sign the agreements and the companies are those who mainly own the technologies.

The fact that transfer of ESTs is essential for sustainable development in developing countries was confirmed at the Earth Summit. With the establishment of the TRIPS Agreement the trend has shifted towards stricter protection of intellectual property rights making it difficult for developing countries to get access to ESTs.

[75] Article 10A of the Montreal Protocol reads: "Each Party shall take every practicable step, consistent with the programmes supported by the financial mechanism, to ensure that the best available, environmentally safe substitutes and related technologies are expeditiously transferred to . . . developing countries under fair and most favourable conditions."
[76] Khor, M., *supra* footnote 16, pp. 92–94.
[77] *Ibid,* pp. 94–95.

The TNCs that are based in developed countries own a majority of patents for ESTs technologies and can thus keep prices high for their patents or simply deny selling the technology to developing countries. The developing countries often don't have the economic capacity to buy licenses and if they do, the TNCs require that they must control the company buying the license.[78]

The WTO's Committee on Trade and Environment (CTE) was established in 1994. It investigates, among other things, intellectual property rights and the TRIPS Agreement. Its work programme includes discussions as to what extent the Agreement allows for the transfer of environmentally sound technology. The Committee also investigates the TRIPS Agreement's compatibility with the Convention on Biological Diversity (CBD) that calls for technology transfer on "fair and most favourable terms", a sentence that some countries consider incompatible with the TRIPS Agreement.[79]

4.6. Communication from the Member Countries to the TRIPS Council

The Doha Ministerial Decision on Implementation-Related Issues and Concerns reaffirmed that Article 66.2 is mandatory. It was also decided that the TRIPS Council, which is responsible for administering and monitoring compliance with the TRIPS Agreement, should put in place a mechanism for ensuring the monitoring and full implementation of the Article.

In July 2002, the least-developed countries placed before the TRIPS Council a communication stating their views concerning the implementation of Article 66.2. In the report, it was pointed out that provisions in international agreements on technology transfer, for instance the TRIPS Agreement, have proven to be only paper promises. It is therefore necessary to make sure that the Doha Decision, which states that the TRIPS Council shall put in place a mechanism for the full implementation of Article 66.2, is realized. The establishment of a mechanism aims at ensuring the full implementation of Article 66.2, and the developed countries are thus obliged to hand in reports that shall be reviewed and updated annually. The least-developed countries pointed out that measures should be taken against the member countries that fail to report. They stress the importance of the need for the mechanism not to become an ad hoc system; and that instead it should be incorporated in the TRIPS Agreement.[80]

The TRIPS Council decision of 19 February 2003 gave effect to instructions to put in place a mechanism for ensuring the monitoring and full compliance with Article 66.2. This decision lays down an obligation on developed country members to submit reports on actions taken or planned in pursuance of their commitments under Article 66.2. These report shall be updated annually and new detailed reports shall be handed in every third year. The TRIPS Council shall review these reports at

[78] *Ibid*, pp. 87–95.
[79] The CTE agenda, available from www.wto.org/english/tratop_e/envir_e/cte07_e.htm, [accessed February 2005].
[80] IP/C/W/357.

its end of year meeting each year and during these meetings, members get an opportunity to ask questions and request additional information. The decision also contains a list of information that shall be provided, for instance identification of the type of incentives and information on their practical functioning. It was also decided that the Council should review the arrangement in the decision after three years with the view of improving them.[81]

The developed countries have handed in updates to their reports on actions taken or planned to be taken in pursuance of their commitments under Article 66.2. The 2004 yearly report from the European Communities (EC) states that government attempts to promote technology transfer are limited because private enterprises own a majority of the technology and the governments are unable to force private owners to transfer their technology. For these reasons, the incentives have to consist of facilitation of projects with the objectives to, among other things, improve the capability of the least-developed countries to absorb technology, support common research projects and to promote direct investment and licensing.[82]

The EC has developed mutual projects to promote technology transfer and individual countries have national programmes aimed to fulfil their obligations under the decision. It should be noted that there is no EC project that is specifically aimed at the least-developed countries; instead, the projects are focused on regions or a specific country.[83]

The US report of 2003 presents the activities that the government has taken to comply with its obligations. These are mainly different programmes and projects devoted to increase the capacity building and the technical assistance to developing countries, for instance the Millennium Challenge Account launched by President Bush to enhance economic growth in developing countries.[84]

An additional example is Japan, which is offering training courses on intellectual property rights for government-related persons and officials of intellectual property offices in developing countries. Projects between the Japanese private sector and participants from developing countries are also carried out.[85]

These projects naturally increase the developing countries knowledge about technology transfer and intellectual property rights and help them create an indigenous technological capacity. A developed technological capacity is important for these countries' ability to attract and absorb technology as efficiently as possible. These incentives accelerate the developing countries' process in receiving access to technology, but are only the first step towards development for these countries.

[81] IP/C/28.
[82] IP/C/W/412/Add.5.
[83] *Ibid.*
[84] IP/CW/412/Add.3.
[85] IP/C/W/412.

5. AN OBSTACLE OR A CONDITION?

Can stronger intellectual property rights protection promote international transfer of technology to developing countries or is it an obstacle? This issue has separated the developing and the developed nations into two groups. In this chapter, the effect of intellectual property rights on technology transfer and the divergent views of the north and south will be discussed.

5.1. General Remarks

When investigating the effects that intellectual property rights can confer on technology transfer, it is important to bear in mind the following aspects. It should be remembered that intellectual property rights are just one of the factors that affect technology transfer and companies decisions to invest. Factors such as availability of skilled workforce, the political situation, the domestic market and the infrastructure of the country are also considered.[86] Intellectual property rights cover all sorts of creations, for instance inventions, literary or artistic works and designs that all have their specific nature. It is therefore important not to generalize and refer to the effects of intellectual property rights altogether since that would give a simplified picture. Even if a separate area of intellectual property rights is analysed it is necessary to consider which product and sort of activity is concerned.[87] The importance of developing countries' ability to absorb technology should further be noted. For these countries to be able to receive technology successfully there must be a capacity to learn, to invest, to absorb and put the technology into practice.[88] These factors need to be taken into consideration by developing countries. There is no conclusive evidence that intellectual property rights enhance development and innovation.[89] Several studies from different angles have been made on the effects of intellectual property rights, for instance on trade, FDI, transfer of technology and on the impact of stronger intellectual property rights in developing countries. Since these studies have been performed with varied methods and differ in extent, it is difficult to extrapolate any general inferences.[90] The effect that intellectual property rights can confer on trade has been analyzed many times from an economic perspective. Examples of studies performed are Nogués (1993), Mansfield (1994) and (1995), Maskus and Penubarti (1995), Primo Braga and Fink (2000), Smith (1999) and (2001), McCalman (2001), Glass and Saggi (2002).

[86] Matthews, D., *supra* footnote 37, pp. 111−112.
[87] Correa, C. M., *supra* footnote 17, p. 24, 26.
[88] Correa, C. M., *supra* footnote 62.
[89] UNCTAD Policy Discussion Paper, *supra* footnote 40, p. 5.
[90] Correa, C. M., *supra* footnote 17, pp. 25, 26, 30.

5.2. North – South Perspectives on Intellectual Property Rights and Technology Transfer

The different approaches of developing and the developed countries towards intellectual property and technology transfer are important to consider for the understanding of this issue, which has divided nations into two groups.
It is well known that developing countries and developed countries frequently have different views regarding the protection of intellectual property rights. The traditional view of many developing countries is that technological information belongs to the common heritage of mankind and accordingly intellectual property rights should not limit access to it. These countries tend to have weak intellectual property rights protection claiming that they need access to technology created in developed countries to be able to develop, which is easier if they have weak intellectual property right laws.[91]

There are a number of additional explanations as to why there is a lack of effective protection of intellectual property rights. For instance, pirates have an advantage over the real producers since those who copy intellectual property rights have lower production expenses and can choose to make the most attractive products, thereby reducing the risks they take on the market. Accordingly the pirates are more successful in developing countries because they can better serve the needs of the developing countries, for example, by offering low prices on products. A further explanation is that these countries do not have a high number of inventors and authors that could demand enhanced protection and enforcement of intellectual property rights. The governments may also have low economic assets which would make them reluctant to invest in foreign intellectual property because they consider that too much of a burden for their economy.[92]

Additionally, developing countries have problems enhancing their technological development. There are many reasons for this difficulty. The technical infrastructure may be underdeveloped, for example the research and development (R & D) possibilities. Another reason is that technology transferred from developed countries originally may not be created to fulfil the needs of the developing countries, instead it is meant directly for sale, often to other developed countries. This technology would be difficult to use in countries that do not have any capability to use it effectively.

Because of the numerous technology options many developing countries may have problems determining what kind of technology they actually need. This could lead to developing countries acquiring technology that does not meet their requirements. Finally, these countries may not have established an effective plan for their future technological development.[93]

The developing countries use technology transfer mechanisms such as imitation to increase their level of development. Imitation and copying were also used by the

[91] D'Amato and Long, D. E., *supra* footnote 3, pp. 61–62.
[92] *Ibid*, p. 62.
[93] *Ibid*, p. 42.

now developed countries during their technological development, and had in fact an important role for the industrialization of those countries. Developing countries have expressed concerns that strengthened intellectual property rights would lead to difficulties in obtaining transfer of technology this way.[94]

The developed countries have traditionally a different approach towards intellectual property rights. They consider that intellectual property rights are a necessary compensation to inventors since the latter disclose their creations. This economic compensation encourages the inventors and authors to use their assets to embark upon further research for their work. Developed countries consider that the common heritage of mankind theory is not useful to developing countries since the latter, by denying protection to their national inventors, does not give them any incentive to invent locally.[95]

The most common form of international technology transfer for MNEs has been to invest technology in their subsidiaries abroad, because then they can effectively control the information transferred. The motives for these companies to invest in developing countries are among other reasons to use the cheap labour available, to control and establish new markets, and to discover new raw material.[96]

Companies' preferences for internalized technology transfer and FDI, is also due to the low price and the fast process if compared to externalized technology transfer, such as joint ventures and licences. A particular disadvantage with FDI for the recipient country is that companies receive increased control over their technology and accordingly this could restrain spillover and technology learning. For the technology transfer recipient the benefits of all technology transfer channels are several, although it is difficult to measure. Benefits that occur in the early stage are increased productivity, new products, and lower costs. The level of benefits in the later stage depends mainly on how much the recipient can adapt and learn from the technology transferred, and on the ability to increase its own capability. Technology transfer will also lead to technology diffusion and spillover to companies and institutions in the recipient country.[97]

5.3. Intellectual Property Rights promote Technology Transfer

The most common argument for stronger intellectual property rights in developing countries has been, and is, that developed countries are more positive towards technology transfer to countries with effective intellectual property rights. The developed countries fear that weak intellectual property rights would lead to lack of

[94] Khor, M., *supra* footnote 16, pp. 205−206.
[95] D'Amato and Long, D. E., *supra* footnote 3, p. 65.
[96] *Ibid*, p. 41.
[97] 'Foreign Direct Investment and the Challenge of Development', *UNCTAD World Investment Report,* 1999, pp. 203, 207, available from www.unctad.org/en/docs/wir99_en.pdf, [accessed February 2005].

control over the transferred technologies, which would make them an easy target for piracy.[98]

This view is confirmed in two extensive studies made by Edwin Mansfield for the World Bank in 1994 and 1995 examining FDI, intellectual property rights and technology transfer. He performed a survey on 94 major US firms covering six different industries asking them how important intellectual property rights protection was when they considered FDI in other countries. The results of the survey showed that the US firms in the survey "tend to regard intellectual property protection as being more important in decisions regarding the transfer of advanced technology than in investment decisions".[99] A president of a large chemical company stated that the weaker a country's intellectual property rights are, the more reluctant they would be to transfer technology through joint ventures, licenses or direct investment because of "The risk that the laws will not be able to effectively deter or remedy a theft of our technology . . .".[100] In the study there were also industries that considered strong intellectual property rights less important, for instance electrical equipment companies. Mansfield concludes that this could be due to the fact that patent protection is regarded as more important for the pharmaceutical and chemical sector than for other areas since their products are easier to copy.

In his study, Mansfield found that the strength of countries intellectual property rights appeared to have a decisive impact on the type of technology transferred. This was especially relevant for technology transfer by high-technology industries, such as the chemical and the pharmaceutical industries. Mansfield further found that the companies' type of investments had an impact on their FDI decisions: "For investment in sales and distribution outlets, only about 20 percent of the firms reported that intellectual property protection was of importance. For investment in rudimentary production and assembly facilities, about 30 percent said that such protection was important. For investments in facilities to manufacture components or complete products, about 50-60 percent said it was important, and for investment in R &D facilities, about 80 percent said it was important."[101]

According to Mansfield's study, the chemical industry was particularly reluctant to transfer technology to a country with weak intellectual property rights. The

[98] Primo Braga, C. A. and Fink, C., 'The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict', in Abbott, F., Cotteir, T. and Gurry, F. (eds.), *The International Intellectual Property System, Commentary and Materials*, The Hague: Kluwer Law International, 1999, p. 276.

[99] Mansfield, E., 'Intellectual property protection, foreign direct investment and technology transfer'*, The World Bank and the International Finance Corporation (IFC)* 1994, pp. 1 and 14. Available from www.iprsonline.org/resources/technologytransfer.htm, [accessed February 2005]. The industries in the survey include chemicals, transportation equipment, machinery, food and metals.

[100] *Ibid*, p. 24.

[101] *Ibid*, p. 1.

survey also showed that the technology transferred to these countries was older than the technology transferred to countries with effective intellectual property rights.[102] Mansfield's 1995 study focused on direct investment and technology transfer to developing countries by companies in Germany and Japan. The results showed that countries intellectual property right laws had a major effect on the size and type of the technology transfer and the direct investment to these countries by high technology industries such as chemicals, pharmaceuticals, machinery, and electrical equipment, in Japan, the US and Germany.[103] Mansfield found further that 80 percent of the pharmaceutical and chemical industries considered the effectiveness of intellectual property rights were important while 20 percent of sales and distribution outlets were of the same opinion.[104]

These studies show that a country's strength of intellectual property rights is an aspect which firms in developed countries pay attention to when they consider investing. The chemical and pharmaceutical sectors proved to be especially attentive to the weakness or strength of intellectual property rights. However, not all industries regarded intellectual property rights of the recipient to be decisive.

Mansfield's studies were performed several years ago but the methods of large companies have probably not changed in a substantial manner. Their views regarding the importance of strong intellectual property rights protection have probably been reinforced by increased technological progress. Several scholars support Mansfield's findings. Pamela J Smith has made two studies analysing the effects of foreign patent rights on US exports. She found that weak patent rights restrain US export, but this is only the case for countries that extensively use imitation. Strengthened intellectual property rights in those countries, as conveyed by the TRIPS Agreement, would lead to decreased possibilities to imitate and therefore increased US export.[105] Smith has further found that effective intellectual property rights increase information flows between countries that use imitation heavily and leads to enhanced establishment of affiliates and licensing abroad.[106] The Maskus and Penubarti (1995) study shows that exporting firms pay attention to a country's national patent laws and that patent protection affects imports in both small and large developing countries positively.[107] McCalman (2001) found that

[102] *Ibid*, p. 22.
[103] Mansfield, E., 'Intellectual property protection, direct investment and technology transfer: Germany, Japan and the United States', *International Finance Corporation (IFC,)* discussion paper, no. 27, 1995, p. 1, available from www.iprsonline.org/resources/technologytransfer.htm, [accessed February 2005].
[104] *Ibid.*, p. 22.
[105] Smith, P. J., 'Are weak patent rights a barrier to US exports?', 1999, 48:1 *Journal of International Economics*, p. 170.
[106] Smith, P. J., 'How do foreign patent rights affect U.S exports, affiliate sales and license', 2001, 55:2 *Journal of International Economics*, pp. 411−439.
[107] Maskus, K. and Penubarti, M., 'How Trade-Related are Intellectual Property Rights?', 1995, 39:3−4 *Journal of International Economics*, pp. 227−248.

patent harmonization would lead to increased technology transfer between countries with benefits especially for the US.[108]

These are some of several studies that assert that intellectual property rights are of major importance for transfer of technology. As mentioned above, many of the studies on this issue were performed with different methods and therefore it is difficult to make general conclusions. More research is needed to clarify all aspects of the issue, a comment that is also made by scholars.

Nevertheless, research is pointing at the availability of intellectual property as important for companies' investment decisions, although it depends on which industry it concerns. Especially research-intensive industries such as chemical and pharmaceutical companies whose products are sensitive to imitation, consider intellectual property protection as important.

As Carlos Correa pointed out in a law and economics conference in 2003, it is understandable that companies could be reluctant to transfer technology to countries where the protection of their technological information does not exist or is scarce.[109] Companies develop technology that they naturally want to protect so that their research work is rewarded. The reward is also important for the financing of future R&D.

Enhanced intellectual property rights may increase FDI and licensing, but could also confer other benefits to developing countries. Stronger intellectual property rights in developing countries could promote the development of indigenous inventions. Developed countries may also become more willing to perform research on pharmaceutical products, which remedy common diseases in developing countries, if these countries have an effective intellectual property rights system. These benefits may lead to increased flows of technology from developed to developing countries.[110]

5.4. Intellectual Property Rights Hinder Technology Transfer

Scholars do not agree upon the importance of intellectual property rights in investment decisions abroad by companies. There are studies performed which show that intellectual property rights protection is of less importance.

To begin with, Nogués (1993) noted, "the decision to licence and transfer technology depends much more on the legal strength of the licensing agreement and the adaptable capacity of the buyer to absorb technology". He found that, because of lack of evidence, it could not be asserted that companies would be more willing to transfer their newest technological information if intellectual property rights were available. Nogués asserts that intellectual property rights are important for companies' investment decisions when it concerns R&D, but less important for

[108] McCalman, P., 'Reaping what you sow: an empirical analysis of international patent harmonization', 2001, 55:1 *Journal of International Economics*.
[109] Correa, C. M., *supra* footnote 62.
[110] Matthews, D., *supra* footnote 37, p. 110.

investment decisions in products since these decisions depend more on the country's investment climate.[111]

Primo Braga and Fink (2000) found in their study that the impact of intellectual property rights on trade flows of high technology was not of significance. They pointed out that stronger intellectual property rights could have a positive effect on imports since the risk of piracy would be reduced. Nevertheless, companies may also decrease exports if the intellectual property rights system is enhanced as they get more market power where copying and imitation is limited.[112]

Glass and Saggi (2002) found that stronger intellectual property rights in the south reduce the risk of imitation but not more than imitation performed by firms in the north. They pointed out that stronger intellectual property rights make imitation more costly since it demands more labour. This leads to a waste of resources that in their turn diminishes FDI and innovation.[113]

Correa considers that the mere existence of intellectual property rights per se does not constitute a sufficient incentive for technology transfer to developing countries. Stronger intellectual property rights enhance TNCs' control over technology and the right to refuse access since most technology is in their hands. Stronger protection further allows these companies to impose conditions and charge higher prices for their products.[114]

Enhanced intellectual property rights, as conferred by the TRIPS Agreement, are likely to increase the expenses of developing countries. This could result because companies in developed countries own most patents and developing countries accordingly have to pay high prices to get access to the technology. The developing countries dependence on the developed countries will thus increase and, if they cannot afford the prices for the patents, the access to information will be diminished.[115]

Developing countries that have developed significant technological capability, such as Brazil, Korea and China, used weak intellectual property rights protection at the beginning of their development process, just as the developed countries did during their industrialization process. Since these countries had limited economic assets to buy technologies, they used weak intellectual property rights protection in order to get access to technological information. It could thus be asserted that weak intellectual property rights protection is more linked to increased development for countries with a weak technological base than strong intellectual property rights. If

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[111] Nogués, J., 'Social costs and benefits of introducing patent protection for pharmaceutical drugs in developing countries', 31:1 *The Developing Economies* (March 1993) p. 42, available from www.ide.go.jp/English/Publish/De/vo131.html, [accessed February 2005].

[112] Primo Braga, C. A. and Fink, C., 'How stronger protection of intellectual property rights affect international trade flows', *IPRS online,* 2000, p. 3, available from www.iprsonline.org/resources/ trips1994-2000.htm#2000, [accessed February 2005].

[113] Glass, A. J. and Saggi, K., 'Intellectual property rights and foreign direct investment', 2002, 56:2 *Journal of International Economics*, pp. 381–410.

[114] Correa, C. M., *supra* note 62.

[115] Matthews, D., *supra* note 37, p. 113.

countries enhance their intellectual property rights systems companies would have a more effective remedy to combat imitation, and developing countries would accordingly be more reluctant to use this form of technology transfer. In the CIPR final report it is asserted that the experience of countries indicates that intellectual property rights are important for the ability of countries to attract technology, but only when they have reached a certain level of development. Least-developed countries thus will not benefit as much from increased intellectual property rights as developing countries that have obtained a level of technological capacity.[116]

Kim (2002) has made a similar conclusion. This study concludes that intellectual property rights restrain technology transfer in the beginning of the industrialization process during which a country uses reverse engineering and imitation. Kim found that intellectual property rights were not important for technology transfer until the country had managed to develop a scientific and technological infrastructure. Countries such as Japan, Korea and the U.S would not have been able to reach their present technological level if they had used strong intellectual property rights at the beginning of their industrial development.[117]

Stronger intellectual property rights can further reduce developing countries local R&D. Effective intellectual property rights laws attracts companies from abroad but if the majority of patents granted in the country is mainly owned by foreign companies it could diminish innovation, since the foreign companies increase their bargaining power.[118]

The conclusion that can be drawn from this discussion is that empirical evidence on the effects of intellectual property rights on technology transfer is varied. Scholars are of divergent opinions whether intellectual property rights really can increase technology transfer and FDI. Many of them also point out that this area is complex and further research is necessary to increase the understanding of this issue.

Intellectual property rights seem to have an effect on technology transfer but the effect is ambiguous. Additionally, intellectual property rights are just one factor that affects technology transfer. The situation in the recipient country must also be considered together with other factors such as the type of technology transferred.

Today it is generally recognized that the development of national scientific and technological capacity is crucial for the developing countries ability to absorb technology. The development of this capacity depends on many factors such as availability of economic resources, a well-developed education system and a system for supporting institutions.[119]

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[116] CIPR Final Report, *supra* footnote 59, pp. 21−22, 26.
[117] Kim, L., 'Technology Transfer and Intellectual Property rights: Lessons from Korea's Experience', *UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development,* October 2002, p. 5, available from www.iprsonline.org/resources/technologytransfer.htm#2002, [accessed February 2005].
[118] Khor, M., *supra* footnote 16, p. 90.
[119] CIPR Final Report, *supra* footnote 59, p. 20.

A way to measure a country's technological capacity is to look at the number of patent applications filed under the Patent Cooperation Treaty (PCT).[120] Patent applications under the PCT from developing countries increased from 680 in 1997 to 5359 in 2002, which is a growth of almost 700 per cent. In 2003 patent applications from developing countries had risen by 11 per cent, and the countries that had the most applications (in descending order) were Korea, China, India, South Africa, Singapore, Brazil, and Mexico.[121] When considering these figures, it should be noted that the developed countries and a few developing countries hold most patents, the latter mentioned above. These developing countries also have developed a considerable technological capacity and have therefore the opportunity to perform R&D.[122] R&D is concentrated in OECD countries; there are 10 OECD countries that account for 84 percent of the global R&D and for 94 percent of the patents granted in the US.[123] These figures show that developing countries are still dependent on technology from developed countries.

5.5. The Way Forward

Technology transfer to developing countries is, after more than thirty years of international debate, still a pressing issue. The attempts to create a code of conduct for transfer of technology have so far been unsuccessful and provisions in international agreements, which call upon the developed countries to transfer technology to developing countries, have proven to be ineffective.

It is generally recognized that access to technology is of major importance for a country's development and it is evident that the enhanced international intellectual property rights system has lead to restricted technology access for developing countries. An obvious example is the developing countries difficulties in getting access to ESTs. The question is thus, how to increase technology flows from developed to developing and least-developed countries, since companies in the north own most of the technology. What is needed is some sort of tool to make TNCs more willing to invest in developing countries.

During the Doha negotiations, it was decided that a Working Group on Trade and Transfer of Technology should investigate how to enhance technology transfer to developing countries. Several developing countries have, in submissions to the

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[120] *Ibid*, p. 12.

[121] WIPO Press Release, WIPO/PR/2003/338, Geneva, 18 February 2003. Available from www.wipo.int/edocs/prdocs/en/2003/wipo_pr_2003_338.html, [accessed February 2005]. WIPO Press Pelease, WIPO/PR/2004/375, Geneva, February 23, 2004 available from www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_375.html, [accessed February 2005].

[122] CIPR Final Report, *supra* footnote 59, p. 12.

[123] Roffe, P., 'IPRs and access to technology – a developing country perspective', *WIPO-WTO joint Workshop on Intellectual Property and Transfer of Technology*, 17 November 2003. Available from www.wipo.int/documents/en/meetings/2003/wipo, [accessed February 2005].

Working Group, expressed the need to review the provisions in the TRIPS Agreement on technology transfer in order to make them more effective.[124]

The importance of defining the technology transfer components has been noted, for instance by the EC. A submission from the EC in 2002 to the Working Group stressed that the focus should be on the establishment of a mutual definition of technology transfer, to identify the channels for technology transfer and to clarify under what conditions these channels are most effective. The EC held that the understanding of these issues would be the basis for future work in clarifying how to increase technology transfer to developing countries.[125]

A group of developing countries has tabled a communication on "Possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries".[126] The communication recommended, among other things, that the provisions on technology transfer in WTO Agreements should be examined with the aim of making them operational and meaningful. The communication also asserted that MNEs preferred to transfer technology to their subsidiaries and were reluctant to use licensing because they feared that it would create competition for their subsidiaries. Therefore, it is important for the Working Group to recommend methods for a more effective use of licensing by MNEs. It was further recommended that the Working Group investigate difficulties experienced by developing countries in meeting obligations stipulated in WTO agreements. The communication highlighted the need of internationally agreed rules to facilitate trade and development, especially rules for technology transfer to developing and least-developed countries. These recommendations should aim at increasing global technology flows and there should be special consideration regarding developing countries, for instance the training of their personnel and access to scientific literature and databases. The Working Group should further investigate how to enhance the technological base of developing countries. Finally the communication stated that the need for a "self contained agreement on trade related technology transfer and development" should be examined.[127] As mentioned in Chapter 2, the recommendations from developing countries on how to increase technology transfer were presented during the WTO Ministerial Conference in Cancún 2003. The Working Groups annual report of 2004 held that the members considered the Groups discussions concerning trade and technology transfer had not been comprehensive. The member countries pointed out that further work was needed to clarify all issues concerning the subject. It was stressed that since technology transfer was a complicated area it was necessary to clearly define its components and channels. The members agreed that all factors of technology transfer, for instance the role of the government and of the companies

[124] *See for instance* India, 18 February 1999, (WT/GC/W/147) and the African Group, 6 August 1999, (WT/GC/W/302.
[125] WT/WGTTT.
[126] WT/WGTTT/W/6. Communication submitted by Cuba, India, Indonesia, Jamaica, Kenya, Nigeria, Pakistan, Tanzania, Venezuela and Zimbabwe.
[127] *Ibid.*

and the technology transfer channels should be taken into consideration by the Working Group in order to get an overall picture. The members agreed to continue the work on the examination of trade and technology transfer, and on recommendations that could be taken within the WTO to increase technology flows to developing countries.[128] The TRIPS Agreement, because of its wide coverage, is the most important international instrument on technology transfer, but has proven to convey a negative effect on technology transfer to developing countries. The obscurity of the provisions on technology transfer and the lack of effective use of the technology transfer provisions by developed countries have been decisive. A review of the TRIPS Agreement with the aim of making the provisions more effective may lead to increased technology transfer to developing countries. However, to revise the agreement is a lengthy procedure; the latest WTO Ministerial Conference held in Cancún in 2003 ended without consensus. An important point mentioned above is that the TRIPS Agreement binds governments, it is they who should provide incentives to enterprises and institutions. It is also a fact that governments have limited power to oblige TNCs to transfer technology. Since the provisions in the TRIPS Agreement on technology transfer have not been effectively complied with by developing countries, it is relevant to discuss other solutions. In this context is should be noted that instruments which are meant to harmonize national laws should be addressed to the governments since only states are recognized as subjects of international law. Companies are not recognized as subjects under international law but are obliged under the host country's laws, which may have been adjusted to comply with international agreements.[129]

The two attempts in the 1970s to create a code of conduct for technology transfer to developing countries were never successful, but codes of conduct, which regulate companies' behaviour, have gained expanded interest in recent years. Codes of conduct can be addressed to governments or directly to TNCs, the latter concerning voluntary obligations since companies are not regarded as subjects of international law with rights and obligations. Accordingly, it is difficult to directly place obligations on companies in international legally binding instruments. Codes of conduct can be public but there are also private internal codes developed by TNCs. The benefits with public codes are that they can become legally binding for states and establish the governments' obligations to regulate TNCs. The drawbacks are that negotiators may have difficulty in agreeing on all terms, as was the case with the codes created in the 1970s. Private codes, although fast and cheap to adopt, may not have an effective monitoring system and lack enforcement provisions.[130] Thus, these instruments are difficult to use to make companies comply with what they have set out to do. TNCs have undoubtedly major power in international trade, but their actions and investment decisions are difficult to influence, as has also been

[128] WT/WGTTT/6.
[129] Day Wallace, C., *supra* footnote 22, p. 1098.
[130] Wawryk, A., 'Regulating Transnational Corporations through Corporate Codes of Conduct', in Frynas, G. J. and Pegg, S. (eds.), *Transnational Corporations and Human Rights*, New York: Palgrave Macmillan, 2003, pp. 54–55.

pointed out by the country members in the TRIPS Council. The commercial technology transfer process is performed between voluntary parties, and international instruments, such as the TRIPS Agreement, cannot decide where companies shall invest. However, these instruments can establish rules, which facilitate the technology, transfer process and remove obstacles.[131] It is thus important to make sure that the provisions in international instruments that promote technology transfer to developing countries are functional and complied with by developed countries.

Enhanced global harmonization, through international agreements such as the TRIPS Agreement, makes it impossible not to consider the situation in other countries. The increasing international trade and cooperation between countries creates an environment where it is necessary to pay attention to all parties involved. Both parties will benefit from considering each other's needs, since they all are parties to the same agreements and participants in international trade. It is accordingly necessary to strike a balance between the demands of the developing countries and the developed countries.

That some industries are attentive to the effectiveness of countries intellectual property laws when they consider investing cannot be disregarded. It is also a fact that developing countries will continue to be importers of technology from developed countries, where most technology is owned. Technology transfer is accordingly still crucial for their development.[132]

The effect of intellectual property rights on technology transfer depends to some extent on how these rights are applied by technology owners. If companies consider the situation of the developing countries, they could use less strict intellectual property rights were it is most urgent, as for instance in the case of ESTs.

The importance of considering the needs of developing countries was reaffirmed in the year 2000 when the UN Millennium Development Goals were established. It contains eight goals that all UN member countries will have committed to achieving by the year 2015. Goal eight is meant to be achieved by the developed countries and calls upon them to develop a global partnership for development. This includes, among other things, to make the benefits of new technology available, particularly information and communication technology, in cooperation with the private sector. It is also stipulated that countries shall cooperate with the pharmaceutical companies to provide access to affordable essential drugs in developing countries.[133] This goal confirms that cooperation between the private sector and the governments is necessary for the development of poor countries and that access to new technology is part of this process.

[131] Roffe, P., *supra* note 123.
[132] UNCTAD Policy Discussion Paper, *supra* footnote 40, p. 13.
[133] UN Millennium Goals, available from www.un.org/millenniumgoals, [accessed February 2005].

6. CONCLUSION

There is no conclusive evidence that stronger intellectual property rights are an obstacle or a condition for technology transfer. Many studies have been performed on this issue, but scholars have reached divergent conclusions. Reasons for this dissonance are that different research methods have been used and that the focus has been on different aspects of technology transfer. It is obvious that this matter is complex and involves many components which need to be considered.

Nevertheless, it can be asserted that the use of weak protection for intellectual property rights are more associated with development for countries with a weak technological base and limited economical resources than strong intellectual property rights protection. It is a common feature of developing countries to use weak intellectual property rights to acquire modern technology, since they lack economic assets to buy expensive technologies. At the beginning of a country's industrialization, when a country uses channels such as imitation and reverse engineering, stronger intellectual property rights thus reduce technology transfer. Stronger intellectual property rights become an important factor for technology transfer after the country has developed a technological capacity.

As shown in this thesis, there are both benefits and drawbacks to stronger intellectual property rights for developing countries. Undoubtedly, stronger intellectual property rights enhance companies control because they can more effectively punish infringement and refuse access to their technologies. Companies can also impose higher prices and conditions since they have fewer competitors where the practice of imitation is restricted. The results of these actions are that technology transfer channels will be restricted, especially channels which the developing countries use. On the other hand, strengthened intellectual property rights can have a positive effect on the will of companies to invest in developing countries.

Ultimately, companies decide where to invest. However, an effective intellectual property rights system is only one factor that influences companies' decisions. Other factors are also important, for instance the infrastructure and the domestic market of the recipient country. To increase the desire of companies to invest, developing countries can therefore consider these factors and commit to the development of an indigenous technological capacity. A developed technological capacity also increases the ability to absorb and adapt technology, factors which have proven to be of decisive significance for development.

Still, technology transfer from other countries is important for developing countries and therefore a functional international instrument that results in increased technology transfer to these countries is needed.

The TRIPS Agreement cannot be regarded as a sufficient tool for technology transfer to developing countries. The obscurities of the text of the Agreement could lead to technology transfer channels such as compulsory licensing being diminished. Additionally, developed countries have not effectively used the provisions in the agreement for promoting technology transfer. Because of the Agreement's wide

coverage, it is necessary to improve the technology transfer provisions and make them more effective, although this procedure will take time.

A CASE STUDY OF THE DUAL CITIZENSHIP ARRANGEMENT BETWEEN RUSSIA AND TURKMENISTAN

Begench Ashirov[*]

INTRODUCTION

On 10 April 2003, the President of Russia, Vladimir Putin, and the President of Turkmenistan, Saparmurat Niyazov, met in Moscow and reached an accord which soon led to a heated debate over the status of the ethnic Russian community in Turkmenistan and badly frayed Russian-Turkmen relations. That day, the Presidents signed a Protocol on Terminating the Agreement between Turkmenistan and the Russian Federation on Regulating the Issues of Dual Citizenship (hereinafter – the Dual Citizenship Agreement).

The Dual Citizenship Agreement that had been in effect since December 1993 provided for the right of citizens of one state party to take, without losing their citizenship, the citizenship of the other party and charged both states equally with the defence and protection of dual citizens' rights and freedoms. For a decade, it was seen and projected by Russia as a tool to protect those Russians who had found themselves in Turkmenistan after the disintegration of the Soviet Union.

The focus of the thesis will be on the Dual Citizenship Agreement's 'life-cycle', reasons for its conclusion and subsequent termination, its current status, as well as its impact on all those directly and indirectly affected by the twists and turns surrounding it. The study of the Dual Citizenship Agreement will touch upon some important theoretical questions in international law. As the title suggests, this paper is devoted to the issue of nationality in international law, generally, and dual nationality, specifically. Even more specifically, it is about the legal institute of dual citizenship established between two countries under a bilateral treaty.

Thorough research on the topic has demonstrated that institutionalized dual citizenship is a very rare case in international law. Throughout the history of humankind there have been numerous international agreements, both bilateral and multilateral, aimed at regulating the issues of dual citizenship in terms of diplomatic protection, military service, civil status, taxation, etc., avoiding dual citizenship, eliminating dual citizenship, and so forth. At the same time, there are only a few instances in modern international law when states purposefully created dual citizenship, allowing their citizens to acquire another citizenship, while retaining their original citizenship.

Being centred on the concept of institutionalized dual citizenship, especially its application to the case in question, the thesis is built around the following research

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questions: What is institutionalized dual citizenship within the broader framework of the umbrella term 'dual citizenship' in international law? What is special about it? Why do states conclude treaties on dual citizenship and, by doing so, recognize that aliens can acquire their citizenship *en mass*? How does the Russian-Turkmen case relate to earlier practice in this field and current international law framework? How might the case be legally settled?

The thesis' consists of two major parts which are then subdivided. The first one is devoted to the discussion of the Dual Citizenship Agreement itself. In the second part, the dispute between Russia and Turkmenistan over the Dual Citizenship Agreement and the institute of dual citizenship is examined with regard to the applicable rules of international law.

PART I. THE DUAL CITIZENSHIP ARRANGEMENT BETWEEN RUSSIA AND TURKMENISTAN

1. TOWARDS RUSSIAN-TURKMEN DUAL CITIZENSHIP

1.1. Citizenship[1] *in the Wake of State Succession after the Dissolution of the USSR*

Dividing peoples in cases of state succession raises some of the most difficult problems in international law. The political, legal, and technical complexities that sprang up in the aftermath of the splintering of the Soviet Union are not special in this regard. Quarrels between the former Soviet republics about how to sort out which share of the Soviet population belongs to whom still have not been resolved.[2] Indeed, in a situation where many members of particular ethnic groups found themselves 'abroad' overnight, that is to say, living in the territories populated by

[1] Two different terms ('citizenship' and 'nationality', derivative from 'citizen' and 'national', respectively) are employed in legal texts to describe more or less the same concept – the legal relationship between a person and a State. The differences between these terms still exist, but are extremely rare, so they are often used interchangeably. Illustrative in this regard would be a relevant quotation from the famous Oppenheim's treatise on international law, which fuses one term with the other into one definition: "*Nationality* of an individual is his quality of being a subject of a certain State and therefore its *citizen*", McNair, A.D. (ed.), *Oppenheim's International Law*, Vol. I 'Peace', 4th ed., London/ New York/ Toronto: Longmans, Green and Co., 1928, pp. 524−525 (emphasis added). For a more detailed discussion on the terminology ('nationality' and 'citizenship'), *see* Zilbershats, Y. *The Human Right to Citizenship*, Ardsley, N.Y: Transnational Publishers, Inc., 2002, pp. 4–5. For the sake of uniformity and consistency of terminology, the term 'citizenship' is chosen and used throughout this thesis, unless sources cited herein apply the other.

[2] Examples of the debates can be found in Bloed, A., 'Citizenship Issues and the OSCE High Commissioner on National Minorities', in O'Leary, S. and Tilikainen, T. (eds.), *Citizenship and Nationality Status in the New Europe*, London: Sweet & Maxwell, 1998, pp. 39–52; Thiele, C., European Center for Minority Issues (ECMI), 'The Criterion of Citizenship for Minorities: The Example of Estonia', *ECMI Working Paper #5*, August 1999, available from http://www.ecmi.de/download/working_paper_5.pdf, [accessed 6 February 2004]; Ziemele, I., 'The Citizenship Issue in the Republic of Latvia', in O'Leary and Tilikainen, pp. 187–204.

other ethnic groups and now governed by new national authorities, the issue of citizenship has become extremely painstaking.

It is worth noting that much of the pain incurred by the unravelling divorce could have been allayed, had the divorced constituents followed the formula, which had been enunciated well before the formal separation took place. The Law of the USSR on the Procedure of Deciding Questions Connected to the Exit of a Union Republic from the USSR of 3 April 1990 envisaged the following scenario of state succession regarding citizenship:

> "Article 15. Citizens of the USSR on the territory of exiting republic are afforded the right of choice of citizenship, place of residence and employment. The exiting republic compensates all expenses connected with the resettlement of citizens outside the confines of the republic.

Article 16. In accordance with the generally recognized principles and norms of international law and the international obligations of the USSR, the exiting republic guarantees the civil, political, social, economic, cultural and other rights and freedoms of citizens of the USSR who remain to reside on its territory without any discrimination whatever on grounds of race, color of skin, gender, language, religion, political or other convictions, [ethnic] or social origin, property status, place and time of birth".[3]

As it turned out, although these statutory pronouncements were largely ignored by most of the exiting republics of the USSR, they did serve to set the general tone for dealing with citizenship matters by Russia and Turkmenistan in their respective laws on citizenship. Both countries adhered to the principles of equality, non-discrimination on any ground, respect for the right of choice of citizenship and place of residence and, as a consequence, opted for a so-called 'zero option' approach towards old Soviet citizenship. The 'zero option' meant that "the newly independent states offered citizenship to any Soviet citizen who was resident on the territory of the state in question in December 1991 and who chose to take it".[4] One has indeed to admit that the 'zero option' concept looks attractive, inasmuch as it allows eschewing to a significant extent such common curses of states succession as, e.g., refugee flows and statelessness, by means of summary grants of citizenship and, at the same time, keeps the states from potentially encroaching on each other's population.

1.1.1. The Russian Law on Citizenship of 1991

Being in line with the preferred 'zero option' mode of succession in citizenship matters, Article 13 of the Law on Citizenship of the Russian Soviet Federated Socialist Republic (the RSFSR) of 28 November 1991 ascribed Russian citizenship to all citizens of the USSR permanently residing in the territory of the RSFSR on the

[3] Translated and quoted in Ginsburgs, G., *From Soviet to Russian International Law: Studies in Continuity and Change*, The Hague/ Boston/ London: Martinus Nijhoff Publishers, 1998, p. 147.

[4] Bloed, *supra* footnote 2, p. 42.

date of entry into force of the Law, [5] if within one year from that date they do not indicate their wish not to belong to the citizenship of Russia.[6] Permanent residents entitled to Russian citizenship were considered those who had themselves formally registered with a local office of the Ministry of Internal Affairs and had in their passports a permanent residence stamp – the infamous *propiska*. As such, citizenship was in fact determined by the *propiska*, with other aspects being of minor importance.

A specific quality of Russia in the process of state succession was her aspiration to be the heir to the USSR and claim the status of not just an ordinary successor state but rather a continuing one. Russia's claim for continuation was generally respected by the international community without strong reservation. Since Russia strove to fill the USSR's shoes, an obligation was presumably owed to all Soviet citizens (not only those residing on the Russian soil), concerning the future of their citizenship. The Law on Citizenship of the RSFSR confirmed the right of citizens of the USSR permanently residing on the territory of other republics directly forming an integral part of the USSR on 1 September 1991 to acquire Russian citizenship by registration if they were not citizens of those republics and if within three years of the date of entry of the Law into force expressed their desire to acquire Russian citizenship.[7] The choice of wording seemed to cover all interested individuals and present Russia as a 'last resort' for every former Soviet subject without getting involved in complicated arguments with other former Soviet republics about possible infringement of their newly gained sovereignty.

1.1.2. Conferment of Citizenship by Turkmenistan: Law on Citizenship of 1992

Turkmenistan's policies towards people living in the country at the time of the USSR's collapse were similar to those of Russia and just as hospitable. Under the Law on Citizenship of Turkmenistan of 30 September 1992, all those who were permanently residing in the country at the moment of the Law's enactment were indiscriminately granted Turkmen citizenship. Article 49 of the Law states,

> "All citizens of the former USSR permanently residing in the territory of Turkmenistan by the time this Law comes into force shall be recognized as citizens of Turkmenistan, unless they renounce citizenship of Turkmenistan in written form.

Citizens of the former USSR born in the territory of Turkmenistan and moved out with the purpose to permanently domicile in other states of the former USSR before this Law comes into force shall be recognized as citizens of Turkmenistan, if they confirm in written form their wish to retain citizenship of Turkmenistan within one

[5] It came into force on the day of its publication in mass media, *i.e.* on 6 February 1992 (*See for example*, *Rossiiskaia gazeta*, 6 February 1992).
[6] *See* Ginsburgs, *supra* footnote 3, p. 152.
[7] Translated and quoted in Ginsburgs, *supra* footnote 3, pp. 177–178.

year from the day this Law comes into force. These provisions also apply to lineal descendants of the said persons".[8]

Here, too, the only tool to screen bidders for Turkmen citizenship was the *propiska*, but not, e.g., ethnic origin or any other distinction. Like Russia, Turkmenistan did not take any steps to revise the residency registry system in the form of the *propiska* inherited from the Soviet regime, so the countries' operational procedures on these matters continued to follow the precedent set in the USSR. For all its negative features, the *propiska* provided some degree of uniformity in the way citizenship issues were settled in both countries in the early 1990s.

1.2. Legal Grounds for Dual Citizenship between Russia and Turkmenistan

In the early post-USSR phase, Russia and Turkmenistan differed in their policies towards dual citizenship. Russia exercised a rather cautious approach in this respect and strictly limited the application of dual citizenship. In Article 3(1) the Law on Citizenship of the RSFSR directed that "acquisition of the citizenship of the RSFSR by a foreign citizen can occur contingent on his renunciation of his former citizenship, except where otherwise provided by an international treaty of the Russian Federation".[9] Furthermore, there was a requirement set by Article 37(3) of the Law to the effect that a person willing to acquire Russian citizenship and belonging to the citizenship of another state must append to his application for Russian citizenship a document confirming the termination of his former citizenship. In this Article, too, the exception clause provided for only one case, when a person was allowed to possess simultaneously the citizenship of another state with which Russia had contracted a corresponding treaty.[10] Therefore, it could be argued that Russia ruled out the institute of dual citizenship, except in one designated case – the existence of a treaty on dual citizenship.

In comparison with Russia, Turkmenistan appeared to be much more liberal with regard to the issue of dual citizenship. The country's Law on Citizenship explicitly provided for the possibility of holding dual citizenship, since "Turkmenistan recognizes dual citizenship, i.e. the belongingness of an individual to citizenship of other states, together with that of Turkmenistan"[11] (Article 9). It is interesting to note that Turkmenistan's position of unconditionally allowing such duality stood apart from all the other former Soviet republics (not only Russia), which were not enthusiastic about this type of citizenship.[12]

While Turkmenistan's liberalism persisted for more than a decade, Russia changed her attitude towards dual citizenship quite soon. Russia's original opposition to dual citizenship was probably calculated to prevent an exodus of

[8] Translated by the author; the Russian text is available on available from http://www.untuk.org/ publications/legislation/, [accessed 5 January 2005].
[9] Translated and quoted in Ginsburgs, *supra* footnote 3, p. 177.
[10] *Ibid*., p. 160.
[11] Translated by the author.
[12] Lyubarsky, K., 'Citizens and Compatriots', 1993, 8 *New Times*, pp. 24–26.

Russian-speaking communities in other parts of the former USSR from fleeing to Russia proper. The prime objective was to stabilize the potentially volatile situation with Russians in the 'near abroad' and exercise as much control over the flow of migratory traffic into Russia in order to avoid a spontaneous wholesale stampede of local Russians that would certainly gravely deplete Russia's own strained resources. However, already in 1992, the position of Russians in those areas gave signs of seriously deteriorating. As one commentator testifies,

> "The restrictive citizenship laws promulgated in the various successor republics, a pervasive climate of discrimination in daily life, the government campaigns to 'nativize' civic and cultural mores, especially the official state language and school curriculum, all conspired to spread fear among local residents of 'foreign' extraction that for them the future held only the prospect of marginalized existence in this environment swamped by a wave of radical nationalism."[13]

Not surprising, the Russian leadership was propelled by various political factions to help those left beyond the Russian Federation and defend them by mobilizing available diplomatic and legal resources. Among perspective methods to tackle the problem was dual citizenship as a means of defending the rights of Russian compatriots residing abroad. Dual citizenship was thought to enhance the sense of security and certainty among the affected persons in order to prompt them to remain where they were living and postpone their plans to move. The merits and faults of dual citizenship were comprehensively analyzed in political and legal discourse in Russia, and the concept was generally endorsed.[14]

The Russian legislature responded to public opinion by approving a package of amendments to the Law on Citizenship on 17 June 1993.[15] The most relevant amendment in the context of this discussion is the change made to Article 3(1). The original version cited above had made acquisition of Russian citizenship by a foreigner contingent upon renunciation of his former citizenship. According to the new formulation,

> "A person possessing the citizenship of the Russian Federation is not recognized as belonging to the citizenship of another state, unless otherwise provided by an international treaty of the Russian Federation."[16]

Under this provision foreigners wishing to become Russian citizens were no longer required to renounce their original citizenship and submit a document confirming such an act.[17] Now, the Russian authorities gave no effect to any foreign citizenship the converts might also have. Therefore, although the new version of Article 3(1) did not recognized on its face dual citizenship within the Russian Federation's territorial jurisdiction, it had nevertheless paved the way for multiple affiliations by Russian citizens with other states, which could be easily enjoyed outside Russia. The

[13] Ginsburgs, *supra* footnote 3, p. 173.
[14] For an informative account of the discussion, *see ibid.*, pp. 171–236.
[15] *Rossiiskaia gazeta*, 14 July 1993.
[16] *Ibid.* (translated and quoted in Ginsburgs, *supra* footnote 3, p. 177).
[17] Article 37(3) of the Law on Citizenship of the RSFSR was repealed.

second part of Article 3(1), to the effect that dual citizenship is allowed where provided by a corresponding international treaty of the Russian Federation, remained intact. Moreover, the Constitution of the Russian Federation, adopted in a nationwide referendum on 12 December 1993, mandated in Article 62(1) that the "citizen of the Russian Federation may have the citizenship of a foreign state (dual citizenship) in conformity with the federal law or international treaty of the Russian Federation".[18]

In that vein, Moscow's new agenda in its policy regarding Russian compatriots was to forge a series of agreements with the former Soviet republics in order to solicit dual citizenship in a bilateral setting. However, since dual citizenship inevitably implies dual loyalty, Russia's subtle hints and open discussions on dual citizenship were perceived by her partners as a threat to their just-gained independence and national security. Talking about how to institute dual citizenship with the members of the former Soviet Union, A.K. Mikitaev, the then Chairman of the Commission on Questions of Citizenship of the Supreme Soviet of the Russian Federation said,

> "for [dual citizenship] to operate, special inter-state agreements are necessary. And so far, we have not succeeded in concluding them. The republics that had just won independence perceive dual citizenship as a threat to their sovereignty . . . "[19]

Despite the fact that getting the intended states to sign agreements on dual citizenship had proved a difficult mission, Russia tenaciously continued pursuing her policy. And the first agreement that marked success in this venue was an accord on dual citizenship with Turkmenistan.[20] The Russian authorities intended to extend this experience further. According to Jakhan Pollyieva, the then Division Head in the Office of the Russian Federation President's Advisor on Political Issues, "at a recent meeting of the Commission on Citizenship Issues in the Office of the President of the Russian Federation this treaty was reckoned one of the most promising ways of solving the problems of ethnic Russians living in CIS countries".[21] Whether the accord indeed justified the hopes rested on it will be examined in detail in the following chapters.

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[18] The text of the Constitution of the Russian Federation is available on available from http://www.mshr.ru/docs/erconst.htm, [accessed 14 January 2005].

[19] L. Grafova, 'Dostup k mogilam po zagranpasportu?' (An Access to Burial Places upon Presenting Foreign Passports, isn't it?), *Literaturnaia gazeta*, 29 July 1992, p. 12 (translated and quoted in Ginsburgs, *supra* footnote 3, p. 175).

[20] Russia managed to conclude only another comparable accord – the Agreement on Dual Citizenship with Tajikistan of 7 September 1995.

[21] 'Jakhan Pollyieva: chastnyi vzgliad na obschie problemy' (Jakhan Pollyieva: Personal View on General Problems), *Turkmenskaia iskra*, no.117 (20638), 25 May 1994, p. 3 (translated by the author).

2. TEXTUAL ANALYSIS OF THE 1993 DUAL CITIZENSHIP AGREEMENT

Turkmenistan's generosity in granting citizenship in the early 1990s was reaffirmed by the conclusion of the Agreement between Turkmenistan and the Russian Federation on Regulating the Issues of Dual Citizenship (the Dual Citizenship Agreement), which was signed by the then President of the Russian Federation Boris Yeltsin and the President of Turkmenistan Saparmurat Niyazov in Ashgabat on 23 December 1993.[22] The Parliament (*Mejlis*) of Turkmenistan ratified the Dual Citizenship Agreement just three days after signature. Russia did so almost one year later, on 25 November 1994. The Dual Citizenship Agreement ultimately came into force on 18 May 1995, when the parties exchanged the instruments of ratification with each other.

In the preamble to the Dual Citizenship Agreement the parties declared that they were aspiring to settle dual citizenship matters in a just and humane manner for the purposes of further promoting their relations. At the follow-up press conference Boris Yeltsin called the Dual Citizenship Agreement "unprecedented" and "the act of our peoples' strong confidence in and profound respect to each other".[23] Turkmenistan's President agreed with his Russian colleague and emphasized that "henceforth the relations between two states will be attaining a special level, at the basis of which are mutual respect and legal regulation".[24]

The Dual Citizenship Agreement's key proviso is formulated in Article 1(1) in the following way: "Each of the Parties recognizes the right of its citizens to take, without loosing its citizenship, the citizenship of the other Party".[25] It is added in Article 1(2) that "[a]cquisition by the citizen of one Party of the citizenship of the other Party shall be done on the basis of free will of the citizen in accordance with the terms and procedures established by the legislation of the Party, whose citizenship is being acquired".[26]

Article 2 entitles the citizens of one Party who have acquired the citizenship of the other Party without loosing their original citizenship before the Dual Citizenship Agreement comes into force to retain the citizenships of both Parties. In Article 3 one can find a number of rules dealing with the citizenship of dual citizens' children,

[22] Agreement between Turkmenistan and the Russian Federation on Regulating the Issues of Dual Citizenship, *Diplomaticheskii vestnik*, no.1-2, 1994, pp. 24–25; the Russian text is also available on available from https://alumni.state.gov/bin/alumni/Dual%20Citizenship%20Agreement.doc, [accessed 6 January 2005] (translated by the author).

[23] 'Boris Eltsin: Dinamika razvitia turkmeno-rossiiskih otnoshenii mozhet sluzhit' primerom dlia mnogih gosudarstv SNG' (Boris Eltsin: The Trend and Pace of the Turkmen-Russian Relations Development Can Serve as an Example for Most CIS States), *Turkmenskaia iskra*, no.294(20515), 24 December 1993, p. 2 (translated by the author).

[24] 'Turkmenistan-Rossia: Osobyi uroven' otnoshenii' (Turkmenistan and Russia: A Special Level of Relations), *Turkmenskaia iskra*, no.294(20515), 24 December 1993, p. 1 (translated by the author).

[25] Translated by the author.

[26] Translated by the author.

the most important of them specifies that if at least one of the parents holds both Russian and Turkmen citizenship, the children acquire both citizenships at birth and have the right to opt for either citizenship or retain both of them at age 18.

Article 4 states that the termination of each Party's citizenship by dual citizens shall be done in accordance with the legislation of the Party whose citizenship is being terminated. At the same time, a safety clause states that "no professional or other activities of a person holding citizenships of both Parties can be a reason for terminating the citizenship of any Party".[27] The latter provision was a clear sign of the Parties' confidence in each other. In her interview to *Turkmen Press* News Agency, Nabat Kerbabaieva, the then Head of Citizenship and Pardon Division, the Office of the President of Turkmenistan described this in the following way,

> "For the sake of state interests, our legislation, as it is well known, envisages the loss of Turkmen citizenship when the citizen of Turkmenistan has enrolled in military service, security service, police, or justice bodies of another country. In accordance with the fourth article of the [Dual Citizenship] Agreement, this requirement shall be no longer valid with respect to Russia."[28]

Yet, the Dual Citizenship Agreement vests dual citizens with full rights and freedoms but, at the same time, imposes upon them the duties of citizenship of the Party, in which territory they permanently reside. In the same vein, social programs shall be provided to dual citizens in accordance with the legislation of the Party, in which territory they permanently reside, unless otherwise provided for in separate bilateral treaties. And finally, dual citizens shall do compulsory military service in the territory of the Party where they permanently reside at the moment of drafting. Those dual citizens who have already served in the armed forces of one of the Parties are to be relieved from drafting in the other one.[29]

Article 6, according to which both states are charged with the protection of dual citizens, is perhaps crucial for Russian efforts to present dual citizenship as a tool to protect ethnic Russians living outside Russia. It reads,

> "Persons holding citizenship of both Parties shall be entitled to enjoy the protection and patronage by each of the Parties. Protection and patronage of these persons in a third state shall be extended by the Party in which territory they permanently reside or, at their request, by the other Party which citizenship they also hold."[30]

Article 7 is a sort of 'no arbitration' clause, which says that "points of dispute between the Parties over interpretation and application of this Agreement shall be settled through diplomatic channels",[31] thus in fact excluding any recourse to judicial or quasi-judicial means of dispute settlement.

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[27] Translated by the author.
[28] 'Soglashenie o dvoinom grazhdanstve: nashi prava i obiazannosti' (The Agreement on Dual Citizenship: Our Rights and Duties), *Turkmenskaia iskra*, no.20(20541), 25 January 1994, p. 3 (translated by the author).
[29] Article 5 of the Dual Citizenship Agreement.
[30] Translated by the author.
[31] Translated by the author.

Article 8 concludes the Dual Citizenship Agreement and states that "this Agreement shall be subject to ratification, come into force on the day of the exchange of ratification instruments and be effective for five years. It shall be automatically prolonged for next five-year periods, unless one of the Parties expresses its desire to cancel it no later than six months prior to the expiration of its term".[32]

3. MOVES TO DISMANTLE THE DUAL CITIZENSHIP REGIME

3.1. Freedom of Movement from and to Turkmenistan Curtailed

The Dual Citizenship Agreement operated more or less smoothly without giving rise to serious criticism until 1999, when a threat to it started looming. On 9 June 1999, Turkmenistan withdrew from the Bishkek agreement on visa-free movement of CIS members' citizens within the members' territories of 19 October 1992, and afterwards concluded a series of agreements regulating the movement of persons with CIS members, including Russia, on a bilateral basis. Under a new entry-exit procedure, all foreigners wishing to visit Turkmenistan must have entry visas and all Turkmen citizens were required to get exit visas before leaving Turkmenistan for any foreign country with only a few exceptions, such as that regarding dual Russian-Turkmen citizens stipulated in a new consular convention with Russia.[33]

The official reason given by Turkmen authorities for such action was that "it is necessary to spur on the fight with international crime, first and foremost, with drug-trafficking and illegal migration that is impossible to do when borders are 'open'".[34] Whether this reason was the real reason is subject to speculation, but one of the by-products of this move was that a certain number of Turkmen subjects (an estimated 100,000 dual-citizenship holders) continued having the right to freely travel without being checked and screened by the authorities. The imposition of the visa requirement on a certain segment of the population and the lifting of the requirement for the rest inevitably caused tension within the society. Of course, it could be eased at the expense of depriving right-holders of their rights, because to act otherwise would contradict the regime's *modus operandi*.

[32] Translated by the author.
[33] *See* M. Vladimirov, 'Probita bresh' v bezvizovom prostranstve' (A Breach Has Been Made in Visa-Free Area), *Inostranets*, no.23, 16 June 1999, available from http://www.inostranets.ru/cgi-bin/materials.cgi?id=5836&chapter=7, [accessed 25 December 2004].
[34] *Ibid.* (translated by the author).

3.2. Assassination Attempt against the Turkmen President and the First Attack on Dual Citizenship

The turning point for the Dual Citizenship Agreement was 25 November 2002, when an assassination attempt against Niyazov was allegedly made.[35] He blamed the Turkmen opposition leaders living in exile (most of them in Russia) for the assassination attempt. An unfortunate fact for the Dual Citizenship Agreement was that many of them happened to be dual citizens, as were some of those who had been arrested under suspicion of being involved in the conspiracy to assassinate Niyazov. Turkmenistan made a request to extradite opposition leaders hiding in Russia, which was not honoured because of their Russian citizenship.[36] This aroused the Turkmen President's suspicion of all dual citizens.

In his speech delivered on national television on 13 January 2003, Niyazov publicly stated that the Dual Citizenship Agreement could be "temporarily suspended".[37] In his opinion, it enabled criminals to escape punishment, because "they go there [to Russia], obtain local passports, and become citizens of that country and, as a result, they are beyond the scope of our laws".[38] He also said that "if we want the [Dual Citizenship] Agreement to remain in force in the future, our laws shall cover those who have committed crimes here [in Turkmenistan] and received Russian citizenship".[39] He also noted that his proposal concerning the Dual Citizenship Agreement had been presented to Russian partners, and Russia had agreed to it.

The Russian Ministry of Foreign Affairs responded immediately and, the next day, requested the Turkmen authorities to explain the reasons for their demarche and asked them whether Turkmenistan would unilaterally abrogate the Dual Citizenship

[35] 'Sovershenо pokushenie na Turkmenbashi' (An Attempt to Assassinate Turkmenbashi Was Made), *Vesti*, 25 November 2002, available from http://www.vesti.ru/news.html?id=20479>, [accessed 26 December 2004.

[36] *See* J. Orkhan, 'Kto strelial v Turkmenbashi?' (Who Shot at Turkmenbashi?), *Novaia gazeta*, no.4, 20 January 2004, available from http://2003.novayagazeta.ru/nomer/2003/04n/n04n-s30.shtml, [accessed 26 December 2004].

[37] 'Turkmenam zapretiat imet' vtorioe rossiiskoie grazhdanstvo' (Turkmens Will Be Prohibited to Have the Second Russian Citizenship), *NTV.Ru*, 13 January 2003, <http://www.ntv.ru/news/index.jsp?nid=11206, [accessed 30 October 2004].

[38] 'Rossiisko-turkmenskoie soglashenie o dvoinom grazhdanstve mozhet byt' priostanovleno' (The Russo-Turkmen Agreement on Dual Citizenship May Be Suspended), available from http://emigration.russie.ru/news/1/789_1.html, [accessed 24 December 2004] (translated by the author).

[39] *Ibid.* (translated by the author).

Agreement.[40] On 15 January 2003, Ashgabat repudiated its intention to suspend the Dual Citizenship Agreement,[41] and it continued to be implemented.

4. CANCELLATION OF THE DUAL CITIZENSHIP AGREEMENT

4.1. Other Agreements and the Deal

Three months later, on 10 April 2003, Niyazov arrived in Moscow for talks with the President of Russia, Vladimir Putin. The summit's agenda, which had been made public prior to their meeting, was silent on any matters concerning the Dual Citizenship Agreement but, instead, focused on the ratification of the Treaty on Friendship and Cooperation between two states of 2002, and agreements concerning security cooperation, cooperation in natural gas deliveries and the development of oil fields in the Turkmen section of the Caspian Sea.[42]

Central to this package was the agreement between two monopolies – *Gazprom* and *Turkmenneftegaz* – on cooperation in the gas sector for 25 years. This agreement was extremely important for the Russian corporation, as gas supplies from Turkmenistan could supplement *Gazprom*'s shortages and relieve it, at least temporarily, of costly investments in new natural gas field exploration and development in Siberia.[43] The Russian leadership fervently favoured this deal, as they perceived that it could also help restore Russia's sway in Turkmenistan, in particular, and in Central Asia, in general.

Under the gas agreement Turkmenistan undertook an obligation to supply 2 trillion cubic meters of natural gas to Russia during a quarter of a century. Niyazov called the signed agreement "historic for bilateral relations".[44] He especially noted that "this is approximately 200 billion US Dollars, which will be income for

[40] *See* 'MID Rossii trebuiet ob'iasnenii turkmenskogo demarsha' (The Ministry of Foreign Affairs of Russia Demands an Explanation of the Turkmen Demarche), *Lenta.Ru*, 14 January 2003, available from http://lenta.ru/russia/2003/01/14/explanaitons/, [accessed 24 December 2004].

[41] *See* 'Turkmenia oprovergla soobschenie o vozmozhnom otkaze ot dvoinogo grazhdanstva' (Turkmenistan Refuted the Information about its Would-Be Repudiation of Dual Citizenship), *Lenta.Ru*, 15 January 2003, available from http://www.lenta.ru/world/2003/01/15/turkmen/>, [accessed 24 December 2004.

[42] *See* Kalabuhova, P. and Shishlo, A., 'President Turkmenii iedet v Moskvu' (The President of Turkmenistan Going to Moscow), *RIA Novosti*, 8 April 2003, available from http://www.gundogar.org/ruspages_12/1557.htm, [accessed 24 December 2004].

[43] *See* G. Panfilov, 'Druzhit' li s Turkmenbashi?' (Shall We be Friends with Turkmenbashi?), *MiK*, 14 April 2003, available from http://www.iamik.ru/shownews.php?id=7783>, [accessed 24 December 2004.

[44] 'Putin i Niyazov podpisali 'gazovoie' soglashenie' (Putin and Niyazov Signed the 'Gas' Agreement), *Finansovyie izvestia*, 10 April 2003, available from http://www.finiz.ru/cfin/tmpl-print/id_art-10474, [accessed 24 December 2004] (translated by the author).

Turkmenistan, and 300 billion US Dollars, which will be income for Russia"[45] for the specified period.

4.2. The Protocol on Terminating the Agreement between Turkmenistan and the Russian Federation on Regulating the Issues of Dual Citizenship of 10 April 2003

Against such a spectacular background the conclusion of a protocol on terminating the Dual Citizenship Agreement passed almost unnoticed by mass media. Indeed, it was considered primarily of a technical character, that of legalizing the legitimate intention of both parties to stop their obligations under the Dual Citizenship Agreement. In his follow-up press-release President Putin articulated the rationale behind the Russian decision, stating that "[w]e came to the conclusion that the Dual Citizenship Agreement had succeeded in its object and agreed upon its termination. Most people who wished to move to the Russian Federation solved, in general, the problem for themselves."[46] The text of the Protocol on Terminating the Agreement between Turkmenistan and the Russian Federation on Regulating the Issues of Dual Citizenship of 10 April 2003 (hereafter – the Terminating Protocol) follows,

> "Turkmenistan and the Russian Federation have agreed on the following:
>
> 1. From the day this Protocol takes effect, the Agreement between Turkmenistan and the Russian Federation on Regulating the Issues of Dual Citizenship, dated 23 December 1993, will be annulled.
>
> 2. The present Protocol will come into force from the date of the last written notification that the Parties have completed all the necessary internal procedures."[47]

The mechanism of the termination of the *Dual Citizenship Agreement* written in the Terminating Protocol is pretty straightforward: the Dual Citizenship Agreement expires when the Terminating Protocol comes into effect, while the Terminating Protocol itself comes into effect upon its ratification, basically, by both Parties. A

[45] *Ibid.* (translated by the author).

[46] Press-Service of the President of the Russian Federation, Information and Press Department, the Ministry of Foreign Affairs of the Russian Federation, 'Zaiavlenie dlia pressy Prezidenta Rossii V.V.Putina po itogam rossiisko-turkmenskih peregovorov, Moskva, Kreml, 10 aprelia 2003 goda' (Press-Release by the President of Russia V.V.Putin after Finishing the Russian-Turkmen Negotiations in Moscow, the Kremlin on 10 April 2003), *Information Bulletin*, 11 April 2003, available from http://www.ln.mid.ru/bl.nsf/edd527a61971c54b43256987002e123f/761c3597b66dc93043256d050029efc9?OpenDocument, [accessed 24 December 2004] (translated by the author).

[47] Protocol on Terminating the Agreement between Turkmenistan and the Russian Federation on Regulating the Issues of Dual Citizenship translated and quoted in Turkmenistan Project, Central Eurasia Project, Open Society Institute, *Weekly Update on Turkmenistan*, 14–20 April 2003, available from http://www.eurasianet.org/turkmenistan.project/index.php?page=wnb/wnb030414& lang=eng, [accessed 24 December 2004].

simple, routine procedure in international law! But if there is no interest in doing things, even simple things may be made extremely complicated. This was demonstrated by the subsequent chain of events concerning Russian-Turkmen dual citizenship.

4.3. The Decree of the President of Turkmenistan on Settling the Issues Relating to the Revocation of Dual Citizenship between Turkmenistan and the Russian Federation of 22 April 2003

Very fast, less than a week after signing the Terminating Protocol, the *Mejlis* of Turkmenistan ratified it, and an instrument of ratification was sent in due course to the Russian counterparts. The next logical step for Turkmenistan would be to wait for the Russian Parliament (*State Duma*) to do the same and, then, proceed to a set of organizational and legislative measures aimed at settling all possible problems that might be caused by withdrawal from the Dual Citizenship Agreement. Instead, on 22 April, the President of Turkmenistan issued a decree, which would provoke a large-scale and long-lasting crisis between Russia and Turkmenistan.

According to the Decree of the President of Turkmenistan on Settling the Issues Relating to the Revocation of Dual Citizenship between Turkmenistan and the Russian Federation of 22 April 2003 (hereafter – the Revocation Decree),[48] persons with dual citizenship ought to opt for citizenship of either Turkmenistan or Russia within the next two months.[49] Dual citizenship holders permanently residing in Turkmenistan who had failed to submit to Turkmenistan's interior bodies notifications within the given period of time would be become Turkmen citizens.[50] Dual citizenship holders permanently residing in the Russian Federation or in other countries who failed to inform Turkmenistan's consulates in foreign countries within the given period of time about their choice of Turkmen citizenship would lose their Turkmen citizenship status.

Interestingly, the latter provision was not meant to "apply to those with criminal records and those on the wanted list",[51] an unambiguous reference to those charged with the attempted assassination of the Turkmen President but escaped from the country.

The Revocation Decree also shed some light on an actual reason for revoking the Dual Citizenship Agreement, as it compelled dual citizenship holders permanently residing in Turkmenistan to "observe common regulations set for

[48] Decree of the President of Turkmenistan on Settling the Issues Relating to the Revocation of Dual Citizenship between Turkmenistan and the Russian Federation translated and quoted in Turkmenistan Project, Central Eurasia Project, Open Society Institute, *Weekly Update on Turkmenistan*, 21–27 April 2003, available from http://www.eurasianet.org/turkmenistan.project/index.php?page=wnb/wnb030421&lang=eng, [accessed 25 December 2004].
[49] *Ibid*., Article 1.
[50] *Ibid*., Article 2.
[51] *Ibid.*

Turkmen citizens entering and leaving the country"[52] during the two-month transition period. While dual citizenship holders permanently residing in other countries, including Russia, were forced to "observe regulations set for foreigners entering and leaving the country".[53] Thus, those who had enjoyed the right to travel from Turkmenistan and back visa free became 'equalized' in duties with the rest.

5. A CRISIS

The Revocation Decree prompted widespread confusion and seized the dual citizenship community in Turkmenistan with panic. Hundreds of agitated people besieged the Embassy of the Russian Federation in Ashgabat in an effort to clarify their future,[54] but the diplomats confined themselves to issuing general statements in an attempt to reassure the crowd. It was also reported that the sale of airline tickets to individuals with dual citizenship wishing to fly to Russia on Russian passports was terminated and those who attempted to travel to Russia under Turkmen passports could not do this freely, since Turkmen passport holders could leave the country only after obtaining an exit visa, the issuance of which was severely curtailed. *Turkmenistan Airlines* cancelled two of its daily flights from Ashgabat to Moscow, because too many tickets remained unsold.[55]

A few days after the Revocation Decree was issued, the Russian Foreign Ministry expressed "serious concern" to their Turkmen colleagues regarding "Ashgabat's actions in connection with the termination of the agreement on dual citizenship".[56] Russia's position was that Russia had not ratified the Terminating Protocol yet, and the Dual Citizenship Agreement remained in force. "Had the [Terminating] Protocol come into effect, it would have no retroactive force, and citizens who had obtained dual citizenship should retain it in the future".[57] The Ministry also expressed its "deep concern" regarding a provision in the Revocation Decree, according to which dual citizens had to choose citizenship within two

[52] *Ibid*., Article 3.
[53] *Ibid.*
[54] M. Martova, 'Obviniaietsia v rossiiskom grazhdanstve: V Ashgabate zhgut portrety Putina' (Charged with [Having] Russian Citizenship: Putin's Portraits Are Being Burnt in Ashgabat), *Moskovskii komsomolets*, 30 April 2003, available from http://www.mk.ru/numbers/310/article10307.htm, [accessed 30 December 2004].
[55] 'Dva iz semi ezhednevnyh reisov Ashgabat-Moskva-Ashgabat Turkmenskih avialinii otmeneny' (Two out of Seven Daily Flights Ashgabat-Moscow-Ashgabat by Turkmen Airlines Cancelled), *RIA Novosti*, 16 May 2003, available from http://www.avia.ru/cgi/news/news.cgi?action=gethot&id=1053069741, [accessed 29 December 2004].
[56] 'Moskva ne odobriaiet deistvia Ashgabata po povodu likvidatsii dvoinogo grazhdanstva' (Moscow Deprecates Ashgabat's Actions Regarding the Revocation of Dual Citizenship), *ITAR-TASS*, available from http://www.demoscope.ru/weekly/2003/0111/rossia01.php, [accessed 30 December 2004] (translated by the author).
[57] *Ibid.* (translated by the author).

months, because it would be detrimental to their interests and basic rights. It further urged that this would have far-reaching consequences for Turkmenistan.[58]

But in order to address the principal concern of dual citizens, namely their continued ability to enter Russia, the Russian Ministry of Foreign Affairs and Embassy in Ashgabat started issuing entry visas to holders of Russian passports as if they were foreigners, not Russian citizens. Such an unprecedented move by Russia was in strict compliance with Article 3 of the Revocation Decree, which required permanent residents of Turkmenistan holding dual citizenship to get Turkmen exit visas before going abroad. Otherwise, they would not be allowed to leave Turkmenistan.

In the mean time, rancorous rhetoric between Russia and Turkmenistan was escalating. Russian politicians and mass media condemned the Turkmen authorities for planning "the mass deportation" of Turkmenistan's Russian population,[59] for violating virtually all human rights, for being involved in drug trafficking and for supporting Afghanistan's former rulers, the radical Islamic Taliban movement. They could not avoid, of course, touching upon the latest 'fashion' in international relations, that is to say, making allegations of supporting "international terrorism" by Niyazov's regime. It would be logical then to propose that such a "regime should be isolated by the international community", and "preventive measures" should be taken against it.[60] One Russian official had even hinted that Moscow would be justified in seeking "regime change" in Turkmenistan.[61] Another one called for the imposition of "certain sanctions" against Turkmenistan if the Turkmen leadership failed to make any changes to the policy they were pursuing.[62]

The Turkmen authorities readily responded, accusing Russian leaders of engineering a mass media campaign designed to discredit Turkmenistan.[63] In response, they attempted to blackmail Russia by threatening to set up a special national commission on finding out the "legitimacy of getting Russian citizenship by

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[58] *Ibid*.

[59] 'Turkmenia gotovitsia k deportatsii russkih?' (Is Turkmenistan Preparing to Deportation of Russians?), *Komsomol'skaia pravda*, 23 May 2003, available from http://spb.kp.ru/news/print/26715/, [accessed 30 December 2004].

[60] 'Turkmenbashi groziat 'preventivnymi merami'' (Turkmenbashi is Threatened with 'Preventive Measures'), *Finmarket biznes*, 26 May 2003, available from http://www.fmbiz.ru/txt.asp?id=1067, [accessed 30 December 2004] (translated by the author).

[61] *Ibid*.

[62] Commission on Human Rights at the President of the Russian Federation, *Rossia budet zhestko otstaivat' prava svoih grazhdan v Turkmenistane* (Russia Will Firmly Defend the Rights of Her Citizens in Turkmenistan), 20 June 2003, available from http://www.h-rights.ru/obj/doc.php?ID=193049, [accessed 1 January 2005].

[63] 'Saparmurat Niyazov obvinil rossiiskie SMI v 'diskreditatsii politiki Turkmenistana'' (Saparmurat Niyazov Accused Russian Mass Media of 'Discrediting Turkmenistan's Policies'), *RIA Novosti*, 17 June 2003, available from http://www.cjes.ru/lenta/view_news.php?id= 10256&year=2003&lang=rus, [accessed 30 December 2004] (translated by the author).

Turkmen people"[64] (fortunately, it remained no more than an empty threat). Deliberating on the Commission's future mandate, the Turkmen President said,

> "The commission is to examine each case of receiving Russian citizenship and to determine the legitimacy of issuing passports . . . If Russian citizenship was obtained by an honest way, the commission should fix exact dates for moving to Russia, rendering assistance and giving time for collecting things, without infringing upon the rights of a given citizen . . . In other cases, not a single person who wants to retain dual citizenship, should be permitted to enter and stay in Turkmenistan."[65]

While the deadline of 22 June to opt for either Russian or Turkmen citizenship under the Revocation Decree was approaching, political pressure on Turkmenistan was reaching its culmination. On 19 June, the *State Duma*'s Foreign Relations Committee included Turkmenistan on the list of countries to which Russians were advised not to travel.[66] The next day, the *State Duma* almost unanimously adopted the Statement "On the Observance of the Rights of the Citizens of the Russian Federation in Turkmenistan",[67] which generally reiterated Russia's refusal to recognize Turkmenistan's move to unilaterally rescind the Dual Citizenship Agreement. It addressed the situation in Turkmenistan concerning the rights of dual citizens in the context of the overall human rights situation in the country and on the basis of general norms and principles of international law and UN, OSCE, and CIS documents, which had been signed by both Russia and Turkmenistan. The *State Duma* found "the requirement by the Turkmen authorities for Russian citizens to get permission before leaving Turkmenistan particularly humiliating for the honour and dignity of the Russian Federation's citizens".[68] An appeal was made in the Declaration to the Russian executive to exert influence on the Turkmen leadership to resolve the problems faced by Russian citizens.

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[64] 'Turkmenbashi sdelal vid, chto zanialsia dvoinym grazhdanstvom' (Turkmenbashi has Pretended That He is Dealing with Dual Citizenship), *Polit.Ru*, 17 June 2003, available from http://www.polit.ru//news/2003/06/17/619568.html, [accessed 2 January 2005] (translated by the author).

[65] Quoted in Kurbanova, A., 'V Turkmenii sozdana spetskomissia po voprosam dvoinogo grazhdanstva' (A Special Commission on the matters of Dual Citizenship has been created in Turkmenistan), *ITAR-TASS*, 17 June 2003, available from http://www.watan.ru/news/17.06.0310/, [accessed 2 January 2005] (translated by the author).

[66] 'Rossianam rekomendovano vozderzht'sia ot poiezdok v Turkmenistan' (Russians are Recommended to forbear from Traveling to Turkmenistan), *Logistic.Ru*, 19 June 2003, available from http://www.logistic.ru/news/print/2003/6/19/16/14709.html, [accessed 1 January 2005].

[67] 'Zaiavlenie Gosudarstvennoi Dumy 'O sobliudenii prav grazhdan Rossiiskoi Federatsii v Turkmenistane'' (The Statement of the State Duma 'On the Observance of the Rights of the Citizens of the Russian Federation') adopted by the Resolution of the *State Duma* no.4240-III of 20 June 2003, *Parlamentskaia Gazeta*, no.1247, 1 July 2003, available from http://www.pnp.ru/archive/12470643.html, [accessed 1 January 2005].

[68] *Ibid.* (translated by the author).

At a news conference on 20 June, the Russian President Vladimir Putin promised that Russia would always defend Russians residing outside the country, including those in Turkmenistan. He said: "We will consistently defend our citizens, wherever they live, in Europe, Africa or in Central Asia".[69] At the same time, Putin acknowledged that the Dual Citizenship Agreement had indeed come to an end, but explained that this did not affect those already holding dual citizenship. In his opinion, it was agreed that the decision to revoke such citizenship would have a bearing on those citizens who might wish to acquire a second citizenship in the future: from now on, there would be no such opportunity. He also said that Niyazov had given him assurances that Turkmenistan would not undertake any actions aimed at worsening the situation of the citizens of Russia until the completion of the work of a high-level bilateral commission on settling any issues arising from the termination of the Dual Citizenship Agreement.[70]

Indeed, the deadline to choose citizenship, 22 June, passed virtually unnoticed. Nothing changed after it expired: dual citizens were not forced to renounce either citizenship and formally kept the same status as before, while the Turkmen authorities did not allow them to leave the country without having both a Turkmen exit visa and a Russian entry visa. The only thing Russia had done to help dual citizens surmount obstacles to exit Turkmenistan was that the Russian Embassy in Ashgabat began issuing multiple entry visas to them free of charge.[71]

6. DUAL CITIZENSHIP STALEMATE

6.1. The Russian-Turkmen Commission on Citizenship Matters

On its face, the dispute over dual citizenship reached a standstill and further clarification of the issue seemed to have been postponed until the interstate commission tasked with studying the issue completed its work. The first meeting of the Russian-Turkmen Commission on Citizenship Matters was held in Ashgabat, on 8–9 July 2003. The results produced by the Commission were fixed in a protocol signed by the delegations' heads. The Russian side illustrated their success at the meeting by the fact that the Turkmen delegation had agreed to withdraw its demand that Russian passport holders secure an exit visa in order to be permitted to leave Turkmenistan in favour of a compromise procedure. The 'compromise' was achieved on the terms that instead of Russian exit visas, dual citizens would be

[69] Quoted in 'Putin: uhudshenia polozhenia rossiiskih grazhdan v Turkmenii ne proizoidet' (Putin: The Situation with Russian Citizens in Turkmenistan Will Not Be Worsening), *RIA Novosti*, 20 June 2003, available from http://www.rian.ru/rian/intro.cfm?nws_id=396410, [accessed 1 January 2005] (translated by the author).
[70] *Ibid.*
[71] *See* 'Pritesnenii lits s dvoinym grazhdanstvom v Turkmenii ne proishodit – glava dipmissii RF' (No Oppression of Dual Citizens is Taking Place in Turkmenistan – Head of the Diplomatic Mission of the Russian Federation), *Gazeta.Kz*, 25 June 2003, available from http://www.gazeta.kz/print.asp?aid=30634, [accessed 1 January 2005].

issued "multiple exit permissions for a period up to one year".[72] What is the difference between 'exit visas' and 'exit permissions'? It seems to be no more than merely a matter of semantics.

The Turkmen delegation also pledged that the rights of Russian citizens living in Turkmenistan would be fully protected and made an official statement that there would be no discrimination against the rights and interests of the Russian citizens residing in Turkmenistan.

The next meeting of the Commission to be held in September or October 2003.

6.2. The Turkmen Constitution Revised and Amended

With the accompaniment of assurances of cooperation and statements of good will the Turkmen state changed the constitutional bases of citizenship in Turkmenistan. At an annual session of the People's Council (*Halk Maslahaty*) held on 14–15 August 2003 the Constitution of Turkmenistan was revised and amended: Article 7 was supplemented with a provision stating: "[c]itizenship of another State is not recognized for a citizen of Turkmenistan".[73]

6.3. The Current Status Quo

After the amendment the status of dual citizens (or whoever they were) became even more uncertain. Turkmenistan treated people with two passports residing in the Turkmen territory, as if they were only Turkmen citizens. Russian citizenship as a second one would no longer be recognized.

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[72] Information and Press Department, the Ministry of Foreign Affairs of the Russian Federation, 'Stenogramma vystuplenii zamestitelia Ministra inostrannyh del Rossiiskoi Federatsii A.L.Fedotova, direktora Departamenta konsul'skoi sluzhby MID Rossii V.V.Koteneva, zamestitelia predsedatelia Gosudarstvennoi Dumy Federal'nogo Sobrania Rossiiskoi Federatsii S.N.Apatenko, pervogo zamestitelia nachal'nika migratsionnoi sluzhby Ministerstva vnutrennih del Rossiiskoi Federatsii I.B.Yunasha na press-brifinge po itogam pervogo zasedania sovmestnoi Rossiisko-Turkmenskoi komissii po voprosam grazhdanstva, Moskva, 10 iulia 2003 goda' (The Record of Speeches Delivered by the Deputy Minister of Foreign Affairs of the Russian Federation A.L.Fedotov, Director of Consular Service Department of the Ministry of Foreign Affairs of the Russian Federation V.V.Kotenev, Deputy Chairman of the Committee on CIS Affairs of the State Duma of the Federal Assembly of the Russian Federation S.N.Apatenko, First Deputy Director of the Federal Migration Service of the Ministry of Internal Affairs of the Russian Federation I.B.Yunash at a Press-Briefing Concerning the Results of the First Meeting of the Joint Russian-Turkmen Commission on Citizenship Matters, Moscow, 10 July 2003), *Information Bulletin*, 14 July 2003, available from http://www.ln.mid.ru/ns-rsng.nsf/6bc38aceada6e44b432569e700419ef5/432569d80022146643256d63003faf05?OpenDocument, [accessed 1 January 2005] (translated by the author).

[73] Constitution of Turkmenistan in Flanz, G. H., (ed.), *Constitutions of the Countries of the World*, Binder XVIII, 'Turkmenistan', Release 2004-6, August 2004, New York: Oceana Publications, Inc., Dobbs Ferry, p. 3.

Numerous attempts by Russia to reactivate the work of the Russian-Turkmen Commission on Citizenship Matters during 2003 and 2004 were not successful. It virtually ceased to exist. From the Turkmen point of view there was nothing to discuss: national legislation does not provide for dual citizenship, while international obligations regarding dual citizenship are no longer valid.

The issue of the rights and status of dual citizens in Turkmenistan had gone off the boil simply in the course of time, when the most problematic requirement of having exit permissions prior to leaving Turkmenistan was lifted. On 8 January 2004, the President of Turkmenistan signed a decree, according to which the previously introduced order of exit for citizens from Turkmenistan (requiring permission to exit Turkmenistan) was abolished.[74] A couple of months later, he issued another decree, which was to "ensure the freedom of exit of citizens from Turkmenistan to foreign countries and remove any obstacles as regards going abroad in accordance with the legislation of Turkmenistan".[75]

Now dual citizens could freely buy plane tickets and leave Turkmenistan for Russia upon the presentation of both Russian and Turkmen passports without having either an exit or entry visa. They could come back to Turkmenistan in the same way.[76] As such, the most urgent problems were settled, but the legal dispute over Russian-Turkmen dual citizenship was left unsolved and has remained in a state of uncertainty.

PART II. THE DUAL CITIZENSHIP CONTROVERSY BETWEEN RUSSIAN AND TURKMENISTAN IN LIGHT OF APPLICABLE RULES OF INTERNATIONAL LAW

1. FREEDOM OF STATES IN THE FIELD OF DUAL CITIZENSHIP REGULATION

The position of modern international law on issues of citizenship, in general, and of dual citizenship, in particular, is exemplified by the European Convention on

[74] 'Niyazov otmenil raneie vvedennyi poriadok vyiezda grazhdan iz Turkmenii' (Niyazov has Repealed Earlier Introduced Order of Exit of Citizens from Turkmenistan), *Turkmenistan.Ru*, 8 January 2004, available from http://www.turkmenistan.ru/index.cfm?r=2&d=3492&op=viw, [accessed 3 January 2005].

[75] 'Niyazov prinial postanovlenie o sovershenstvovanii poriadka vyiezda grazhdan iz Turkmenistana' (Niyazov has Adopted the Decree 'On Improvement of Exit Order for Citizens from Turkmenistan'), *Turkmenistan.Ru*, 11 March 2004, available from http://www.turkmenistan.ru/index.cfm?r=2&d=3695&op=viw, [accessed 3 January 2005] (translated by the author).

[76] Personal communication of the author with few Russian-Turkmen dual citizens in March 2005.

Nationality of 1997[77] and the ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States of 1999.[78] These instruments are not particularly helpful in guiding how states should act with regard to dual (multiple) citizenship. They do not make it obligatory for states to ensure that people possess only one citizenship, thus allowing multiple citizenship, but they do permit states to pursue a single citizenship policy if they so wish.

1.1. The 1997 European Convention on Nationality

The 1997 European Convention on Nationality formally defines 'multiple nationality' (an umbrella term for, *inter alia*, dual nationality), as "the simultaneous possession of two or more nationalities by the same person".[79] It indicates "that States, at least in Europe, are no longer prepared to recourse to multilateral international instruments in order to limit the occurrence of multiple nationality . . . The absence of international constraints gives room to greater flexibility in relation to their specific approach to the problem".[80]

In two cases – in accordance with the principle of equality of spouses – the Convention explicitly requires States Parties to allow multiple nationality: (i) in the case of marriage of nationals of different states and (ii) for children born from nationals of different states.[81]

As for other cases, the Convention leaves it up to the states to decide whether to permit their citizens to have additional citizenships. Thus, Article 15 provides that:

> "The provisions of this Convention shall not limit the right of a State Party to determine in its internal law whether:
>
> A) its nationals who acquire or possess the nationality of another State retain its nationality or lose it;
>
> B) the acquisition or retention of its nationality is subject to the renunciation or loss of another nationality."

[77] European Convention on Nationality signed at Strasbourg, 6 November 1997, E.T.S. 166, available from http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm, [accessed 16 December 2004].

[78] Draft Articles on Nationality of Natural Persons in Relations to the Succession of States, *Report of the International Law Commission*, 1999, Chapter IV, available from http://www.un.org/law/ilc/ reports/1999/english/chap4.htm#E_1, [accessed 3 March 2005]. The UN General Assembly adopted a resolution taking a note of the articles in 2001.

[79] European Convention on Nationality, Article 2(b).

[80] 'Report on Multiple Nationality' adopted by the Committee of Experts on Nationality, Council of Europe, 30 October 2000, CJ-NA(2000)13, p. 8, available from http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Foreigners_and_citizens/ Nationality/Documents/Reports/CJNA%20(2000)13%20E%20multiple%20nationality.pdf, [accessed 7 January 2005].

[81] European Convention on Nationality, Article 14(1).

In paragraph 96 of the Explanatory Report to the Convention the Council of Europe clarifies the meaning of Article 15, stating that "Article 15 specifically indicates that the Convention does not limit the right of States Parties to allow multiple nationality. This article makes it clear that States, which so wish, are free to allow other cases of multiple nationality."[82]

1.2. The 1999 ILC Draft Articles on Nationality of Natural Persons in Relations to the Succession of States

The Draft Articles on Nationality of Natural Persons in Relations to the Succession of States was adopted by the International Law Commission (ILC) at its fifty-first session in 1999. Being based on the general principle first articulated in Article 15(1) of the 1948 Universal Declaration of Human Rights that "[e]very one has the right to a nationality",[83] Article 1 of the Draft Articles declares the right of every individual to a nationality as it applies in the particular context of state succession:

> "Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles."

The phrase "individual . . . has the right to the nationality of at least one of the States concerned" may suggest support for the concept of multiple nationality. But under no circumstances should it be regarded as an affirmative provision. Rather the ILC takes a neutral position in this respect: "The recognition of the possibility of multiple nationality resulting from a succession of States does not mean that the Commission intended to encourage a policy of dual or multiple nationality. The draft articles in their entirety are completely neutral on this question, leaving it to the discretion of each and every State".[84] Moreover, the Draft Articles provide sufficient opportunities (see, e.g., Articles 8, 9 and 10) to states which favour a policy of single nationality to apply such a policy.

1.3. Concluding Remarks

To conclude, it is possible to confidently say that modern international law, especially taking into account the most recent 1997 European Convention on

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[82] 'Explanatory Report to the European Convention on Nationality,' E.T.S. 166, available from http://conventions.coe.int/Treaty/EN/Reports/Html/166.htm, [accessed 12 February 2005].

[83] Universal Declaration of Human Rights proclaimed by the UN General Assembly Resolution No.217 (III) on 10 December 1948, cited in Brownlie, I., *Basic Documents on Human Rights*, 4th ed., 1995, p. 258.

[84] 'Commentary to the Draft Articles on Nationality of Natural Persons in Relations to the Succession of States,' Commentary 5 to Article 1, *Report of the International Law Commission*, 1999, Chapter IV, available from http://www.un.org/law/ilc/reports/1999/english/chap4. htm#E_1, [accessed 3 March 2005].

Nationality and 1999 ILC Draft Articles, adopts a neutral approach regarding dual citizenship, allowing the retention of more than one citizenship by a person. According to the present status of international law encapsulated in the wording of the ILC, "[i]t is not for the Commission to suggest which policy States should pursue on the matter of dual or multiple nationality",[85] states have the discretion to decide whether to allow it. Therefore, Russia and Turkmenistan were absolutely free to institutionalize dual citizenship under a bilateral agreement. The question now is whether they had the same degree of freedom with regard to revocation of the Dual Citizenship Agreement and abolition of the institute of dual citizenship as such.

2. INTERNATIONAL TREATIES AS LIMITATIONS ON STATE SOVEREIGNTY IN CITIZENSHIP MATTERS

It is a generally accepted view that, in principle, questions of citizenship fall within the domestic jurisdiction of each state. Many prominent writers have repeated it in numerous works. For instance, Ineta Ziemele and Gunnar Schram stated: "It used to be generally recognized that most rules on nationality fell within the scope of domestic jurisdiction and therefore within the domain of municipal law".[86] It should be acknowledged that they ground this proposition on high legal authority. As early as 1923, the Permanent Court of International Justice in its Advisory Opinion concerning the *Nationality Decrees Issued in Tunis and Morocco* case stated:

> "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain."[87]

However, although nationality is mainly governed by national legislation, the competence of states in this field is not unlimited and may be exercised only within the limits set by international law. The same Court in the same Advisory Opinion noted that "jurisdiction [over nationality questions] which, in principle, belongs solely to the State, is limited by rules of international law".[88] The Court's position was later reiterated by its successor, the International Court of Justice in the *Nottebohm* case of 1955.[89]

Similarly, Article 2 of the Harvard Draft Convention on Nationality of 1929 asserts that the power of a state to confer its nationality is limited by rules of international law:

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[85] *Ibid*., Commentary 2 to Article 9.
[86] Ziemele, I. and Schram, G. G., 'Article 15', in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague/ Boston/ London: Martinus Nijhoff Publishers, 1999, p. 298.
[87] P.C.I.J., 1923, Series B, no.4, p. 24.
[88] *Ibid*.
[89] *Liechtenstein* v. *Guatemala* (the *Nottebohm* case), Second Phase, 6 April 1955, *I.C.J. Reports* 1955, p. 23.

> "Except as otherwise provided in this convention, each state may determine by its law who are its nationals, subject to provisions of any special treaty to which the state may be a party; but under international law the power of a state to confer its nationality is not unlimited."[90]

Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930 provides that:

> "It is for each state to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international customs, and the principles of law generally recognized with regard to nationality."[91]

More recently, Article 3 of the 1997 European Convention on Nationality was worded along the same lines:

> "1. Each State shall determine under its own law who are its nationals.
>
> 2. This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality."

On the basis of the pieces of law reproduced above, one can infer that at this stage of the development of international relations and international law a state is free to legislate on nationality issues, but its right to use its discretion thereof may be restricted by obligations which are undertaken towards other states. It is especially notable that the 1929 Harvard Draft Convention, the 1930 Hague Convention and the 1997 European Convention refer to a 'special treaty' or 'international conventions' which may limit the competence of states in the field of nationality.

3. RUSSIAN-TURKMEN INSTITUTIONALIZED DUAL CITIZENSHIP AND THE LAW OF TREATIES

Coming back to the dispute between Russia and Turkmenistan, it is apparent that there are such treaties, that is to say, the Dual Citizenship Agreement and the Terminating Protocol. What is written in those documents matter most. Of particular interest, is another Advisory Opinion of the Permanent Court of International Justice of 15 September 1923, concerning the *Acquisition of Polish Nationality* case[92] under the Polish Minorities Treaty of 28 June 1919. Having been asked to render an opinion about the interpretation of a treaty clause, the Court, *inter alia*, stated:

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[90] Harvard Draft Convention on Nationality, 23 *Am.J.Int'l.L.* 11 (Special Supp. 1929), reproduced in Zilbershats, *supra* footnote 1, p. 187.

[91] Convention on Certain Questions Relating to the Conflict of Nationality Laws signed at the Hague, 12 April 1930, 179 *L.N.T.S.* 89, available from http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Foreigners_and_citizens/Nationality/Documents/Legal_instruments/Conv%20conflict%20nationality%20The%20Hague%2004_1930.pdf, [accessed 16 December 2004].

[92] P.C.I.J., 1923, Series B, no.10, p. 16 *et seq*.

> "Though, generally speaking, it is true that a sovereign State has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to the Treaty obligations referred to [in the Minorities Treaty]".[93]

Taking into account that there is very little in terms of international law of a general character involving the issue of institutionalized dual citizenship and the fact that the institute of dual citizenship between Russia and Turkmenistan was created under the bilateral treaty, the most appropriate approach in dealing with the dispute would be to first analyze the Dual Citizenship Agreement and the Terminating Protocol themselves. An analysis of the terms and conditions stipulated in these two documents should be undertaken in the broader framework of the international law of treaties as specified in the Vienna Convention of the Law of Treaties of 1969.[94]

But before doing this, it may be helpful to recall the positions of both sides to the dispute. Russia's position has been reaffirmed many times by different national authorities and can be summarized in the following way: (i) Russia did not ratify the Terminating Protocol and, therefore, the Dual Citizenship Agreement remained in force; (ii) even if it could be assumed that the Terminating Protocol had come into effect and, as a result, the Dual Citizenship Agreement had indeed ceased to be operative, the termination of the Dual Citizenship Agreement would have no retroactive force, meaning that dual citizens may not be deprived of one of their citizenships. At the same time, Turkmenistan is of the opinion that the termination of the Dual Citizenship Agreement implies the termination of dual citizenship as such. Moreover, the Constitution of Turkmenistan, after being amended in 2003, outlaws dual citizenship.

It should be acknowledged that Russia's position finds strong support in international law. Under Article 54 of the 1969 Vienna Convention, to which both Russia and Turkmenistan are parties, the "termination of a treaty . . . may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States".

Russia and Turkmenistan negotiated and consented to voluntarily terminate the Dual Citizenship Agreement in the Terminating Protocol. The states agreed that the Dual Citizenship Agreement is annulled when the Terminating Protocol comes into force. The 1969 Vienna Convention provides that a "treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree".[95] In the Terminating Protocol, which is an international treaty itself, the states agreed on a 'manner' and date of entry into force, specifically "from the date of the last written notification that the Parties have completed all the necessary

[93] *Ibid.*
[94] Vienna Convention of the Law of Treaties adopted on 22 May 1969 and opened for signature on 23 May 1969, 1155 U.N.T.S. 331, available from http://www.un.org/law/ ilc/texts/ treaties.htm, [accessed 9 January 2005].
[95] *Ibid.*, Article 24(1).

internal procedures",[96] one of which is the ratification by the Russian Parliament. Without waiting for such an act by Russia, Turkmenistan, obviously, did not comply with the agreed method by which the Terminating Protocol would come into effect. Nor did it observe such universally recognized principles of international law as good faith and *pacta sunt servanda*.

As far as the principle of non-retroactivity is concerned, international law does not favour Turkmenistan's position, suggesting that the status of dual citizens may not be changed regardless of whether the Dual Citizenship Agreement is considered to be terminated or still in force. Article 70(1) of the 1969 Vienna Convention explicitly stipulates the consequences of terminating an international treaty as follows,

> "Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> . . .
>
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."[97]

Having concluded the Dual Citizenship Agreement and thus permitting dual citizenship for their citizens, Russia and Turkmenistan created a 'legal situation,' to use the terminology in Article 70(1). This 'legal situation' existed for about ten years and gradually created rights and obligations in accordance with the provisions enshrined in the Dual Citizenship Agreement, which could have been rescinded only if the parties involved had agreed to such a rescission. The latter is definitely not true: it is agreed in the Terminating Protocol that "[f]rom the day this Protocol takes effect, the Agreement between Turkmenistan and the Russian Federation on Regulating the Issues of Dual Citizenship, dated 23 December 1993, will be annulled".[98] The Terminating Protocol says nothing about the annulment of Russian-Turkmen dual citizenship, nor does it require dual citizenship holders to renounce either citizenship.

As for the attempts of the Turkmen authorities to hide behind newly concocted constitutional provisions outlawing dual citizenship and use the Constitution of Turkmenistan as safe heavens and justification for failing to comply with their international obligations, they would be extremely easy targets in any international judicial forum. It is a well-established principle of public international law that a state cannot invoke its internal legislation as justification for non-compliance with its obligations under international law. For example, when considering Poland's argument that the question of treatment of Polish nationals was to be decided, *inter*

[96] Protocol on Terminating the Agreement between Turkmenistan and the Russian Federation on Regulating the Issues of Dual Citizenship, Article 2.
[97] Vienna Convention of the Law of Treaties, Article 70(1).
[98] Protocol on Terminating the Agreement between Turkmenistan and the Russian Federation on Regulating the Issues of Dual Citizenship, Article 1.

alia, on the basis of the Constitution of the Free City of Danzig where the alleged violations had taken place, the Permanent Court of International Justice held that:

> "according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted."[99]

Furthermore, not only are states prevented from invoking their national constitutions or other legislation as a defence to violations of international law,[100] the enactment of a legislative act contrary to international obligations could be regarded as another separate violation. According to Ian Brownlie, "there is a general duty to bring national law into conformity with obligations under international law; and in this connection the opinion has been expressed that where a state adopts legislation on its face contrary to its obligations the legislation may itself constitute the breach of an obligation".[101]

From the above we see that Turkmenistan's legal position is precarious and can hardly be defended on the basis of the applicable rules of international law. Although it is quite obvious that Turkmenistan is very likely to lose an international legal proceeding, Russia's ability to bring the matter before a court or arbitration tribunal is highly constrained due to, *inter alia*, the 'no arbitration' clause in Article 7 of the Dual Citizenship Agreement, under which disputes between the Parties "over interpretation and application of the Agreement shall be settled through diplomatic channels".[102] This leaves virtually no room for any judicial or quasi-judicial means of dispute settlement.[103]

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[99] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech on the Danzig Territory*, Advisory Opinion, P.C.I.J., 1931, Series A/B, no.44, p. 24, quoted in Kiseleva, E. (Khovanskaya), *Kaliningrad Transit: Why to Facilitate?* (LL.M Thesis, Faculty of Law, Lund University, Lund, Fall 2004) p. 13.

[100] *See* Article 27 of the 1969 Vienna Convention, which reads, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

[101] Brownlie, I., *Principles of Public International Law*, 6th ed., Oxford: Oxford University Press, 2003) p. 376.

[102] Translated by the author.

[103] Though the prospects for judicial dispute settlement are very unlikely, this does not necessarily mean that adjudication or arbitration is impossible whatsoever. Turkmenistan has violated its obligations under the Dual Citizenship Agreement and the Terminating Protocol and, by doing so, injured its Russian counterpart. Under the rules on state responsibility, a breach of an international obligation of the state constitutes an internationally wrongful act which entails the international responsibility of that state. This responsibility remains unless and until the injured state waives its claim for reparation (*See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the International Law Commission*, Official Records of the UN General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1). Until Russia validly waives her claim (this has not been done yet), the 'window of opportunity' for adjudicating the dispute under consideration will remain open.

4. RUSSIAN-TURKMEN INSTITUTIONALIZED DUAL CITIZENSHIP AND DIPLOMATIC PROTECTION

According to the classic doctrine of diplomatic protection, a state may espouse the claims of its citizens who have been injured by acts contrary to international law by another state, provided that local remedies have been exhausted without satisfaction.[104] In the *Barcelona Traction* case the Court observed that:

> "within the limits prescribed by international law the State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease . . . Since the claim of the State is not identical with that of the individual or corporate person whose claim is espoused, the State enjoys complete freedom of action."[105]

The Court did not specify in its judgement the "limits prescribed by international law", which are meant to restrict the state's discretion as to whether to extend its protection or not. But there are such limits indeed. If a point of controversy arises directly between two states each of which considers a person concerned to be its citizen (like in the presently discussed case) the often quoted Article 4 of the 1930 Hague Convention should apply: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses".

Article 4, if applied, would prevent Russia from claiming the right to exercise diplomatic protection in favour of Russian-Turkmen dual citizens against Turkmenistan. One could rejoin by pointing to Article 6 of the Dual Citizenship Agreement, which endows persons holding citizenship of both Russia and Turkmenistan with the right "to enjoy the protection and patronage by each of the Parties". Some experts even find this provision "unusual by international standards, where dual citizenship implies the precedence of norms of whichever state the individual finds him/herself; here lies the heart of other states' objections to the concept".[106]

But this provision should not be read in isolation, instead it should be read together with the second sentence of Article 6: "Protection and patronage of these persons in a third state shall be extended by the Party in which territory they permanently reside or, at their request, by the other Party which citizenship they also hold". This means that Article 6 does not cover all possible instances, but rather entitles both states to afford diplomatic protection to dual citizens against third states. The Dual Citizenship Agreement is completely silent about whether Russia and Turkmenistan may exercise diplomatic protection against each other.

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[104] *See* Donner, R., *The Regulation of Nationality in International Law*, 2nd edition, N.Y.: Transnational Publishers, Inc., Irvington-on-Hudson, 1994) p. 19.

[105] The *Barcelona Traction* case (Case Concerning the Barcelona Traction, Light and Power Company, Limited), *Belgium* v. *Spain*, Second Phase, 5 February 1970, *I.C.J. Reports* 1970, p. 3.

[106] Hurlburt, H. F., 'Russian Bilateral Treaties and Minority Policy', in Bloed, A. and van Dijk, P. (eds.), *Protection of Minority Rights Through Bilateral Treaties: The Case of Central and Eastern Europe*: The Hague: Kluwer Law International, 1999, p. 77.

Under the general rules of interpretation of international treaties, in the absence of any specific provision in a treaty on a point of concern the applicable law is international law, as provided in paragraph 3(c) of Article 31 of the 1969 Vienna Convention. Article 4 of the 1930 Hague Convention which excludes diplomatic protection in the case of dual citizenship where the individuals concerned possess citizenship of both protecting and responding states, has been mentioned above. But as this rule was codified in 1930 it seems to have become quite antiquated and there have been many significant developments concerning the concept of diplomatic protection.

Numerous claims and arbitral tribunals have dealt with claims made by dual citizens and the case law may provide legal clarification. Of the precedents it is worth pointing, first, to the *Mergé* case decided by the Italian-United States Conciliation Commission on 10 June 1955.[107] Mrs. F.S. Mergé submitted her claim as a citizen of the US by birth seeking compensation from Italy for the loss of property in that country as a result of the war. The Italian Government contended that the claim ought to be dismissed on the grounds that Mrs. Mergé was also an Italian citizen by marriage and, in support of this proposition, referred to Article 4 of the 1930 Hague Convention. In its analysis, the Commission acknowledged that Article 4 applied, as Mrs. Mergé was in fact a citizen of both the claimant and defendant states. However, the Commission took into account another principle of international law relevant to the case, namely the principle of effective or dominant nationality, which was in favour of the claimant. The Commission treated the two principles as equally persuasive and came to the conclusion that in cases where the claiming state was the state of the dominant or effective nationality the principle of dominant or effective nationality should take precedence over the principle of no diplomatic protection to a dual citizen against a state of his other nationality.[108] The claim was eventually dismissed. However, it should be noted that it was not dismissed on the basis of Article 4, rather the Commission did so on the ground that the claimant "can in no way be considered to be dominantly a United States national".[109]

The most recent major claims commission is the Iran-United States Claims Tribunal established in 1981 by an agreement between Iran and the US in the aftermath of the Islamic Revolution to settle claims of US citizens against Iran and Iranian citizens against the US. Having started its work, the Tribunal was compelled to decide on the eligibility of claimants simultaneously possessing Iranian citizenship in accordance with Iranian law and US citizenship in accordance with US law. As the Tribunal's statutory document said nothing about its mandate in case of dual citizenship, the Tribunal had to turn to the general principles of international law as applicable law. In the *Esphahanian* case,[110] having studied the body of

[107] The *Mergé* case (*United States* v. *Italy*), *I.L.R.* 1955, p. 443–457.
[108] *Ibid*., p. 455.
[109] *Ibid*., p. 456.
[110] The *Esphahanian* case (*Nasser Esphahanian* v. *Bank Tejarat*), Award No.31-157-2, 2 Iran-U.S.C.T.R., p. 157.

international law on the subject, including the *Nottebohm* and *Mergé* cases, the arbitrators applied the dominant and effective nationality rule. In the end, the Tribunal arrived at the conclusion that it had jurisdiction over claims of Iranian-US dual citizens, when the dominant nationality is that of the claimant and not of the respondent state. It also added that in cases of diplomatic or consular protection of dual citizens physically present in a state, which considers them as its own citizens, against that state the "formal protection will be denied".[111] On other occasions the Tribunal reiterated and confirmed the right of an individual to bring claims against the state whose nationality he also possesses, contrary to the provisions of Article 4 of the 1930 Hague Convention, but on the condition of fulfilling the requirements of the rules of dominant and effective nationality.[112]

If Article 4 as modified by the subsequent arbitration practice had been applied to the Russian-Turkmen dispute, this would not seriously challenge the position of Turkmenistan. The persons concerned are those Russian-Turkmen dual citizens who live in Turkmenistan and, as a result, their dominant and effective nationality is linked to their place of permanent residence,[113] Turkmenistan. Being guided by international law at its present stage of development, a hypothetical Russian-Turkmen arbitration tribunal would definitely deny Russia's right to diplomatic protection and dismiss claims made by permanent residents of Turkmenistan holding dual citizenship.

5. CONCLUSION

The status of the Dual Citizenship Agreement and the Terminating Protocol remains unclear. While both Putin and Niyazov agreed to the revocation, their subsequent understandings of the terms and scope of these two documents have differed significantly. Russia insists that it will continue to recognize the Dual Citizenship Agreement until the state *Duma* ratifies the Terminating Protocol. Even then, it will not enforce it retroactively. The Turkmen authorities, much to the dismay of their Russian partners, denounced the Dual Citizenship Agreement only two weeks after signing the Terminating Protocol and unilaterally selected a date for beginning enforcement of their new citizenship policy. As a result of the pressure from the Russian government, this policy was left inactive but not revoked.

Many scholars view dual citizenship as an indication of the maturity and democratic nature of states allowing it. Thomas Frank is of the opinion that "[t]he response of a legal system to a citizen's claim to 'dual nationality' is an excellent indicator of that society's tolerance not merely for multiple loyalty but for the right of individuals to choose their affiliations".[114] Similarly, by institutionalizing dual

[111] *Ibid*., p. 165.
[112] *See e.g.*, the *Golpira* case (*Golpira* v. *The Government of the Islamic Republic of Iran*), Award No.32-211-2, 2 Iran-U.S.C.T.R., p. 171.
[113] *See* Articles 5 and 6 of the Dual Citizenship Agreement.
[114] Frank, T. M., 'Clan and Superclan: Loyalty, Identity and Community in Law and Practice', 1996, 90 *American Journal of International Law*, p. 378.

citizenship in their bilateral relations the states demonstrate their trust and confidence in both one another and their citizens. Indeed, institutionalized dual citizenship is an unambiguous indication of a high degree of unity and harmony in the relations between two states, which are closely connected by common history or common interests.

In 1994, Jakhan Pollyieva enthusiastically commented on the newly established institute of dual citizenship between Russia and Turkmenistan and dual citizenship holders:

> "Being the subjects of both states, these persons, as no one else, are interested in preserving peace and good-neighbour relations. They are a 'living guarantee' of the friendship between Turkmenistan and Russia . . . With their help, it is possible to preserve all of the best that has happened in the history of the two peoples, including, first of all, the potential of mutual understanding which has been attained for many years . . ."[115]

It is very sad to note that just a decade later both Russia and Turkmenistan have been unable to live up to the high expectations of not only dual citizenship but also their own promises and obligations enshrined in the Dual Citizenship Agreement.

[115] 'Jakhan Pollyieva: chastnyi vzgliad na obschie problemy' (Jakhan Pollyieva: Personal View on General Problems), *supra* footnote 21, p. 3 (translated by the author).

PATENT RIGHTS AND ACCESS TO MEDICINES:

Are Patents really the only Barrier for Good Health Care in Developing Countries?

Björn Ley[*]

INTRODUCTION

One of the most promising areas of modern science is the area of medicine. New medicines have reduced the threat of many diseases like malaria, tuberculosis and diphtheria and lessened the impact of diseases like AIDS. Therefore it seems that the human race can look forward to a bright future of rising life expectancy through new medicines.

But will all people benefit? Have the diseases mentioned above really been concurred all over the world? Simultaneously to the start of the biotechnology age in developed countries, eight million people yearly are still infected with tuberculosis. The annual mortality from tuberculosis worldwide is still estimated at three million,[1] 95 per cent of whom live in developing countries.[2]

Not only are the old diseases not defeated in developing countries, new diseases are also hitting the people of the developing countries much harder than those of the developed countries. An example of this is the AIDS epidemic. In the beginning AIDS was incurable and deadly but since 1996, with the advent of effective Antiretroviral Treatment (ART), it has been transformed into a chronic disease, which is manageable with some difficulties.[3] But whereas in North America and Europe the coverage of ART available for people in need is between 75 per cent and 100 per cent,[4] in Africa just 0.1 per cent of the 28.5 million people living with AIDS

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[*] LL.M., currently working for the Siemens Corporation in Germany.

[1] Li, J., '*Tuberculosis*', available from www.emedicine.com/EMERG/topic618.html, [accessed 29 April 2005].

[2] New Jersey Medical School National Tuberculosis Center, '*History of Tuberculosis*', available from www.goshen.edu/bio/Biol206/Biol206LabProject/tricia/Tbhx.html, [accessed 29 April 2005].

[3] Murru, M., '*AIDS, Primary Health Care and Poverty*', p. 7 available from www.fiuc.org/umu/faculty/bam/dhs/healthpolicy/vol2/AIDS%20Primary%20Health%20Care%20and%20poverty.pdf, [accessed 29 April 2005].

[4] *WHO,* 'Treating 3 million by 2005: Making It Happen, The WHO strategy', p. 4 Available from www.who.int/3by5/publications/documents/en/3by5StrategyMakingItHappen.pdf, [accessed 29 April 2005].

have access to HIV Drugs.[5] In these countries 50 percent of the population lacks access to even the essential drugs[6] because they cannot afford it. For example, the cocktail of ART costs around USD 10,000 per patient per year. This sum is unaffordable for people in Sub-Saharan Africa where the average income is USD 1,600 a year.[7] But there is hope, because an Indian manufacturer offers the same drug for just USD 350. However, this product cannot be sold in many countries because the inventor has a patent and the generic drug therefore would infringe the rights granted to the inventor under the international patent system. Of course it is only fair to grant the original manufacturer a patent for his product, because he invented it and should therefore be rewarded for his efforts. The question is, however, is it just that the rights owner sells the product at any price he wants and therefore determines who has access to life-saving medicine and who has not. Many people think this is unfair. In their view, patent rights are instruments used by western pharmaceutical companies to charge exorbitant prices, which are protected by these patents.

Until 1994 the problem was not acute, because up to that time states decided what could be patented or if there should be a patent system in their country. But in 1994 this situation changed due to the adoption of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. The TRIPS agreement requires member states of the World Trade Organization (WTO) to establish a patent system in their respective countries, which cannot exclude certain fields of technology from patentability. For many critics it seems clear that patent system, especially the TRIPS Agreement, and the pharmaceutical industries are the main barrier for people in developing countries accessing new medicines and therefore achieving life expectancies as high as that of people in developed countries.

The question arises whether there really is a clash between the patent rights of western pharmaceutical companies on the one side and the health needs of people in developing countries on the other. Perhaps a balance can, or even has already been found through the TRIPS Agreement.

The scope of this paper is therefore threefold:

1. Analysis of problems arising with the adoption of the TRIPS Agreement between access to medicine on the one side and the patent owner's rights on the other side.
2. The availability of alternatives for an international patent system and whether these solutions more adequately meet the needs of developing countries

[5] United Nations, '*UNDP Statistical Fact Sheet*', available from www.undp.org/hiv/docs/Barcelona-statistical-fact-sheet-2July02.doc, [accessed 29 April 2005].

[6] WHO, '*The Rationale of Essential Medicine: Access, Quality and Rationale Use of Medicines and Essential Drugs*', available from www.who.int/medicines/rationale.shtml, [accessed 29 April 2005].

[7] Australia Immigration Visa Services, '*Immigration Laws: September, 2000 - Number #22: Africa: Development*', available from www.migrationint.com.au/news/seville/sep_2000-22mn.asp, [accessed 29 April 2005].

3. A cursory examination of other restraints which impede the provision of health care in developing countries

THE TRIPS AGREEMENT

Patent Protection before TRIPS

Prior to the TRIPS Agreement, the Paris Convention for the Protection of Industrial Property governed international patent relations. The Paris Convention, however does not, for example, require that patents be applied to any particular areas of technology, nor does it require any minimum term of protection or set of exclusive rights to be conferred on patent holders.[8] Therefore prior to TRIPS many developing countries still had no product patents for pharmaceuticals.[9]

A study undertaken by WIPO in 1988 revealed that of the 98 Members of the Paris Convention, 49 excluded pharmaceutical products from protection.[10] Even those developing countries with a patent system in place had rather weak ones. For example India had a system of allowing process patents but not product patents. In such a process patent system, you can patent the method of production but not the resulting product. In a system of product patents, however, you can patent the resulting product. Therefore you can bar any competitor from producing the same product, even if he finds a different way of production of such product.

Another exception was to include a so-called local working requirement in a patent act. This means that the patent holder will lose his patent protection in a country if he does not manufacture the product locally. Such a rule was often used by developing countries to promote the transfer of technology into these countries. However, it was often not economically feasible to build a factory in a small developing country just to avoid the loss of patent protection there. Therefore, the patent owners often lost their patents in developing states, or even did not apply for any right of protection there. So all things considered, patent protection in developing countries for medicines was rather weak.

Patent Protection under TRIPS

The Content of the Treaty

In the first chapter, the TRIPS agreement provides regulations that are applicable to all intellectual property rights and not only to patents. Article 6 allows member

[8] Gillespie-White, L. *et al*., '*Patent Protection and Access to HIV/AIDS Pharmaceuticals in Sub Saharan Africa*', p. 24 available from www.iipi.org/activities/Research/HIVper cent20AIDSpercent20 Report.pdf, [accessed 29 April 2005].

[9] Scherer, F. M. and Watal, J., '*Post Trips Options for Access to Patented Medicines in developing countries*', p. 3 available from www.icrier.res.in/pdf/jayawatalper cent20.pdf, [accessed 29 April 2005].

[10] Drahos, P, '*Developing countries and International Intellectual Property Standard Setting*', p. 9 available from www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf, [accessed 29 April 2005].

states to provide for the international exhaustion of rights and, therefore, to admit parallel imports. The consequences of parallel imports will be examined in section 2.3.2.

The main justification for the introduction of patent laws is contained in Article 7, which states that:

> "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology . . ."

The argument that the absence of patent rights is the main barrier for the transfer and dissemination of technology from developed into developing countries is often seen as one of the main vindications for western diplomat's assertion for the installation of patent rights.[11] However I believe that the more accurate conclusion is that, while there are indications that strengthening IPR can be an effective means of inducing additional inward foreign direct investment (FDR), it is only a component of a far broader set of important influences.[12] The positive impact of IPR protection on growth that works indirectly through trade and inward FDI can be offset by a negative impact slowing the diffusion of knowledge and discouraging imitation.[13] Therefore, in order to get the best possibilities for economic growth, officials in developing countries should use the maximum flexibility TRIPS offers.

Article 8 seems to be one which offers flexibility and therefore might be a very important rule for access to medicines. It states:

> "Members may . . . adopt measures necessary to protect public health and nutrition . . . provided that such measures are consistent with the provisions of this Agreement."

Even though this paragraph sounds promising, other than in prior agreements, these measures must be consistent with the agreement. Therefore they grant states only limited leeway. The provision is more a letter of intent than a hard legal term that can be enforced in court.

Nevertheless, the purpose of the TRIPS agreement as an instrument that should not prevent access to public health was further clarified in the DOHA Agenda. It states:

> "We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our

[11] Abbot, F. M., '*The TRIPS Agreement, Access to Medicines and the WTO Doha Ministerial Conference*', p. 5 available from http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID285934_code011008630.pdf?abstractid=285934#PaperDownload, [accessed 29 April 2005].

[12] Maskus, K., '*The Role of IP Rights in Encouraging Foreign Direct Investment and Technology Transfer*', p. 29 available from http://siteresources.worldbank.org/INTRANETTRADE/Resources/maskus2.pdf, [accessed 29 April 2005].

[13] Falvey, R., Foster , N. and Greenaway, D., '*Intellectual Property Rights and Economic Growth*', p. 17 available from www.nottingham.ac.uk/economics/leverhulme/research_papers/04_12.pdf, [accessed 29 April 2005].

> commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all."[14]

Nevertheless, as stated above, these limitations have to be consistent with other provisions of the Agreement. Article 8 gives no exculpation from the other rules laid down in the treaty but it can be helpful to 'broaden' the exceptions of the treaty when it comes to public health needs.

Provisions about Patents

The provisions relevant solely to patents can be found in Chapter 5 of the TRIPS Agreement. The first article in this chapter is Article 27 paragraph 1 which requires member states to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to the normal tests of novelty, inventiveness and industrial applicability.

Inventiveness of a Product

The main criteria for a patent are: novelty, inventive step and industrial application. Already, the examination of the novelty of a product is a huge barrier for a developing country because the examination costs money that developing countries do not have.

In fact, even in the US thousands of patents are granted each year for minor, purely trivial developments, or for substances (including genes) that already exist in nature and which have merely been *discovered* but not *invented* by their would-be "owner".[15] This happens despite the fact that the US Patent and Trademark Office has an annual budget of USD 1 billion and a staff of more than 3,000 scientists, engineers and legal experts.[16] The equivalent office in Pakistan, with half the population of the US, has an annual budget of USD 80,000 and seven technical staff. As such, there is the risk that patents are not easily accessible in developing countries.

This problem is especially important in regards to traditional medicines. Today, many new medicines are based on traditional knowledge about herbs still available in isolated spots in developing countries. Although the herbs cannot be patented, industrial produced substitutes can be. Such exploitation of traditional medicines can only be stopped if databases are available in developing countries to rebut the allegation of novelty. However, such databases require bigger patent offices and greater funding, which is not available. Therefore there is a risk that traditional medicines will be adapted and patented by scientists and industry, for the most part

[14] Decision of the General Council of 30.08.2003'Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health' available from www.wto.org/ english/tratop_e/ trips_e/implem_para6_e.htm, [accessed 29 April 2005].
[15] Correa, C., '*Patent Law Trips and R&D Incentives: A Southern Perspective*', p. 8, available from www.cmhealth.org/docs/wg2_paper12.pdf, [accessed 29 April 2005].
[16] 'Patently absurd!', *The Economist*, 21 June 2001.

from developed countries, with little or no compensation to the custodians of this knowledge and without their prior informed consent.[17] From this follows that even in one of the few domains in which developing countries are leading and would profit from new IP rights, they can be often deprived of these benefits.

Exclusion of Fields

Under Article 27 paragraph 1 of the TRIPS Agreement it is no longer possible for member states to exclude medicines from patentability and therefore allow generic pharmaceuticals. The potential benefit of generic products has already been shown with the example of AIDS treatments. Whereas the patented triple-cocktail of antiretrovirals costs USD 10,000 the Indian generic drug is available for USD 350.

Introduction of Product and Process Patents

Furthermore, it is no longer possible to restrict patents only to process patents. The protection of process patents fosters competition especially for successful patents, because other firms will try to develop other processes to manufacture the same product without violating the process patent of the original rights owner.

One of the main countries exceptionally successful in developing generic medicines is India and this can be attributed to the fact that it only recognised process patents. With the end of process patents under TRIPS, India will cease to be one of the biggest suppliers of cheap generics for developing countries, with 64 per cent of its exports going to such countries.[18]

Of course in the future there will still be some countries, which have no patent system. The problem is whether the markets of these countries will be big enough to attract sufficient investors to finance the development of generics. Even though the Indian pharmaceutical market is small, compared to western markets, it is still much larger than markets in most developing countries. For this reason, there were economic incentives to develop generics for the big Indian market. Whether this will be the case for small developing country markets is rather doubtful.

Local Production Requirements

Under paragraph 1 of Article 27, patents must also be available, and patent rights enjoyable without discrimination as to the place of invention and whether they are produced locally or imported. The proposal of some developing countries to require companies to utilize their intellectual property rights locally was actively fought

[17] '*Report of the Workshop on IPRs in the Context of Traditional Medicine Bangkok*', p. 6, available from www.who.int/medicines/library/trm/who-edm-trm-2001-1/who-edm-trm-2001-1.pdf, [accessed 29 April 2005].

[18] M. Foreman, '*Patents, pills and public health: Can TRIPS deliver?*', p. 13, available from www.panos.org.uk/resources/reportdownload.asp?type=report&id=1053>, [accessed 29 April 2005.

against by industrialized countries.[19] Therefore there will be less incentive to build factories in developing countries under the TRIPS Agreement.

Subject of Patents

Article 27 contains an interesting exception regarding the subject of patents. Paragraph 3 excludes diagnostic, therapeutic and surgical methods for the treatment of humans or animals from patentability. The reason behind this seems to be that such life-saving treatment should not be subject to an exclusive right held by a single person. In contrast, life-saving medicines can be subject to such a right. The different treatment maybe explained by the different level of research and development (R&D) necessary for such a development. Whereas medicines often need years of R&D from thousands of people and millions of dollars, this is often not the case for surgical treatments.

Term of Protection

The term of protection available shall not end before the expiration of a period of 20 years from the filing date (Article 33). This means that, for example, the protection period in India has now almost tripled from seven to 20 years. However, the pharmaceutical industry in particular argues that such long periods are necessary. A product's patent term begins when the patent application is filed, typically early in the development process. The time taken in patent prosecution and the time required to conduct preclinical and clinical studies to obtain regulatory approval eliminate a substantial portion of the 20 year term. Manufacturers argue that safety regulation procedures can take up to eight or nine years,[20] thus reducing effective patent life to no more than eleven years, leaving a relatively short period of effective patent life in which the rights owner can enjoy monopoly status for its product and recoup investments.[21]

Transitional Arrangements

Article 65 handles the subject of transition periods. All states have a transition period of one year following the date of the TRIPS entry into force, which was 1 January 1995. Developing countries were granted an additional transition period of four years and this period may be prolonged for another five years in those areas of technology where patent protection was not available prior to the TRIPS agreement. For least developed countries the transition period is ten years (Article 66), therefore they do not have to install a patent system in general until 2006. For pharmaceutical

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[19] Singh, A., '*Foreign Direst Investment and International Agreements; A South Perspective*', p. 12, available from www.southcentre.org/publications/occasional/paper06/occasional6.pdf>, [accessed 29 April 2005].

[20] OECD, '*Pharmaceutical Policies in OECD countries: Reconciling Social and Industrial Goals*', April 2000 from Foreman, M., *supra* footnote 18, p. 13.

[21] Milne, C., Kaitin, K. and Ronchi, E., '*Orphan Drug Laws in Europe and the US: Incentives for the Research and Development of Medicines for the Diseases of Poverty*', p. 9. Available from http://www.cmhealth.org/docs/wg2_paper9.pdf, [accessed 29 April 2005].

patents this period was prolonged further until 2016 under the DOHA Agreement.[22] However, due to political pressure, especially by the US, many least developed countries (LDC) have already implemented patent protection for medicines. For example, only two out of thirty African LDCs do not currently grant patents for pharmaceuticals.[23]

Conclusion

There seems to be at least for LDCs, no reason to worry about medicine prices and patents until 2016, because until then they may use generics. But although the framework looks promising, the problem of access to cheap medicines is far from settled. Even though LDCs have the right to use generics, the problem is where to get such generics. Many LDCs do not have a pharmaceutical industry at all.[24] And even where a pharmaceutical industry does exist, the redevelopment of medicines requires, firstly highly trained scientists and secondly, an investor to fund the R&D. Of course an investor will only be attracted if there are profit-making possibilities. The return on investment will be hard to achieve if the market in which the generic is offered is small. The problem is that the market for medicines is small in most developing countries due to the fact that the average income is low. In addition, an investor might face the problem of not only paying for the R&D, but also having to build up the industrial and technological manufacturing resources in such a country. (Explanation: it is a general patent law which prohibits the production of a generic in a country where patent system in place, and not only due to the TRIPS. Exportation before the 2005 Council decision was not allowed to any country and not only to LDCs.)

Solutions Available under TRIPS

The TRIPS system has some safeguards installed to tackle public health problems. There are three main solutions that are consistent with TRIPS and which are most frequently proposed as a way to facilitate access to cheap medicines in developing countries.

Compulsory Licensing

The first solution that I will analyse is compulsory licensing. Compulsory licensing is defined as "authorization permitting a third party to make, use or sell a patented invention without the patent owner's consent".[25] Therefore compulsory licensing allows a government to temporarily override a patent. However, in return for this

[22] WTO Press release, '*Council approves LDC decision with additional waiver*', available from www.wto.org/english/news_e/pres02_e/pr301_e.htm, [accessed 29 April 2005].

[23] Correa, C., '*Implications of the Doha Decleration on the TRIPS Agreement and Public Health*', p. 39, available from www.who.int/medicines/organization/ood/trips_med.shtml, [accessed 29 April 2005].

[24] Correa, C., *supra* footnote 23, p. 52.

[25] Grace, C., '*Equitable pricing of newer essential medicines for developing countries: Evidence for the Potential of Different Mechanisms*', p. 38, available from www.eldis.org/ static/ DOC13148.htm, [accessed 29 April 2005].

unauthorized use, the licensee has to pay compensation to the rights owner. Therefore, the original inventor is not totally dispossessed. Compulsory licenses are part of most patent acts in the world, even in developed countries. For example after September 11th the US threatened Bayer AG, a German Company, with the issuance of such a license for the manufacture of an anti anthrax pill. Of course the national acts must fulfill the criteria laid down in the TRIPS Agreement. While these measures are still allowed, TRIPS tightens the respective provisions in the Paris Convention.[26]

Requirements for Compulsory License under TRIPS

The rules for compulsory licenses are laid down in Article 31 of the TRIPS agreement. First of all, it is astonishing that there is no general rule specifying in which cases a compulsory license can be issued. Article 31 more or less only lays out the procedure that has to be followed on issuing a compulsory license. There is no list of reasons given for the issuance of a compulsory license. However, a compulsory license still has to fulfill the following preconditions.

Prior Negotiations with the Patent Owner

Firstly, under paragraph (b) the government has to contact the patent owner and try to reach an agreement on reasonable commercial terms. However, prior contact with the patent holder is not necessary if there is a national emergency, a case of extreme urgency or if it is to be used in a public, non-commercial manner. There have been many disputes about what constitutes a national emergency. Many states opined that a national emergency must be novel, it cannot be a previously known event. This dispute has now been settled by the DOHA Declaration[27] which states:

> "5.c) Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency."

It is therefore now accepted that a national emergency includes a health crisis, which permanently threatens these countries, and not only a sudden epidemic. Therefore, the DOHA Declaration has broadened the interpretation of the TRIPS Agreement.

The problem is, if this special rule is not relevant, it will be difficult to reach agreement as to what "on reasonable commercial terms" really means. As long as there is no case law clarifying this uncertainty, developing states will be rather hesitant to issue a compulsory license. The reason for this is the fact that developing states will often fear the risk of patent litigation, because it can be very costly.

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[26] J. Revesz, '*Trade-Related Aspects of Intellectual Property Rights*', p. 88, available from www.pc.gov.au/ research/staffres/trips/trips.pdf, [accessed 29 April 2005].
[27] WT/MIN(01)/DEC/2.

Non-exclusive use

Another precondition for the grant of a compulsory license is that under paragraph (d) the use shall be non-exclusive. This means that a license cannot be given exclusively to one company, if there are several applicants it must be granted to all. This also means that the patent owner himself can continue to exploit the invention and can compete, as aggressively as he wishes, with the compulsory licensee, with the advantages conferred in many cases by the prestige of brand names and abundant marketing resources.[28] In fact, the market share that compulsory licensees may obtain may be small and even insignificant on account of the reputation and dominant presence of the patent owner in the market.[29] This will be another obstacle making the assessment of a future investment more difficult and will therefore scare away many potential investors.

Predominant Supply of Domestic Market

Under paragraph (f) the use of the license shall be predominantly for the supply of the domestic market. This limitation seems logical, due to the fact that a compulsory license is usually issued to combat a threat in the state granting the license. Even though this limitation seems logical, it is one of the gravest problems with regard to the access of developing countries to essential medicines.

The problem arises when a small developing country issues a compulsory license. The high costs of establishing a local factory will not be recouped due to the small local market for generics. Of course more investors could be attracted if the production of different medicines may be allocated among several countries.[30] However such an allocation will not be possible if production has to be predominantly for the local market. Therefore even if another state was willing to help the state in need of medicine by issuing a compulsory license just for export into the developing country, this would mean a breach of the "supply of the domestic market rule" under Article 31 paragraph (f). Therefore in the end it might be that the countries most in need of compulsory licenses, cannot enjoy the advantages of this safeguard because they simply do not have the industrial capacity to produce the generics. If developing and least developed WTO Members are effectively excluded from addressing pressing health concerns because of lack of local manufacturing capacity, the purposes of Article 31 are frustrated. As noted above, the WTO would face the paradox that its most well off members would be able to take advantage of its public interest exceptions, but its least well off would not.[31]

But this problem, known as the paragraph 6 problem, was anticipated by many activist groups and developing countries which pressured the WTO Council for

[28] Correa, C., *supra* footnote 15, p. 24.
[29] Watal, J., '*Pharmaceutical patents, prices and welfare losses: a simulation study of policy options for India under the WTO TRIPS Agreement*', cited in Correa, C., *supra* footnote 15, p. 24.
[30] Abbott, F. M., *supra* footnote 11, p. 14.
[31] *Ibid*., p. 17.

change. As a result, in November 2001, the Fourth Ministerial Conference in Doha, Qatar assigned the TRIPS Council to find an expeditious solution to the problem. It took until 30 August 2003 for the General Council to adopt a solution to the problem. In general, it is now possible for a second state to issue a compulsory license solely for export to another country. However, the importing state must notify the WTO, the first state must have no manufacturing capacities and the amount of goods needed must be specified. The exporting country also has to issue a compulsory license solely for the purpose of export and the goods produced have to be specially marked. Therefore the risk of illegal re-imports, one of the greatest fears of patent owners in developed countries, is minimized. This system is rather questionable because the country in need of medicines is dependent on the goodwill of another state with sufficient manufacturing capacities. Most countries with such capacities are developed countries, which are in general reluctant to issue compulsory licenses and weaken their own pharmaceutical companies. The other countries are developing countries, which in the majority of cases, are very sensitive to political pressure by developed countries. Political pressure by the US is particularly persuasive as the US can enact sanctions under Section 301 of its trade law. Although such pressure is officially not permitted it is clear that in some cases such pressure will be exerted. The political willingness of developing countries leaders to resist this pressure for the welfare of another country might be limited. A solution which is not based on the goodwill of other states and their solidarity might be preferable, although such a solution might be difficult to implement, because this would mean that a foreign country or an international institution, like the WHO, would be granted the right to issue a compulsory license in a foreign country. Such interference with domestic affairs would probably not be accepted by the majority of states. It is not updated, need to include Dec.6, 2005 Decision on the Amendment of the TRIPS (protocol)

Payment of remuneration

Under paragraph (h) the principle of remuneration is stated as:

> "the right holder shall be paid adequate remuneration . . ."

The question arises, what is an 'adequate remuneration'. It is evident that 'adequate remuneration' cannot be construed on a 'profits lost' basis. If this was the case, compulsory licensing would impose such high royalty payments on the licensed producer that there could be no price reduction and hence no expansion of drug availability at all. However the uncertainty of the concept of 'adequate remuneration' is again a stumbling block on the way to a compulsory license because of the increasing risk of lawsuits.

Legal Review

Another obstacle is laid down in paragraph (i), which requires that it must be possible to judicially review the issuance of a compulsory license. In particular, the LDCs lack financial resources to compete in courts with international pharmaceutical giants. Such a review can also take a long time and therefore delay

the start of production. Apart from the problem that people often urgently need medicines cheaply, there is also the problem that no company will invest in the manufacturing of the product while legal uncertainties exist. The longer the issuance of compulsory licenses are delayed after patented drugs have entered the marketplace, the less time licensees have to recover their start-up costs and the more difficult it is to achieve effective competition among multiple generic substitute suppliers. Thus, if compulsory licensing is to be successful, expeditious licensing procedures are a necessity.[32]

Termination of License if Situation Changes

Another obstacle exists under paragraph (g) of Article 31, which requires a compulsory license to be terminated if and when the circumstances, which led to the issue of the license cease to exist and are unlikely to recur. This precarious aspect of a compulsory license will be seen by some as a large risk that discourages the request of a license by a third party, since they may not have sufficient time to recover their investment.[33] However, the decision to revoke the license is subject to the "adequate protection of the legitimate interests of the persons so authorized". Therefore paragraph (g) will not be a problem in most cases if a balance is struck between the rights of the patent owners and the interests of the licensee.

Conclusion

Although one of the main problems concerning the issuance of compulsory licenses is now settled by the decision of the TRIPS Council, compulsory licenses should not, however, be seen as a 'magic wand' for obtaining affordable access to patented medicines in developing countries, as there are the following limitations:[34]

Legal Obstacles

In general it can be said that the issuance of compulsory licenses especially in light of the new decision of the TRIPS Council is theoretically a good legal solution. However, the problem of remuneration remains. It would have been better if the TRIPS Agreement included a framework for the level of royalties to be paid. Since this is not the case, costly and time consuming lawsuits will result. The very high costs of disputes with the world's leading nations are frightening and discourage LDCs from asserting their rights.[35]

Furthermore the problem remains that states with no manufacturing capacities are dependent on the generosity of exporting countries. Nevertheless, in general the TRIPS Agreement theoretically provides a good flexible framework. However many

[32] Scherer and Watal, *supra* footnote 9, p. 28.
[33] Correa, *supra* footnote 15, p. 23.
[34] Scherer and Watal, *supra* footnote 9, p. 29.
[35] Dr.K. Balasubramaniam, '*Access to Medicines and Public Policy Safeguards under TRIPS*' p. 18, available from www.ictsd.org/dlogue/2002-04-19/Balasubramaniam.pdf, [accessed 29 April 2005].

states, especially developing states, have not fully incorporated this flexibility into their domestic legislation. The economic profiles and the scientific and technological capacity clearly indicate that a large number of developing countries do not have the resources to implement and enforce an efficient and effective intellectual property regime.[36]

Even if these states have the capacity, there is the problem of pressure from western governments not to use the legal rights provided by the TRIPS Agreement. Another reason for abstaining from installing the safeguards is the fear that they might loose foreign direct investment and therefore will fall even further behind in terms of economic growth.

However, it is rather doubtful they would really lose foreign direct investments due to weaker patent rights. LDCs in practice do not really compete with western countries for R&D facilities. The main reason, apart from lacking highly qualified scientists or infrastructure, is the fact that pharmaceutical companies benefit substantially from research supported by government funding. These subsidies include not only the results of research by government laboratories, but also big tax reductions for R&D expenses.[37] In addition, states with large pharmaceutical companies are often more willing to pay higher prices for medicines in return for pharmaceutical companies making future investments in that country. All these advantages are much too important for pharmaceutical companies to jeopardize by investing deeply into developing countries instead of their domestic markets.

It is true that by providing patent protection, developing and least developed members may provide some additional incentives to their local research communities. While not wishing to discount the value of this incentive, the quantum of innovation that is likely to be stimulated is very low, in terms of economic return, to offset the level of rent transfer from the developing to developed countries.[38] In addition less access to medicine and therefore worse health conditions, will also have a deleterious influence on a state's economy. For example it is estimated that HIV alone will reduce the economic growth of the worst affected countries by one to two percent per year,[39] and this again degrades future chances of access to medicines. This downward spiral can only be stopped if drugs are made more affordable. Therefore if affordability is jeopardised by excessively strong patent rights, not just lives are at stake, but also the economic health of these countries. Therefore LDCs should refrain from adopting excessively strong rights, especially TRIPS plus measures, and ensure the flexibility of TRIPS is properly implemented in their domestic legal framework.

The conclusion is that although there are constraints under TRIPS, developing countries still have considerable room to design their own national laws to address

[36] Balasubramaniam, *supra* footnote 35, p. 4.
[37] Correa, *supra* footnote 15, p. 17.
[38] Maskus, K., '*Intellectual Property Rights in the Global Economy*', p. 164 available from bookstore.iie.com/merchant.mvc?Screen=PROD&Product_Code=99, [accessed 29 April 2005].
[39] United Nations, *supra* footnote 5.

public health concerns. But developing countries, and particularly the poorest ones, will need technical and financial support to establish intellectual property systems that really address their health and, more generally, development objectives.[40]

Technical problems

Legal constraints are not the only problem that developing countries face when they want to use the flexibility of the TRIPS system. There are also technical problems.

Firstly, compulsory licensees must have the capability to 'reverse-engineer' or import the product without the co-operation of the patent owner. However, this is becoming more and more difficult. The companies that have the required research and development facilities, are often larger companies which are increasingly collaborating with multinational companies to achieve advanced capabilities and reach more markets. Such cooperation may be accompanied by tacit agreement to restrict competition in some markets.[41] In addition, the companies that have the necessary R&D facilities will become more and more reluctant to produce generics because they might become the 'target' of other generic producers in the future.

Economic problems

Even if all these problems were addressed, the problem of the economic feasibility of the issuance of compulsory licenses remains.

It is very likely that no private entity will invest in the development and manufacturing of the generics needed. The first and major threat to their profits is the level of royalties. If these are too high, the venture may be unprofitable.

All in all, the situation for the economic success of generics in developing countries is bleak. In a region like sub-Saharan Africa, the median health budget is 10 USD per year per person [42]and that USD 10 has to deal with childhood diseases, malaria and tuberculosis – just to name a few.[43] Therefore, often the only chance for developing countries to access medicines through the production of generics, will be to create generic companies themselves and accept that these companies will be unprofitable. But here again the problem arises that these countries are also the states that cannot afford to establish unprofitable companies. However, the losses of such companies will be small compared to the losses these countries will suffer without adequate health care. For example, it is estimated that in Botswana, the government will lose 20 per cent of public revenue by 2010 due to AIDS.[44] Compared to these numbers, an investment of several million into the creation of a generic company might be a worthwhile investment.

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[40] Scherer and Watal, *supra* footnote 9, p. 37.
[41] *Ibid*., p. 30.
[42] Attaran, A., *'Patents and Access to Essential medicines'*, p. 3, available from www.policynetwork.net/ pdfs/amir_attaran_17june2002.pdf>, [accessed 29 April 2005.
[43] *Ibid*., p. 41.
[44] United Nations, *supra* footnote 5.

In general, it can be said that there will certainly be private investors for generic markets like India or China,[45] but not for small countries like Botswana. And even in such big pharmaceutical markets like India, generic producers will concentrate on blockbuster medicines, not medicines required by a small part of the population.

In addition a compulsory license strategy can only work in cases where the disease patterns are common to different markets[46] and a medicine that can be copied exists. The problem is that for many diseases in developing countries no medicines have been invented. In general the incentive to develop a drug only for markets in developing countries is very small due to the small market and high investments costs. Some people argue that with the issuance of compulsory licenses, the incentive to develop drugs only for developing markets, will further decline because investors may fear that their already small profit base will be further reduced if the government overrides their patent.

Impact on Research and Development

The pharmaceutical industry is among the most R&D intensive industries, measured by the percentage of sales devoted to such activities.[47] However, it is also a fact that the pharmaceutical industry spends up to three times more on marketing than on R&D, therefore marketing seems to be an even bigger factor for the pharmaceutical companies than patents.[48]

Nevertheless, it is not surprising that the patent system is of particular importance for the pharmaceutical industry, as indicated by many studies and by the high profile the issue of patent protection has had in the industry's national and international public relations.[49] However it should be noted that high R&D expenditures are often largely facilitated by tax subsidies and public research institutions.[50] Thus 70 per cent of all drugs with therapeutic gain were produced with government involvement.[51] It is also a fact that between 1981 and 1991 less than five per cent of drugs introduced by the top 25 companies in the United States were therapeutic advances.[52] Today, a major part of R&D is spent on developing drugs that are substitutes for successful drugs but do not fall under their patent range. For example, there are efforts to develop substitutes for Viagra, cardiological medicines and other blockbuster drugs, although the therapeutic gain is small or non-existent.

Nevertheless it is undeniable that the pharmaceutical industry has developed some very important drugs, but it is also a fact that the patent system has totally

[45] Scherer and Watal, *supra* footnote 9, p. 30.
[46]. *Ibid.*, p. 32.
[47] Correa, *supra* footnote 15, p. 6.
[48] *Ibid*., p. 16.
[49] *Ibid*., p. 5.
[50] *Ibid*., p. 17.
[51] United Nations, *Human Development Report 1999*, p. 69, available from www.hdr.undp.org/ reports/ global/1999/en, [accessed 29 April 2005].
[52] *Ibid.*

failed to combat diseases that only exist in developing countries. Of the annual health-related research and development worldwide, only 0.2 per cent concerns pneumonia, diarrhoeal and tuberculosis − yet these account for 18 per cent of the global disease burden.[53] In general these neglected diseases cause 90 per cent of the global burden of disease, yet they account for only ten per cent of the global research.[54] As such, the UNDP[55] criticizes that

> "in defining research agendas, money talks louder than need − cosmetic drugs and slow ripening tomatoes come higher on the list than a vaccine against malaria or drought-resistant crops for marginal lands."

The situation has not changed since 1999. There is no visible increase in R&D for diseases such as malaria, schistosomiasis, trachoma, chagas, leprosy and leishmaniasis, despite the fact that most developing countries already grant product patents for pharmaceuticals and almost all countries have been bound to do so since 2005 with the exception of LDCs. It seems that there is not much R&D spent on diseases that only exist in developing countries. Therefore not much money can be deterred by the issuance of compulsory licenses for these 'developing countries drugs'.

For diseases, which also exist in developed countries, the market in developing countries is small compared to the home markets. The contribution to R&D that could be made by some developing countries or regions is negligible in global terms.[56] However, an extensive compulsory license policy in all developing countries could entirely destroy the already small incentives to produce and develop drugs for developing countries. A case study by C. Chien[57] concludes that compulsory licensing does not categorically harm invention. Threatening or implementing licenses on a regular, predictable fashion, may deter pharmaceuticals from initiating and carrying out R&D investments.[58]

Therefore developing countries should follow a twofold policy in issuing compulsory licenses. On the one hand for medicines, which are of global interest and also have a significant market in developed countries, the impact of compulsory licenses will be relatively small. On the other hand regarding drugs for special 'developing countries diseases', the governments of developing countries should be extremely careful with the issuance of compulsory licenses in order not to discourage investment.

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[53] *Ibid.*

[54] '*Tackling the diseases of poverty: meeting the Okinawa/Millennium targets for HIV/AIDS, tuberculosis and malaria*', available from www.number-10.gov.uk/su/health/03/default.htm, [accessed 29 April 2005].

[55] United Nations, *supra* footnote 52, p. 68.

[56] Correa, *supra* footnote 15, p. 21.

[57] Chien, C., *Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation*', p. 41, available from papers.ssrn.com/sol3/papers.cfm?abstract_id= 486723, [accessed 29 April 2005].

[58] *Ibid.*, p. 43.

It is sometimes argued that compulsory licensing reduces the amount of money invested in R&D by pharmaceutical companies. Of course this is true that by reducing the income of pharmaceutical companies, the amount of funds available for reinvestment is reduced as well. However, in order to leave developing countries' citizens as well off as before the introduction of patents, a three-fold increase in the number of new drugs is required.[59] Such an increase is very unlikely to happen even with higher profits. Therefore all in all, to get the best results for developing countries, compulsory licenses should only be issued for global drugs and not on drugs for special southern diseases.

Conclusion about Compulsory Licenses

TRIPS offers a good legal framework for compulsory licenses if the legal framework is fully utilized. However, this is often not the case, because developing countries lack the resources to fully implement the safeguards of this Agreement. Even where it is properly incorporated the economic hurdles remain. Due to a lack of financial or technological resources, in most cases the issuance of compulsory licenses can only be used as a lever to bargain with the original manufacturer for lower prices. Still, for this lever to function, the legal pre-requisites for a compulsory license have to be met. All in all, the impact of compulsory licensing on global R&D of the pharmaceutical industry will be small, compared to the gains developing countries will experience with healthier people and the resulting healthier economic growth. However, to further lower the negative impact on the future development of southern drugs, compulsory licenses should not be issued on a regular basis and should not be issued for southern medicines.

The only remaining problem is therefore the political pressure from developed countries, especially the US. It is not surprising that due to these hurdles, since the adoption of TRIPS, compulsory licensing for pharmaceuticals has occurred in Canada, Japan, the UK and the US, but in contrast not one compulsory license has been issued south of the equator.[60]

Parallel Trade

Compulsory licensing is not the only solution available under TRIPS to get access to cheaper medicines. Another solution is parallel trade. Parallel trade occurs when a product covered by intellectual property rights sold by, or with the right holder's consent in nation A, is re-sold in another nation (B) without the rights holder's authorization.[61] This may occur when there is a sufficient difference in price between the price paid in nation A and price charged in nation B. If the price

[59] Correa, *supra* footnote 15, p. 20.

[60] United Nations, *Human Development Report 2001*, available from hdr.undp.org/reports/global/2001/ en, [accessed 29 April 2005].

[61] Scherer and Watal, *supra* footnote 9, p. 30. Brazil (7th may 2007) and Thailand (29th November 2006) recently issued a compulsory license.

difference is big enough to cover shipping and other transaction costs and still offer gains to both the shipper and the nation B buyer,[62] parallel trade will be profitable. Parallel trade ensures that the prices paid in one country are the lowest possible worldwide, less of course taxes, transport costs and a small yield to the importer.

To set up parallel trade the country has to follow a policy of international exhaustion in contrast to a policy of national exhaustion. To understand the differences I will explain both policies.

In both cases the patent owner decides whether to place his product on the market or not. However, after the product has been placed on the market with the consent of the patent owner, the owner's rights are extinguished. This means he no longer controls the retail market and cannot forbid the resale of his product. In a system of national exhaustion he may still exercise these rights with regard to products placed on the market outside the domestic market.[63] Countries following this regime choose to isolate their markets from foreign competition. Under a national exhaustion system it is in theory possible to set up individual prices and conditions for each country.

In a system of international exhaustion it is permitted to import the patented product if it has already been put on the market by the patent owner anywhere in the world.[64] Therefore, international exhaustion systems should theoretically eliminate price differences between countries.

Legal Feasibility

Article 6 addresses the subject of parallel trade in the TRIPS Agreement, it states:

> "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."

Therefore the TRIPS Agreement leaves the decision to allow parallel imports to the states.

Economic Potential

Parallel imports have been advocated because they are said to allow countries to benefit from lower prices abroad and even price differences between different countries. However, even within the EU, where parallel imports are permitted internally, there remains considerable price variability. [65] These differences exist even though transaction costs (due to good infrastructure) are relatively low. Thus, there appear to be significant informal impediments to full price integration. Such

[62] *Ibid*., p. 30.
[63] Gillespie-White *et al*., *supra* footnote 8, p. 30.
[64] *Ibid*., p. 30.
[65] With the British price sometimes being 45 per cent higher than the price in Spain *see* K. Maskus, *'Parallel Imports in Pharmaceuticals: Implications for competition and prices in developing countries',* p. 29, available from www.wipo.int/about-ip/en/studies/pdf/ssa_maskus_pi.pdf, [accessed 29 April 2005].

impediments include consumer concerns that parallel imported drugs may be of lower quality, problems with marketing parallel imported medicines under unfamiliar brand names, differences in packaging, and the like.[66]

The question arises whether equal prices are really good for all countries. In fact, in a worldwide system of equal prices, this would probably amplify the health problems of developing countries rather than alleviate them. The small, least-developed countries would certainly not be well served by pharmaceutical companies if there is one globally uniform price.[67] All together, developing markets would be set aside, even though 80 per cent of the world's population live in these markets. But developing country markets account for only 20 per cent of the global pharmaceutical market[68]and are therefore not the main object of pharmaceutical companies. So the main beneficiaries of uniform pricing would be consumers in high-income countries.[69]

In a perfect world there would be different prices in different markets. The best way to determine the best price for the individual state and for the global economy is the so-called Ramsey pricing (Ramsey, 1927). Ramsey pricing concludes that for optimal consumer and investor welfare, all markets should be supplied with the new drug as long as they can pay a price that is above the marginal production costs. The reason for this is once R&D has developed a drug to serve affluent countries, no incremental R&D expense is needed to serve low-income countries.[70] The development costs are sunk, unrelated to how many people use it. These costs should be borne by as many people as possible.

Therefore, theoretically parallel imports seem to undermine health care in developing countries. It forces pharmaceutical industries to set one higher uniform price and therefore demand higher prices in developing countries because they cannot risk their profits in developed countries. Therefore, it seems that parallel imports should be banned.

However, if the pharmaceutical industry were to rely on Ramsey pricing there would indeed be no need for parallel imports in developing countries. In such a perfect system, per capita income would be an important determinant and could serve as a good approximation for the capacity of each country to make its contribution.[71] Therefore, prices in developing countries would be the lowest and there would be no need to import 'prices' from other countries.

However, Scherer and Watal made a price comparison of a number of AIDS antiretroviral drugs sold under brand names by multinational pharmaceutical

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[66] *Ibid*., p. 25.
[67] *Ibid*., p. 14.
[68] Correa *supra* footnote 15, p. 20.
[69] Maskus, *supra* footnote 66, p. 14.
[70] Danzon, P., *Differential Pricing for Pharmaceuticals: Reconciling Access, R&D, and Patents*, p. 5, available from www.cmhealth.org/Workingpercent20Groupper cent202, [accessed 29 April 2005].
[71] *Ibid*., p. 3.

companies in 18 low-income and middle-income countries from 1994–1998.[72] Across all country drug pairs they found that the average price in developing countries averaged just 15 percent below those in the United States. Indeed, in 98 cases the prices in developing countries were even higher than in the US – despite differences in income.[73] In another study Maskus[74] found that in ten of the 18 cases for which prices existed in both Italy and/or Spain, on the one hand, and in South Africa, on the other, the price was higher in South Africa. This is despite the fact that Italy has a per capita GDP of USD 26.00 whereas South Africa has only a GDP of USD 10.00.[75]

Therefore it is a fact that pharmaceutical companies sometimes charge excessive prices in developing countries. One reason for these prices is that developed countries often have price regulations in place. The market for pharmaceuticals in developed countries is often dominated by state run or controlled insurance companies, which negotiate prices. The bargaining power of these agencies is of course much higher than that of private people in developing countries.

Another reason for the high prices in developing countries is the so-called 'External Reference' system of many countries. This means that the agencies that negotiate the prices with the pharmaceutical companies do so by referring to prices the company demands in other countries. Given these linkages across markets, basic economics predict that manufacturers will rationally seek to maintain much higher prices in LDCs than they would require if markets were separate and price leakages did not occur.[76] A major conclusion of this analysis is that guaranteeing low prices in LDCs requires that higher-income countries abstain from trying to 'import' low LDC prices and that policies be established which enforce such market separation.[77] Another conclusion is that low-income countries do not have to abstain from a policy of parallel imports. In fact they already should have very low prices so parallel imports will not occur simply because it would not be profitable.

However, in many developing countries, such imports are not permitted or are permitted under different, in some cases, quite restrictive, conditions.[78] Even in those developing countries where parallel imports are permissible, they are often restricted by high tax tariffs. While almost all industrialized countries have zero tariffs on pharmaceuticals, many developing countries still have import duties and

[72] Scherer and Watal, *supra* footnote 8, p. 37.
[73] *Ibid*., p. 39.
[74] Maskus, *supra* footnote 66, p. 29.
[75] United Nations, *Human Development Report 2004*, available from hdr.undp.org/reports/global/2004, [accessed 29 April 2005].
[76] Danzon, *supra* footnote 71, p. 3.
[77] *Ibid*., p. 3.
[78] Correa, *supra* footnote 15, p. 26.

tariffs on these products.[79] Tariffs at the high end of the spectrum are on average upwards of 30 percent in some countries, including Pakistan, India and others.[80]

Impact on R&D

Again, the question to be answered is what impact do parallel imports have on R&D. Generally it can be said that of course every parallel import reduces the profit of the pharmaceutical industry and therefore reduces the future amount invested in R&D by pharmaceutical companies. However, it has to be kept in mind that a balance should be kept between access to the patented products and the profits of the pharmaceutical industry. When developed countries refrain from using parallel imports, especially from developing countries, the negative impact of parallel trade will not be very big. On the other hand parallel import laws in developing countries are a very easy method to protect these countries from over pricing.

Conclusion

Parallel imports are more a safeguard to protect developing countries from excessive price differences than a lever to lower drug prices under the already existing scope. However, to accomplish this object it is an easy and effective tool. If developed countries abstain from parallel imports from developing countries, the admission of parallel imports will do little harm to R&D. At a minimum, developing countries should have a system where they can allow parallel imports on a case by case basis, so as to use the parallel imported drugs as leverage when negotiating with original manufacturers to accept lower prices.[81]

Tiered Pricing

Another option available under TRIPS to access cheaper medicines is the use of price controls. The TRIPS agreement does not prohibit the use of price controls and price controls are already a feature of the pharmaceutical industry in rich and poor countries.[82]

Although price controls affect the profits of the manufacturer similarly to compulsory licenses, the willingness of the rights owner to accept these might be greater because the innovator company which chooses to serve the price-controlled market would retain control over distribution, and therefore control the colour, shape and size of products manufactured and distributed in poor countries.[83] This lessens the opportunities for the production of counterfeit goods and the possibility that

[79] Bale, H., *Consumption and Trade in Off-Patented Medicines*, p. 8, available from www.cmhealth.org/ docs/wg4_paper3.pdf, [accessed 29 April 2005].
[80] *Ibid*., p. 8.
[81] Maskus, *supra* footnote 66, p. 41.
[82] Grace, *supra* footnote 25, p. 48.
[83] *Ibid*., p. 48.

these products can be easily exported to developed countries and undermine profits there.

The problem, however, is that companies might not accept the set prices in developing countries as easily as in developed countries. In developed countries with the power to include or exclude new drugs in indexes for authorized or reimbursed drugs, national authorities can negotiate lower initial prices, or extract assurances that prices will not be raised above introductory levels.[84] However this is not the case in developing countries. Again the financial background that might be used as a threat is missing. In developing countries, there are often no large insurance companies that can negotiate lower prices by using their purchasing power as a lever. Whereas in OECD countries, almost 75 per cent of pharmaceutical expenditures are reimbursed in some way;[85] in contrast few developing countries have universal public health insurance schemes or public drug reimbursement systems.[86]

A price control system also needs a large administrative body. This is difficult for countries with limited regulatory capacity, because these governments have weak infrastructure to monitor costs of production or prices.[87]

Another difficulty appears if prices are set too low. In such a case patent holders could simply keep patented products off the market altogether.[88] This already happens. Recently the head of Pfizer announced that the company would threaten to withhold new treatment drugs from France unless the government allowed higher prices. Under current rules, a refusal to supply might be sufficient to trigger the national emergency provision allowing compulsory licensing.[89]

However, as discussed, compulsory licensing may not be economically feasible for some countries, unless certain conditions exist. On the other hand, if price controls are typically lax, the administrative costs of establishing and maintaining an effective price control regime over all patented pharmaceuticals may outweigh the benefits.[90]

Conclusion on the Conflict between TRIPS and Access to Medicines in Developing Countries

With the new Doha Declaration it can be said that a balance has been found between the interests of developing countries and the interests of patent rights owners.

[84] Scherer and Watal, *supra* footnote 8, p. 50.
[85] Jacobzone, S., *Pharmaceutical Policies in OECD countries: Reconciling Social and Industrial Goals*, p. 4, available from www.olis.oecd.org/OLIS/2000DOC.NSF/4f7adc214 b91a685c125 69fa005d0ee7/c125685b0057c558c12568c400331a1e/$FILE/00075948.PDF>, [accessed 29 April 2005].
[86] Scherer and Watal, *supra* footnote 8, p. 51.
[87] *Ibid*., p. 51.
[88] Grace, *supra* footnote 25, p. 49.
[89] *Ibid*., p. 49.
[90] Scherer and Watal, *supra* footnote 9, p. 53.

Therefore the TRIPS Agreement as a legal framework grants sufficient leeway for developing countries to address public health problems.

However, the solution is a good one theoretically, but not practically. Although, for example, LDCs are not obliged to introduce patents until 2016 for medicines, the problem is that they will not profit from this exception if they do not have the technical resources to produce the non-patented medicines on their own, or find a state that is willing to issue a compulsory license for them. LDCs will become even more dependent on foreign aid, be it technical aid or financial aid; or a willingness to issue a compulsory license. The impact on LDCs and their public health problems will not be direct but indirect through closure of supply sources. For developing countries the impact is more direct. Most have to pay royalties from 2006 to developed countries for use of their patents. At least in the short term the financial effect will be negative, resulting in a negative flow of resources to developed countries. However, developing countries will be compensated for these patent rights with better trade tariffs. Whether these advantages can, at least partly, counteract the disadvantages of the patent introduction, remains to be seen.

In the long term it is likely that the introduction of intellectual property rights will have a positive impact on foreign direct investment and maybe even development and transfer of technology to developing countries. If these goals are achieved, it will also have a positive impact on the public health concerns of these countries. In the end, poverty remains the major public health threat. Meanwhile, developing countries are advised to use the full flexibility of TRIPS. The impact of too strong and unaffordable patent rights for medicines, will not only result in a direct drain of financial resources, but also much more important indirect losses. Sick people cannot work and people who die early cannot use their acquired skills and pass them on to the next generation. It has to be asked whether it was really necessary to introduce patent rights for medicines in developing countries or whether it would have been better to exclude this topic for some time.

In the end, developed countries will pay the price for new medicines. With patent systems in developing countries in place, they have to, or at least should, give higher development aid to remedy the harm property rights have caused. Without patents they would have to accept a higher burden of compensation through higher medicine prices.

One major advantage of the new rights in developing countries could be the development of specific medicines to meet the needs of developing countries. This is one of the biggest problems for developing countries. As was stated before, of the annual health-related research and development worldwide, only 0.2 per cent goes to pneumonia, diarrhoeal diseases and tuberculosis – yet these account for 18 per cent of the global diseases.[91] Whether this situation has or will change with the introduction of patent rights in developing countries, will be the subject of the following chapter.

[91] United Nations, *supra* footnote 53, p. 69.

A good example of the failure of the existing patent system is malaria. Malaria kills 1–3 million people annually and accounts for 300–500 million new infections every year.[92] Malaria is a major public health problem in more than 100 countries, inhabited by some 2.4 billion people.[93]

The good news is that the malaria product pipeline is currently active. There are research teams in Australia, UK, USA and India. The bad news is that their interest is primarily in the lucrative traveller market.[94] So even though 2.4 billion potential customers suffer from this disease drugs are being developed for, relatively speaking, a handful of travellers. The entire anti-malaria market is currently about USD 200 million, for the most part limited to the traveller market (Ridley 2001).[95] This example makes it clear that even with TRIPS in place the incentive for private pharmaceutical companies to develop new drugs for specific 'southern' diseases is too small.

The problem is that the patent system that worked well for developed countries does not have the same effect on developing countries. Even though patent rights grant the right to demand higher prices and therefore recoup investments in theory, in practice this does not work in developing countries. The reason being that higher prices are not affordable for most people in developing countries, even if they are willing to pay. Therefore there are suggestions to revise the system as a whole, or at least modify it with additional stimuli for neglected diseases. In the next chapter I will analyse some of these proposals to see whether they are promising.

Modifications for Patent Protection

The Two Markets Modification

The first modification I want to analyse is by J. Lanjouw.[96] His proposal tries to minimize the payments of developing countries for 'global' disease treatments and then to reinvest the saved money in 'southern' disease R&D.

The system works as follows. Under his proposal there are still patent rights. However, there are two separate regimes, one for developing countries and one for developed countries. The rational behind the proposal is that a patent applicant can only choose to protect his invention in one of these regimes. This means he must choose one region where protection is granted but not both. Therefore, the inventor will estimate where he can earn more profits, in developed or developing countries. As a result, the inventor will always choose to protect his invention in developed countries if the drug medicates a northern or global disease, as he has more

[92] Milne *et al*., *supra* footnote 21, p. 39.
[93] *Ibid*., p. 39.
[94] *Ibid*., p. 42.
[95] *Ibid*., p. 42.
[96] Lanjouw, J., *A Proposal to Use Patent Law to Lower Drug Prices in developing countries*, available from www.cmhealth.org/docs/wg2_paper11.pdf, [accessed 29 April 2005].

financially to gain. Therefore this proposal practically limits the negative impact of 'northern' medicine payments. For 'southern' drugs, however, the inventor will choose to protect his invention in developing markets. The result of this proposal is that developing countries can effectively free ride on northern or global drugs, whereas the developed countries can free ride on southern diseases.

The result looks promising because southern states have to bear most of the costs for 'southern diseases' anyway. At a first glance the system seems very effective, but there are many problems.

Most important is, of course, the practical chance of such a proposal succeeding. It remains unclear why northern politicians would accept this system, since they just introduced a world wide system of patent protection to gain these extra returns from developing countries and in return provided better trade access. It seems very unlikely that northern politicians will suddenly, in an attack of pure gratitude and total ignorance of national lobbyists, accept such a proposal. Apart from that, another problem is that northern companies might be unwilling to supply the southern market with 'global' or 'northern' medicines, because they cannot gain much there. As a result of this non-supply strategy, developing countries would be free to produce and sell generics and to develop a generic industry. However, this would take time and therefore is very unlikely to happen in the near future.

In the end, developing countries might end up having to import these drugs from developed markets and therefore pay higher prices. Furthermore, it is uncertain whether there will be greater incentives to produce drugs for pure 'southern' diseases. First of all, due to the above stated difficulties it is questionable whether enough money will be saved with the purchase of 'global' and 'northern' drugs to allow the purchase of higher priced 'southern drugs'. Even if some money is saved and can be reallocated on the negative side, there will be income losses from developed markets. Although most of the earnings for 'southern' drugs are made in developing countries, there is for nearly all drugs, a small market in developed countries, too. Even though in terms of quantity this market may be small, this is often not the case for profit. Special medicines are often sold in developed countries for extremely high prices. In addition, developed states may be unwilling to pay high prices for products where predominant numbers are sold in developing countries. The motivation to pay such subsidy prices will be low, because in response to the higher profits made in developed countries, the rights owner might choose to protect his medicine in the developed country regime.

Therefore the goodwill to subsidize 'southern drugs' will be penalized with the introduction of patents in the 'northern' zone, because the market will be more lucrative than the 'southern' zone, but if developed countries try to pay low prices for medicine, in the end they will be rewarded with a 'southern' patent and can get the products almost totally free. This proposal would therefore undermine efforts to develop more medicines for the south with northern subsidy programs. The main problem is not even tackled by this system. Even without patents, most of the population in developing countries cannot even afford medicines priced on manufacturing cost. Therefore the problem of unattractive 'southern' diseases

remains and might even become worse. Therefore the 'two markets system' does not seem very good, or particularly easy to implement.

Push and Pull Programs

Another proposal made to specifically address the problem of neglected diseases are the so called 'push' or 'pull' programs. The term push program means that the development of a new drug is subsidized by public funds. This happens, for example, through grants to academics, public equity investments in product development, research and development tax credits, or work in government laboratories.[97] A pull program, on the other hand rewards the full development of a new drug. That means if a company invents a new product, it gets a bonus payment from the state. Roughly speaking, the distinction is between paying for research inputs and paying for research outputs.[98] The good thing about both proposals is that they are consistent with the already existing patent rights system. They are only add-ons, not a complete break with the system. Therefore, it may be politically much easier to introduce such programs.

Push Programs

The big advantage of a push program is that it does not bring results in only one specialized predefined area, but can be successful in all areas. For example, a tax credit program fosters development as a whole and not only for one special disease.

It is especially successful in promoting basic research. However, supporting basic research does not guarantee that a suitable product will be developed, even if millions of dollars are spent. Therefore, although push programs are advantageous for basic research, they are unsuitable for the development of an applicable product. Even if you are lucky with your push programs and a new drug is developed, such a development does not improve accessibility of the product.[99] The reason is that financial support has not secured any rights to the final product. This means the rights owner can, after getting potentially millions of dollars of tax subsidies, still decide where to sell the product and even more important at what price. Therefore, in the end a product might be developed, subsidized by tax money, which is still unaffordable to most people in developing countries. Tax credits may also create the problem of companies claiming credits for inappropriate expenses.[100]

Push programs in general have a high risk of financial loss without a strict monitoring process. However, this monitoring process can also be very costly and in the end bureaucrats may overestimate the chances of a drug being successfully developed simply to ensure they do not make themselves obsolete. As Kremer writes in his paper "[a] public entity on the other hand may acquire its own

[97] Kremer, M., *Public Policies to Stimulate the Development of Vaccines and Drugs for the Neglected Diseases*, p. 29, available from www.cmhealth.org/docs/wg2_paper8.pdf, [accessed 29 April 2005].
[98] *Ibid*., p. 29.
[99] *Ibid*., p. 35.
[100] *Ibid*., p. 36.

bureaucratic momentum, which can lead governments to throw good money after bad. Public sector institutions are notoriously difficult to shut down."[101]

To conclude, although push programs are critical for stimulating basic research, their record in stimulating actual product development is decidedly mixed.[102]

Pull Programs

Unlike push programs, pull programs only reward successful R&D. Therefore the risk of financing useless studies is minimized. There are, however, several ways to organize pull programs and of course such programs are also not unproblematic.

Research Tournaments

One way to organize pull programs are so called 'research tournaments'. In a research tournament, a sponsor promises a reward to whoever has progressed the farthest in research by a certain date.[103] One advantage of a research tournament is that you can stimulate several research teams, while only paying the best out of the public treasury. However, such tournaments have several limitations and are therefore not well suited to encourage vaccine and drug research. Firstly, a payment must be disbursed no matter what is developed. Another problem with tournaments is that once research has been completed, the award committee might be tempted to allocate the reward on grounds other than progress in research. The committee might award the reward to a more politically correct firm, to a university team, or to whoever has done the most scientifically interesting work, rather than to the team that has made the most progress toward the desired technology. Anticipating this, firms might invest in political correctness or scientific faddishness rather than in producing an effective product. Therefore research tournaments are not really the best way to find cures for neglected diseases.

Milestone payments

Another way to encourage research are so called milestone payments. Milestone payments are payments made after a predefined goal is reached. Milestone payments again have the advantage of attracting more research teams and being cheaper to finance than push programs. However, milestone payments do not target the ultimate objective of the development of the desired technology, and hence might stimulate wasteful investments in research that are unlikely to lead to a viable product. The larger the milestone payment, the greater this problem; if a milestone payment is greater than the cost of performing the research, firms might find it profitable to reach the milestone even if they know they can go no further. A more promising way might be to reward only the full development of the product.

[101] *Ibid*., p. 32.
[102] *Ibid*., p. 29.
[103] *Ibid*., p. 47.

Full Development Pull Programs

Full development programs can be implemented in a variety of ways. Predefined development aims or even only the full development of a new drug may be rewarded. The major flaw of all these programs is that they might be slower than 'milestone payments' or a 'research tournament'. In a research tournament or with milestone payments teams may be obliged to publish their results after the milestone is reached or the tournament is over. These published results can stimulate other research teams and therefore, in most cases with more research teams, the period of time until a final result is found is shortened. In contrast, such programs which tie incentives to the development of a product, may encourage researchers to keep their research results private for as long as possible in order to have an advantage in the next stage of research. [104]

Full development programs still might be the better choice if certain points are observed.

Clear Criteria

One very important point is the establishment of very clear criteria as to what the developed drug should accomplish. At first glance, it seems to be adequate to lay down the objective that a workable and successful drug against malaria is to be developed. However, the problem is to determine what is meant by a workable or successful drug. Therefore you have to lay down exact criteria for the side-effects, the treating-rate to be reached, the price and many other things. Otherwise you could end up with a fine drug that costs USD 200 that has to be constantly cooled to minus 30 degrees. Such a medicine would be totally unsuitable for a vaccine program in Africa. Even if the developed product fulfils all these criteria you still have to find a way to reward the winner.

Methods of gratification

Patent extension

The first proposal to reward the inventor of a new drug for a neglected disease, is to grant him a patent extension for one of the existing drugs he owns. Such a patent extension can be very valuable especially if it is applied to one of the blockbuster drugs. And at first glance, direct compensation for the work has to be paid, so it might be politically preferable. However, such a reward would only stimulate the big pharmaceutical companies and shift the burden of remuneration to one small group of people which is dependent on that other drug, instead of sharing the burden. The research team could even be sold to a large pharmaceutical company to maximise profits from a blockbuster drug by extending its patent. As such patent extensions are not recommended.

Fixed Reward

Another possibility is to give the first inventor a certain reward, like a trophy in a race. This way he can recoup his investments. However, this will result in the

[104] *Ibid*., p. 41.

inventor owning the patent. Accordingly, he can decide what prices to charge and where the goods will be sold. Again, you can end up with a medicine that is unaffordable, on which you have spent millions of dollars developing. However, there are two ways to solve this problem.

Buyout or Purchase Commitments

So-called 'buyout' or 'purchase commitments' are another option. The advantage of them is that no public funds are spent unless the desired product is developed.[105] The first option that I will analyse is the so-called 'buyout' commitment. 'Buyout' commitment means that a certain sum will be paid to the inventor if, in return, he assigns you his patent rights. The good thing about this solution is that you have full control over the invention and a competition between several licensees can be started to produce the least expensive product. Besides, if you declare the patent afterwards as free for public use, other research teams can start using the invention to find a better solution, which is based on the former patent.

However, there are also many disadvantages concerning the use of patent buyouts. While patent buyouts and commitments to purchase desired products are economically quite similar, purchase commitments more closely link payments to delivery of appropriate products and avoid the risk of buying out a patent only to discover that the original developer maintains effective monopoly rights because it possesses a trade secret.[106]

Compared to patent buyouts, product purchases also provide a closer link between payments and product quality. Vaccine purchase commitments, for example, could be suspended as soon as evidence appeared of unacceptable side effects.[107] Moreover, purchase commitments are likely to be politically more attractive than patent buyouts, and thus more credible to potential product developers.[108] Purchasing malaria vaccine for 50 million children each year at a few dollars a dose for ten years, is likely to be more politically appealing than awarding a multi-billion dollar windfall to a pharmaceutical manufacturer.[109] Therefore it might be better to offer to buy, for example, one million dosages per year for a period of ten years from the first inventor. Of course there has to be a fair and balanced price, but with such purchasing power, it should be possible to negotiate an appropriate price. If the purchase of several millions dosages is proposed, enough developers should be attracted, provided the proposal is reliable. Reliability is one of the key aspects of every pull program. In a pull program the investors always have to do their work in advance. For example, in the case of a purchase commitment for a malaria vaccine the potential investor probably has to invest millions of dollars in R&D before a suitable product is developed. Hence, to attract enough venture capital, the monitoring team has to be highly respected and the financial basis highly

[105] *Ibid*., p. 48.
[106] *Ibid*., p. 43.
[107] *Ibid*., p. 45.
[108] *Ibid*., p. 45.
[109] *Ibid*., p. 46.

reliable. Kremer[110] concludes that the annual revenue that must be earned by a successful vaccine should be around USD 336 million. This high number is a logical result of the high-risk potential investors are facing. For example, if potential biotechnology investors expect that a candidate product has a one in ten chance of succeeding, they would require at least a tenfold return on their investment in the case of success to make the investment worthwhile.[111]

Conclusion

Pull programs particularly in the form of a purchase commitment may provide the necessary incentives to develop new medicines for diseases such as malaria or tuberculosis. With the increasing resistance of viruses to existing medicines new vaccines are extremely important. Other than in the case of foreign aid, developed countries might be more willing to spend money for such a fund because most certainly the developer of the new vaccine will be one of their pharmaceutical giants. In the end it is just another form of subsidizing their own industry with the side effect of helping developing countries. If approximately ten states join in, each state will be required to contribute around USD 30 million. A small price compared to the damage these diseases inflict on developing countries. In addition, such a purchase commitment compared to foreign aid will appeal more to developed states because they can control the spending of the money and therefore the risk of corruption will be minimized. Another advantage of these pull programs is that they are consistent with the already existing property rights system and therefore easy to introduce.

However, with such pull programs only a few major diseases can be cured. There simply cannot be such a purchase fund for every 'southern' disease. However, even two or three funds for the major diseases would be a major breakthrough. The money that is invested in such programs will very likely have a good rate of return, even for developed countries.

Compared with the anticipated loss of USD 22 billion alone of South African gross domestic product in the year 2010, even the high sum of USD 12.1 billion calculated by Wong, Maskus and Ganslandt for a comprehensive purchase program does not seem to be so high.[112] Still, such a program would only be a step in the right direction, not the solution for all health problems in developing countries. Other necessary steps will be briefly discussed in the following chapter.

Other Problems Arising with Access to Medicines in Developing Countries

Even if the new medicines are invented with the help of pull programs and developing states introduce a flexible legal framework, developing states will still need a lot of help with their medical systems. Education is extremely important.

[110] *Ibid*., p. 81.
[111] *Ibid*., p. 78.
[112] Ganslandt *et al*., *supra* footnote 94, p. 21.

According to a WHO report an average of only 50 per cent of patients take their medicines correctly.[113] Therefore, even if the people have access to drugs they still have to be taught how to use them correctly.

One disease for which education is very important is AIDS. If people know how to protect themselves, tremendous results can be achieved. A study determined that a woman with primary education is 2.5 times more likely than a woman without schooling to correctly identify the main ways to prevent HIV.[114] Education not only has these direct effects, it also helps these countries improve economic growth which in turn saves people from diseases, because the main factor for health worldwide is the economic status of the person. [115]

Another aspect is the infrastructure of developing countries. They often lack the necessary medical personnel to treat people correctly and especially to detect diseases at an early stage. Fifty per cent of patients taking their medicines wrongly can be attributed to badly educated medical personnel, if there are any personnel at all. One major problem is that, in many countries, the bulk of public spending on health is directed towards hospitals in urban areas and specialist care at the expense of rural primary care facilities. As a result, primary care facilities are often short-staffed and lack medicines.[116] By increasing and strengthening these rural primary care facilities, programs could address important accessibility issues for the poor: travel time to the nearest facility or to a facility with needed or desired services and residence in a rural or neglected area, where services are scarce or unavailable. In Ghana, researchers estimated that reducing the average distance to the nearest public clinic could increase use by more than 90 percent. [117]

Again, the money spent for health care is not only a gift to these countries but an aid to help them help themselves. A recent World Bank study with 127 case studies examining why families fall into poverty, provides further evidence of medical impoverishment. In reviewing these cases, analysts identified health problems as the single most common trigger for the descent into poverty.[118] The reason for this is the fact that in these countries health insurance is not available and most medical care and medicines has to be paid out of pocket. Since the poor are also less likely to participate in employment based health prepayment or insurance schemes, they are more vulnerable to impoverishment as a result of fees.[119] The

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[113] WHO, *World Health Report 1997*, available from www.who.int/inf-pr-1998/en/pr98-WHA4.html, [accessed 29 April 2005].

[114] '*Global campaign for Education: Learning to survive: How education for all would save millions of young people from HIV/AIDS*', p. 9, available from www.campaignforeducation.org/resources/Apr2004/Learningpercent20topercent20Surviveper cent20finalper cent202604.doc, [accessed 29 April 2005].

[115] D. Carr, *Improving the Health of the Worlds poorest*, p. 8, available from www.prb.org/pdf/ImprovingtheHealthWorld_Eng.pdf, [accessed 29 April 2005].

[116] *Ibid*., p. 21.

[117] *Ibid*., p. 21.

[118] The World Bank, '*Dying for Change*' cited in D. Carr, *supra* footnote 116, p. 21.

[119] *Ibid*., p. 25.

solution to this problem is risk pooling or prepayment schemes, but these require far greater institutional and organizational capacity than out-of-pocket financing. Many low-income countries lack the managerial capacity required[120] and the financial resources to uphold such a system.

CONCLUSIONS

In the end, it all comes down to a question of adequate financing. Patent rights are no problem if financing is available to pay monopoly prices. In most cases pharmaceutical companies no longer charge monopoly prices in developing countries and if there is enough political will and persistence in developing countries the flexibility laid down in the TRIPS system can stop them from doing so in the remaining cases. Developed countries, especially the US, also must refrain from applying political pressure to preclude developing countries from using this flexibility. Certainly a patent system always includes the risk that some companies might use their monopoly powers inappropriately, but efficient antitrust policies can prevent this.

Even if there is an adequate antitrust policy, the flexibility of the TRIPS system is used to its full extent and pharmaceutical companies do not charge excessive prices, the problem that people still cannot afford drugs, even at normal rates, would remain. This can be documented by the lack of patents in many developing countries. For example, a study in 2001 in 53 African countries concluded that patents on antiretroviral drugs for HIV had only been applied for in 172 of 795 possible cases.[121] This means that the importation of generics is allowed in 623 cases. Still the majority of infected African people do not take part in an antiretroviral program. Therefore, patents are not the only reason for the lack of access to medicines.

Laying blame for the problem on the WTO and the TRIPS Agreement is overly simplistic and wrong, and does nothing to alleviate the crisis.[122] While it may be easy to use the drug industry as a scapegoat, patents do not alone block access to HIV/AIDS medications in sub-Saharan Africa. Even if antiretroviral HIV/AIDS drugs were freely available, there is still a lack of health care infrastructure to conduct testing, store and distribute medications, and monitor patient compliance with what are often very complicated regimes.[123] Even off-patented drugs are often not affordable. One reason for this is that developing countries often still have import duties and tariffs on these products while almost all industrialized countries have zero tariffs.[124] Tariffs at the high end of the spectrum are on average upwards

[120] *Ibid*., p. 27.
[121] Foreman, *supra* footnote 18, p. 13.
[122] Gillespie-White *et al*., *supra* footnote 8, p. 52.
[123] *Ibid*., p. 52.
[124] Bale, *supra* footnote 81, p. 8.

of 30 percent in some countries, including Burkina Faso, Pakistan, India, and Tanzania.[125]

Again it is wrong to blame the pharmaceutical companies alone but it is also wrong to completely let the industry off the hook. The pharmaceutical industry is to blame for the high prices in the past and only massive public pressure has 'convinced' them to reduce their prices. Furthermore, the pharmaceutical industry has not tackled the problems of 'southern diseases'. Of course it may be argued that the companies are only normal profit-oriented enterprises that make decisions based on operating efficiency, but perhaps the drug industry, despite its shareholders, must do better. To see how badly it did, here are some numbers. Of the 1223 new drugs approved between 1975 and 1997, 13 (less than one per cent) specifically treat tropical diseases.[126] Of course it might not be as lucrative to develop a drug for malaria as for diet pills, but pharmaceutical companies have always claimed that they are a special industry and need high profits to develop new drugs to subsidize drugs which are not lucrative. But they did much less. For years, the pharmaceutical industry has been making huge profits, while spending relatively little on R&D. For more than two decades it was the most profitable industry in the US. In 2002, for example, the ten drug companies in the Fortune 500 made profits of 17 per cent of sales, compared with a median of 3.3 per cent for all the Fortune 500 companies, and spent only 14 per cent of sales on R&D.[127]

It seems that the public and that means the developed countries have to step in by financing pull programs. To keep costs low such programs could be financed by lowering drug prices by using tiered pricing. The pharmaceutical companies could surely endure such a small decrease in their incomes because the pharmaceutical companies are one of the winners of the new worldwide patent system. According to a World Bank economist the minimum welfare loss to a sample of developing countries (Argentina, Brazil, India, Mexico, Korea and Taiwan) would amount to a minimum of USD 3.5 billion to a maximum of USD 10.8 billion, while the gains to foreign patent owners would be between USD 2.1 billion and USD 14.4 billion.[128] There will probably be higher drug prices in some countries, otherwise there would not be such financial gains.

Therefore, it would be fair if some of the new profits made by the pharmaceutical industry were expropriated from them in the form of higher taxes or

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[125] *Ibid*., p. 8.

[126] Lliaro, P., *Drug development output from 1975 to 1996: What proportion for tropical diseases ?*,cited by E. 't Hoen, *Access to medicines should not be a luxury for the rich but a right for all*, p. 2, available from http://npojip.org/jip_semina/semina_no3/ellen-e.pdf, [accessed 29 April 2005].

[127] Angell, M., 'Big Pharma is a two-faced friend', *Financial Times,* 19 July 2004, available from www.financialexpress-bd.com/index3.asp?cnd=7/31/2004&section_id=13&newsid=17350&spcl=yes, [accessed 29 April 2005].

[128] J. Nogues, 'Patents and pharmaceutical drugs; Understanding the pressure on developing countries', 24:6 *Journal of World Trade Law*, cited by Dr. K. Balasubramaniam, *supra* footnote 36, p. 13.

lower medical prices in developed countries and sent to developing countries in the form of foreign aid, or even to the pharmaceutical industry itself, in the form of pull programs. Such aid for the health care of people in developing countries is not only a human rights aid, but also an economically reasonable aid. A Zambian study shows that two thirds of urban households that have lost their main breadwinner to AIDS have experienced a 80 per cent loss of income.[129] The same study found out that 39 per cent lost access to piped water and 21 per cent of the girls and 17 per cent of boys dropped out of school. Again inadequate education is one of the main obstacles for economic growth. As I stated earlier, even if the costs for such a program are higher in the short term, in the long term it is the only way for developing countries to become independent of foreign aid.

In summary, it is fair to say that the new patent system is not as damaging to developing countries as many people think. However, foreign aid is required to establish national legal frameworks to enable them to use the full flexibility of TRIPS. If the extra profits are partly skimmed and used to develop new drugs and provide foreign aid, developing countries will probably be better off than before. Although one should not forget that developing countries did not accept these new property rights without a trade-off. In return they received greater access to markets and more trade opportunities. Whether the trade-off will compensate for these losses is hard to say and not the aim of this paper. The aim of this paper, however, is to show that TRIPS grants a flexible system, reveals how to use this flexibility and demonstrates what more can be done, especially by developed states, to foster the human and therefore economic health of developing countries.

[129] United Nations, *supra* footnote 5, p. 2.

THE DISAPPEARED CHILDREN OF EL SALVADOR – A FIELD STUDY OF TRUTH, JUSTICE AND REPARATION

Christine Lagström[*]

1. INTRODUCTION

The subject of this master thesis is the victim's right to an effective remedy and reparation for crimes against international human rights law committed during the armed conflict in El Salvador and the state's obligation to provide for this. In many post-conflict and transitional societies impunity prevails. Impunity is the term for the phenomenon where states fail to meet their obligations to investigate violations, to take appropriate measures in respect of perpetrators and this unwillingness to deal with past human rights violations leads to victims not being provided with effective remedies and reparation for injuries suffered. It is a fact that once state authorities fail to investigate the facts and to establish criminal responsibility, it becomes difficult for victims or their relatives to carry on effective legal proceedings aimed at obtaining just and adequate reparation. The topic of impunity and post-conflict justice has been increasingly dealt with in scholarly debate. However, the focus has mainly been put on individual criminal liability, so called 'retributive' justice. The recent development in the field of international criminal law and the creation of the International Criminal Court has inspired these discussions.

This study concentrates on the process of 'reparative' or 'restorative' justice at the national level. This sort of justice refers to efforts to acknowledge and repair the harm and pain of victims, even though nothing can ever fully repair the damage done to victims, or more specifically, to alleviate the suffering of a parent who has lost a child. Perhaps the most important goal of this process is the 're-humanisation' of the victims and their restoration as functioning members of society. Achieving these restorative goals is fundamental to both the peace and security of any state since it eliminates the potential of future revenge. In other words, providing victims with reparation is important to reconcile a post-conflict society. What makes the issue of victims' remedies for human rights violations problematic is that there are traditionally two tendencies in post-war societies: on the one hand, the civil society movement of human rights which demands truth, justice and reparation and on the other, the official politics of negation and impunity which insists on "forgetting and forgiving" the past.[1]

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[1] Bassiouni, C. M., 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights', in Bassiouni, C. M. (ed.), *Post-conflict Justice*, New York: Transnational Publishers, 2002, pp. 37–38.

For obvious reasons, grave and systematic violations of human rights are irreparable. There cannot be any proportional relationship between the reparation and the injury inflicted upon the victims. It is, nevertheless, an imperative of justice that responsibility of perpetrators should be established and that attention given to the victims in terms of reparation. Notwithstanding the widespread abuses of recent history, few efforts have been undertaken to provide redress to the victims and their families. This is the result of the fact that either the violating regime or a succeeding government often has treated post-conflict justice as a bargaining chip used in negotiations rather than an affirmative duty. Many national authorities consider the victims' perspectives an inconvenience and consequently ignore their rights in favour of the politics of impunity. Despite the fact that the victims' rights to a remedy and reparation in most cases has been neglected at the national level, it is becoming increasingly important in the case law of international human rights bodies as well as through the efforts to draft guidelines on the right to remedy and reparation, which aims at providing a framework that ensures redress of violations of human rights.[2]

The country chosen for study is El Salvador, which is the smallest and most densely populated country in Central America. Up to 50 per cent of the population lives below the poverty line and the literacy rate is about 80 per cent. The Salvadoran legal system is based on civil and Roman law, with traces of common law, and judicial review of legislative acts takes place in the Supreme Court.

During the 1980s, the country was torn by a conflict between the government forces and the guerrilla opposition, *Frente Farabundo Martí para la Liberación Nacional* (FMLN). There is wide agreement that the root causes of the conflict were twofold: the power of the armed forces and the depth of social injustice. Estimates reveal that more than 75,000 persons were tortured, subjected to extra-judicial killings, or simply disappeared during the Salvadoran conflict.[3] Thousands of children became victims during the conflict and hundreds disappeared. The peace was brokered by the UN and the final peace agreement between the Salvadoran government and the FMLN was signed in January 1992. Since the end of the civil war, El Salvador has started to build its democracy and when it comes to holding free elections El Salvador has succeeded fairly well. What still needs to be improved is the consolidation of the fragile democracy. The rule of law constitutes an important aspect of consolidating democracy and as long as impunity prevails for serious human rights violations democracy can never be fully consolidated.

Regarding the political situation in El Salvador during the last decade, great political polarisation remains between the right and left. In December 1992, FMLN became a political party, but they have not, until recently, been able to compete with the leading right-wing party, *Alianza Republicana Nacionalista* (ARENA). In the

[2] v. Boven, T., *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, 2 July 1993, E/CN.4/SUB.2/1993/8, pp. 341–342.

[3] The United Nations and El Salvador, The United Nations Blue Book Series, Volume IV, New York: UN Department of Public Information, 1995, pp. 6–7.

legislative elections of 2000 and 2003 the FMLN defeated the ARENA and was, for the first time, in majority in the legislative assembly.[4] Because of the success of the FMLN in the two previous elections, hopes were high that the left-candidate would be elected president in 2004. These hopes were crushed when the ARENA's Saca defeated the FMLN's Handal. Observers say that the election was fair, but that the campaign dirty.[5]

1.1. Purpose

The overall purpose of this study is to examine the problems of establishing truth, achieving justice and affording reparation to the victims of the disappearance of children and to see how this category of victims has been treated by the Salvadoran authorities. The first question is what obligations, according to international and regional human rights law, El Salvador has to comply with when a human rights violation has occurred, such as the enforced disappearance of a child. Has El Salvador acted in breach of these obligations and what might be the consequences of a breach? Thirdly, why does El Salvador not comply with international law? Finally, what are the prospects that the victims of enforced disappearance of children will be afforded remedies and reparations and will overcome Salvadoran impunity for past human rights violations? Will the case before the Inter-American Court regarding two disappeared Salvadoran sisters affect the situation at the national level?

1.2. Method and Material

This master thesis has been carried through as a minor field study conducted during two months in San Salvador, El Salvador. In San Salvador I conducted interviews with persons representing various institutions and organisations involved in questions of impunity, human rights and victim reparation. I also gathered written material, such as reports and resolutions on the question of disappeared children and I attended a seminar at *La Universidad Centroamericana*, regarding the issue of victims and justice. Besides the material gathered in the field, I have used written material regarding international human rights law; reports from Amnesty International; concluding observations and decisions on individual petitions by the Human Rights Committee (HRC); reports by the Inter-American Commission on Human Rights (IACHR); and judgments and advisory opinions of the Inter-American Court. I have used legal sources at the national level, such as the amnesty law of 1993 and the report of the Truth Commission is examined. International human rights conventions of interest for this study, and to which El Salvador is a state party, are the International Covenant on Civil and Political Rights (ICCPR) and

[4] *Nationmaster Encyclopedia>El Salvador*, available from http://www.nationmaster.com/encyclopedia/El-Salvador, [accessed 20 September 2004].
[5] Rehberg, W., 'Election Observers see fairly transparent vote but dirty campaign', *Nonviolent Ways Project*, available from http://www.nonviolentways.org/elsal-032004.html, [accessed 20 September 2004].

the American Convention on Human Rights (ACHR). However, El Salvador has not ratified, or even signed, the Inter-American Convention on Forced Disappearance of Persons.

In order to be able to draw conclusions from this study, I will apply standards of international law on the factual situation in El Salvador regarding the victims' rights to remedies and reparations and the state's corresponding obligations.

1.3. Delimitations

Since human rights that are codified in international treaties are to be protected first and foremost by the relevant national legal protection institutions, the study mainly concentrates on the national level. However, the Inter-American regional human rights protection mechanism will be examined to some extent. It is important in the case of disappeared children since the Inter-American Court has accepted a case concerning two abducted Salvadoran children. The scope of this study is limited to one specific category of victims – those affected by the disappearances of children. This has enabled me to look closer at the issue of the victims' rights to effective remedies and reparations. Regarding international law, I have chosen to limit the scope of this study to only take the provisions of the ICCPR and the ACHR into account, as interpreted by the HRC, the IACHR and the Inter-American Court of Human Rights. This delimitation is done since these general treaties contain provisions regarding effective remedies, which is of concern for this study. Thus, international humanitarian law will not be taken into account since it does not have any added value.

2. NEGOTIATING PEACE AND IMPLEMENTING THE PEACE AGREEMENT

When it comes to rebuilding a post-conflict society it is important to address the past. The Salvadoran negotiators had the benefit of looking for guidance at the experience of Argentina and Chile. However, the Salvadoran context called for a different approach than in these countries. El Salvador did not have a defeated or a wholly discredited military and the country was emerging from a civil war which had resulted in a large number of victims. In addition to the risk that military officers might destabilise the transition process, El Salvador had to assure FMLN participation in the political process. The government did not move towards any measures of truth and justice. The sensitive topic of how to address past abuses was left to the negotiating table.[6] However, the negotiations never addressed the need to reach a common understanding to determine the fate and whereabouts of victims, provide reparations and restore the good names of victims. Neither side seemed particularly concerned about protecting the rights of victims. The FMLN decided early on that justice at best would be symbolic and placed greater emphasis on

[6] Popkin, M., *Peace without Justice: Obstacles to Building the Rule of Law in El Salvador*, University Park: Pennsylvania State University Press, 2000, pp. 86–89.

forward-looking reform measures. An FMLN document made exemplary prosecution and punishment in four cases a prerequisite to cease-fire. It noted that after the resolution of these four cases, a broad amnesty would be appropriate. The government, for its part, argued that impunity was not exclusive to the armed forces and should instead be addressed as part of the negotiations on reforming the justice system. The government extended the FMLN's list of cases that ought to be investigated with four cases of violence attributed to the FMLN, but insisted that the 1987 amnesty law[7] barred prosecution of all other cases.[8] As for the final outcome of the negotiations, the San José Accords, signed 26 July 1990, provided the UN Observer Mission in El Salvador (ONUSAL) with only a tangential mandate to look at the past. All in all, the peace negotiations resulted in two measures for addressing past violations of human rights: the Truth Commission and the Ad Hoc Commission, which addressed the need to purge the armed forces of those responsible for massive human rights violations.[9]

Relative to other peace processes, the implementation of El Salvador's Peace Accords enjoyed remarkable success. Neither party ever broke the cease-fire.[10] ONUSAL began its verification of the San José Agreement nearly six months before the full peace settlement was finalised.[11] With the signing of the final accord, 16 January 1992, the function of ONUSAL was expanded to include the verification and monitoring of all the agreements. Verifying the peace accords was not an easy task, bearing in mind the societal polarisation caused by years of conflict. However, in sum, one can say that ONUSAL's verification in the end had positive results. It has contributed to ending the armed conflict, a decrease in human rights violations and constitutional and legislative reforms which have strengthened democratic institutions. Most observers agree that the transition to peace and democracy in El Salvador has been successful.[12]

Due to the government's massive violations of human rights, the FMLN, during the peace talks, prioritised reforms concerning demilitarisation and enhancement of human rights protection. The peace agreement contained sweeping military and police reforms and less ambitious, but still important, judicial reforms.[13] International bodies have decried the weaknesses of the Salvadoran judicial system and its inability to confront grave human rights violations. An independent, efficient, accessible and impartial justice system has not existed in El Salvador. The judicial reforms included new rules for electing judges at all levels, increased the budget of the judiciary, established a human rights ombudsman, gave the attorney general

[7] Ley de Amnistía, Decreto 805, Diario Oficial no. 199, Tomo no. 297, 27 October 1987.
[8] Popkin, *supra* footnote 6, p. 90.
[9] Call, C. T., 'Democratisation, War and State-Building: Constructing the Rule of Law in El Salvador', 2003, 35:4 *Journal of Latin American Studies*, p. 835.
[10] *Ibid*., pp. 833–834.
[11] Bar-Yaacov, N., 'The Role of Human Rights in Conflict Resolution in El Salvador and Haiti', 1995, 19 *Fletcher Forum World Affairs*, p. 51.
[12] *Ibid*., p. 54.
[13] Call, *supra* footnote 9, p. 832.

greater responsibility for directing criminal investigations and ended military court jurisdiction over civilians.[14] Many of the judicial reforms were difficult to implement and one obstacle was the Supreme Court, which remained hostile to the Peace Accords and to ONUSAL throughout its tenure (1989–1994). This meant that the judiciary did not take advantage of ONUSAL's presence in the country and no serious efforts to clean out the judiciary were undertaken. Finally, in 1994, an entirely new Supreme Court was elected, but the process of replacing incompetent judges in the lower courts, and of strengthening the Attorney General and Public Defender's offices, has moved more slowly. The government continues to work in all of these areas with the help of international donors.[15]

In much of Latin America, the ombudsman institution has been designed to serve as a key human rights safeguard in the process of restoring or establishing new democratic governments. In a country like El Salvador, where governmental institutions have violated citizens' rights, the potential scope of work for a human rights ombudsman is enormous. An effective ombudsman is likely to clash with governmental authorities.[16] In El Salvador, *La Procuraduría para la Defensa de los Derechos Humanos* (PDDH) was mandated by the constitutional reforms of 1991, and it was created to supervise the human rights situation in the country. The PDDH was given the power to investigate cases, give resolutions and make recommendations, and a special law regulates its work.[17] In the beginning the PDDH was slow to assume its responsibilities, determine appropriate priorities and establish necessary credibility and it did not start to work closely with ONUSAL staff until 1994. Since the establishment of the PDDH, it has shown that progress of the institution to a large extent depends on the will of the person who governs the institution, i.e. the ombudsman him/herself. One of the PDDH's major problems is the lack of effective follow-up mechanisms to ensure that recommendations are implemented. The Salvadoran entities, to which recommendations are directed, rarely, if ever, comply with these.[18]

3. ENFORCED DISAPPEARANCES OF CHILDREN

3.1. Patterns of Abduction

One of the most repressive periods in the armed conflict took place between 1980 and 1984, when government forces carried out cleansing operations of the civilian population. These military campaigns where designed according to the concept of counterinsurgency warfare, developed in the United States, where guerrillas could only be defeated by 'taking the water away from the fish'. This meant that the

[14] Popkin, *supra* footnote 6, p. 101.
[15] *Ibid*., p. 201.
[16] *Ibid*., p. 167.
[17] Ley de la Procuraduría para la Defensa de los Derechos Humanos, decreto no. 183, 20 February 1992.
[18] Popkin, *supra* footnote 6, pp. 170–172.

military operations were directed against the civilian population, who lived in the rural areas where the guerrillas had a stronghold.[19] The abduction of children was one strategy in the larger pattern of violence directed against the civilian and peasant population, who were considered to support the guerrillas and their goals. Various massacres, took place in the beginning of the 1980s and it was usually in the context of massacres families became separated through the abduction of their children or parents were murdered and the surviving children taken by the soldiers.[20]

The government denies that there existed a deliberate strategy to separate children from their families as a method to fight the guerrillas. Mr Mejía, representing the Salvadoran government on human rights issues, says that the disappearances of children never was a strategy of the government forces, but a consequence of the state of war that prevailed in the country at the time.[21] This is not consistent with information from other sources. Some ex-soldiers have declared that from 1982 they received explicit orders to take with them children they found during attacks on the civil population.[22] The PDDH (the Office of the Human Rights Ombudsman) has also declared that they are convinced that there existed a systematic practice to abduct children during armed forces operations.[23]

Not all disappeared children were abducted by the government forces, but also by the FMLN. According to figures provided by Pro-Búsqueda these cases constitute about seven per cent of the total amount of cases (51 of 731 cases). The majority of these children were separated from their families in order to serve as civilian shields at so called 'houses of security' in the capital and larger cities, from which the guerrillas operated. In some cases, parents were pressured, or even threatened, by guerrilla leaders to give up their children.[24]

There is no exact figure on the number of disappeared children. Since it started, the NGO specifically dealing with the issue of disappeared children, *Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos* (Pro-Búsqueda), has received 731 complaints of which 246 cases have been resolved. These figures are based on disappeared children of Salvadoran nationality under the age of 13. However, this number does not represent the actual number of all cases of children who disappeared during the war, only those that have been reported to Pro-Búsqueda.[25]

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[19] *La Paz en Construcción – Un Estudio sobre la Problemática de la Niñez Desaparecida por el Conflicto Armado en El Salvador*, San Salvador: Asociación ProBúsqueda, 2003, p. 15.

[20] 'Where are the "disappeared" children?', *Amnesty International*, 30 July 2003, available from http://web.amnesty.org/library/index/engamr290042003, [accessed 10 September 2004].

[21] Interview with Mejía Trabanino, Director of the Human Rights Division of the Ministry of Foreign Affairs, 11 November 2004.

[22] 'Los Niños Desaparecidos', *El Faro*, 7 July 2003, available from http://www.elfaro.net/Secciones/Especiales/Desaparecidos/Desaparecidos3_20030707.asp, [accessed 12 October 2004] and *La Paz en Construcción*, *supra* footnote 19, p. 16.

[23] Interview with Salazar Flores, PDDH, 24 November 2004; PDDH report about the *Serrano Cruz* case, 2 September 2004, pp. 3 and 8.

[24] 'Los Niños Desaparecidos', *supra* footnote 22.

[25] *La Paz en Construcción*, *supra* footnote 19, p. 24.

3.2. What Happened to the Children?

The separation from their families and the following events has influenced the lives of the disappeared children in different ways – socially, legally and psychologically. Pro-Búsqueda is not only searching for a disappeared child but for a different person. It is essential to bear in mind that between thirteen and twenty-five years have passed since the children disappeared and that these children now are young adults.

The disappeared children can be divided into five different groups. Cases of children who were given up for adoption can be divided into two categories: those who were adopted through a formal, judicial process and those who were adopted 'de facto'. The latter means that the children were registered as the biological children of the adoptive parents – they were appropriated. Other children grew up at orphanages or at military bases. The last group are those children who were subject to trafficking, which is characterized by the total eradication of the identity of the minor and therefore it is difficult to establish the actual situation of these children. It has not been judicially proved that some children were trafficked, but Pro-Búsqueda has gathered evidence that the practice of selling children existed.[26]

The children who were forcibly separated from their families usually ended up at orphanages. They were told that their families had abandoned them to join the guerrillas. At some of the orphanages it was common practice to give children up for international adoption. When it was necessary to obtain a birth certificate, the orphanage caretaker went to a municipal office and staff at the office then invented information about the identity of the child. The children who were too old for international adoption were institutionalized at the orphanages. To a large extent they got to keep their own names, but their birth date, birthplace and parents' names were altered. The identity changes have made the search for the children much harder.

Children, who were adopted 'de facto', ended up staying with a family. This mainly concerned the younger children. Some members of the armed forces took children and brought them to their homes. Not only did soldiers' families adopt children this way; many people knew that the armed forces brought children from war zones to military bases and some went there to claim a child. The easiest solution to regulate the child's legal situation was to register the child as being biologically theirs. To this day many of these children do not know that they are adopted.[27]

Some of the abducted children ended up living at the military base they were first brought to. This was, for obvious reasons, not a proper place for a child. The children were too young to be soldiers, so they helped with daily chores around the military base.[28]

[26] *Ibid*., pp. 27–28.
[27] *Ibid*., 2003, pp. 33–35.
[28] *Ibid*., p. 37.

3.3. The NGO 'Pro-Búsqueda'

Once the war had come to en end and the Truth Commission was set up in 1993, some families seriously began searching for their lost children. The first group of families who formed Pro-Búsqueda united during the process of documentation of the human rights violations, which took place in Chalatenango, as a part of the work of the Truth Commission. Some parents began to file cases regarding their disappeared children through the legal system. The Jesuit Father Jon Cortina, supported these families and helped them prepare their demands at the Court of First Instance of Chalatenango. Other families joined in the efforts to attain truth and justice, and this led to the formation of the *Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos* in 1994, for which Father Cortina became the director.[29]

Pro-Búsqueda's main mission is to "search for children who disappeared as a consequence of the armed conflict in El Salvador; and in the event they are found, respond to demands for truth, justice and reparation and to contribute to the creation of legal and institutional tools to find a solution to the problem".[30] Pro-Búsqueda strives to promote the search for children and defend the rights of the victims. Other objectives are to defend the children's right to an identity, promote the reconciliation and integration of families including adoptive families, and contribute to the moral and material compensation of the victims. Pro-Búsqueda promotes the participation of governmental institutions and NGOs and seeks to contribute to creating a historical record for the collective memory.[31]

Pro-Búsqueda receives complaints and documents the cases. In October 2004 Pro-Búsqueda had documented 731 cases and receives approximately three to four new cases each month. Cases are reported by family members, the 'disappeared' persons and by independent sources. Pro-Búsqueda has an investigation team and their work begins with an investigation on the whereabouts of the child in question (or the biological family). The process of investigation has to adapt to the circumstances of each case. In total, Pro-Búsqueda has located 246 children.[32] When a child has been located, Pro-Búsqueda offers to sponsor a family reunion. At the first few family reunions the children are accompanied by a psychologist. In addition, Pro-Búsqueda offers group therapy for both the children and the families, since there are many issues to deal with.[33]

Pro-Búsqueda is working towards convincing the Salvadoran state that it should take on its responsibilities in terms of truth and justice. In 1999 Pro-Búsqueda proposed to the Parliament that a National Search Committee should be created. Pro-Búsqueda has also taken several legal initiatives at the regional level, bringing

[29] *El día más esperado*, Pro-Búsqueda, San Salvador: UCA Editores, 2001, pp. 44–45.
[30] Plan Estratégico de Pro-Búsqueda 1998–2000.
[31] *En Búsqueda, Identidad – Justicia – Memoria*, publication of Pro-Búsqueda, época 2, vol. 9, August 2004, San Salvador, p. 5.
[32] Interview with the lawyer of Pro-Búsqueda, Victoria Ardón, 17 November 2004.
[33] *La Paz en Construcción*, *supra* footnote 19, pp. 64–65.

several cases before the IACHR, including the *Serrano Cruz* case.[34] What the victims of the enforced disappearances of minors want most of all is the truth and that those involved, the Salvadoran state, the armed forces and the FMLN, contribute and collaborate in the efforts to find it. In addition, it is important that the victims' suffering is recognised by the state (moral reparation) and that they should be afforded some form of material reparation. At this moment, justice in terms of bringing those responsible before court is not an important question. First the government has to recognise the rights of the victims and then the question of justice should be discussed.[35]

4. THE VICTIMS' SITUATION AT THE NATIONAL LEVEL

4.1. The Truth Commission

The Salvadoran Truth Commission (STC) received its mandate from the Peace Accords to investigate "serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth".[36] It was one of few measures aimed at dealing with past abuses of human rights. The STC was entrusted with making legal, political or administrative recommendations and it was brokered and verified by the UN. All three STC members were foreigners, for reasons of impartiality and credibility. It collected information for six months and had two additional months to write the report. It was a difficult task since there were thousands of cases to document. Offices were opened in various towns and the STC received 22,000 notifications and approximately 85 per cent of these were attributed to state agents. Only five per cent were connected to the FMLN.[37]

The report contained detailed information about 32 illustrative cases in order to describe the general pattern of violence, including violence from both sides of the conflict. Lack of time and funds hindered a further investigation of the majority of documented cases, which meant leaving many unanswered questions, including the destiny of those who disappeared. The end of the war and the establishment of the STC meant that families of disappeared children finally could report the violations to some kind of authority, but the systematic disappearance of children was not mentioned anywhere in the report. This was a disappointment for the families who had high hopes that the truth about the disappeared children would be revealed in the

[34] Interview V. Ardón, *supra* footnote 32.
[35] *En Búsqueda: Identidad – Justicia – Memoria*, publication of Pro-Búsqueda, época 2, vol. 3, October 2002, San Salvador, p. 11 and interviews with V. Ardón, *supra* footnote 32; Mejía Delgado, Director of CODEFAM, 2 December 2004; Rogel Montenegro, Director of CDHES, 9 December 2004.
[36] Article 5 of the Chapultepec Peace Agreement, entitled 'End to Impunity'.
[37] The Truth Commission Report: From Madness to Hope, 15 March 1993.

STC's report. The names of the disappeared that had been reported to the STC were listed in an annex to the report, containing the names of 18,000 victims.[38]

To fulfil its mandate, the STC proposed recommendations oriented towards the reconciliation and democratisation of Salvadoran society. For example, it recommended the formation of a judicial reform programme. When it came to the issue of punishing those responsible for violations, the STC recognised that the current judiciary was not capable of applying the law to acts of violence committed during the armed conflict and also that doing so could impede the goal of national reconciliation. However, the report indicated that bringing those responsible to justice could be possible in the future, when the administration of justice had been restructured. The STC aimed at promoting national reconciliation through recommendations designed to satisfy the victims' demands for justice and to encourage the Salvadoran society as a whole to acknowledge that crimes had been committed during the war. The STC stated that the truth is not enough to reach the goal of reconciliation – what is needed is an apology. The victims and their families are entitled to moral and material compensation and the construction of a national monument and the institution of a national holiday in memory of the victims should contribute to recognising the good name of the victims. Regarding material compensation the STC proposed that a special fund be established. The fund should receive an appropriate contribution from the state but, in view of the prevailing economic conditions, should receive a substantial contribution from the international community. It also recommended that not less than one per cent of all international assistance to El Salvador be set aside for the purpose of compensating victims.[39]

The report of the STC was not only unique because it was sponsored and staffed entirely by the UN, but also because the members of the STC decided to publish the names of those who were found to be responsible for human rights violations. This was a controversial decision but, according to them, not to name names would reinforce the very impunity to which the parties instructed the STC to put an end. If there had been an effective system of justice in El Salvador at the time of the publication of the report, it could have used the report as a basis for an independent investigation of those guilty of violations. However, a reason for establishing the STC was that the parties to the peace accords knew that the Salvadoran justice system was corrupt, ineffective and incapable of rendering impartial judgements. If the parties had not wanted the STC to name names they could easily have said so. However, the mandate did not contain such a restriction. In addition, the initial contact between the STC and the parties clearly indicated that they assumed that the STC would identify individuals responsible for serious acts of violence. The attitude of the government changed as it became known that the STC had gathered incriminating evidence against high-ranking government officials, such as the

[38] *El día más esperado*, *supra* footnote 29, p. 43
[39] The Truth Commission Report, *supra* footnote 37

minister of defence, General Ponce. The government started a diplomatic campaign against the publication of names, claiming that it would lead to a military coup.[40]

Once the report had been published on 15 March 1993 with the names of about 40 persons found guilty of violations of human rights, it was up to the Salvadoran government, and to some extent the FMLN, to comply with its recommendations. Regarding the recommendations aimed at democratisation, such as dismissals from the armed forces and from the civil service, the implementation level has been fairly high. The STC's recommendations have made a significant contribution to the establishment of a better balance between the executive, legislative and judicial organs, although reforms of the judicial system still need to be consolidated. However, it should be noted that the implementation of some recommendations owed much to the lobbying efforts of the international community. In contrast, there was very little international pressure calling for the compensation of victims and their families or the other reconciliation measures, and none of these elements of the recommendations have been implemented.[41]

4.2. Amnesty Laws and the Politics of Negation

In October 1987, the first amnesty law was approved by the Salvadoran legislative assembly. This law conceded an absolute amnesty to the authors and persons involved in political crimes, common crimes with political ramifications or common crimes committed by no less than twenty people committed before 22 October 1987. The possibilities of effective investigations, criminal prosecution and victim compensation were eliminated.[42] In January 1992, the legislative assembly passed another amnesty law called the Law of National Reconciliation, which applied to political crimes committed before January 1992. However, the amnesty did not apply to persons who, in accordance with the future STC report, had participated in grave human rights violations since 1 January 1980.[43]

Only five days after the publication of the STC report, a third amnesty law was hastily passed.[44] It provided a broad, absolute and unconditional amnesty to all those involved in political crimes, common crimes with political ramifications or common crimes committed by no less than twenty people, committed before January 1992, whether or not they had been sentenced or judicial proceedings had been initiated against them or not. The law extinguished both civil and criminal responsibility and broadened the definition of what constitutes a political crime to also include crimes against public peace, crimes against judicial activity and crimes committed as a

[40] Buergenthal, T., 'The UN Truth Commission in El Salvador', 1994, 27:3 *Vanderbilt Journal of Transnational Law*, pp. 520–522.
[41] Kaye, M., 'The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratisation: the Salvadorean and Honduran Cases', 1997, 29:3 *Journal of Latin American Studies*, p. 712.
[42] Ley de Amnistía, decreto no. 805, 27 October 1987.
[43] Ley de Reconciliación Nacional, decreto no. 147, 23 January 1992.
[44] Ley de Amnistía General para la Consolidación de la Paz, decreto no. 486, 20 March 1993.

consequence of the armed conflict. The justifications of the law were that the restrictions in the former law created a situation that lacked equity which was not compatible with a democratic process and that an unconditional amnesty was needed in order to promote and reach national reconciliation.[45]

The Salvadoran amnesty law is one of the broadest throughout Latin America and constitutes the most important corner stone that upholds prevailing impunity. Until now, there have only been investigations in a few prominent cases, but in general, thorough and independent investigations have not been undertaken and therefore no one has been brought to justice for the human rights violations that took place during the civil war. As a result of the 1993 amnesty law, the members of the armed forces sentenced in 1991 for killing six Jesuit priests and two staff members in 1989 were released. Despite decisions and recommendations made by international human rights bodies, the Salvadoran authorities continue to seek refuge under the unconditional amnesty law, which denies victims access to justice.

To this day the Salvadoran government has not officially recognised the existence of the practice of enforced disappearance of minors during the armed conflict. Government representatives acknowledge that children became separated from their families as a consequence of the war, but they refuse to admit the responsibility of the state for this and even claim that families supporting the FMLN abandoned their children in order to get involved in guerrilla activities and that the parents did not seem to care much about their children since it took such a long time before they started searching for them.[46] The FMLN, for its part, does not deny the fact that some children became separated from their families because of them.[47]

As a consequence of the Salvadoran state's unwillingness to recognise its responsibility, the victims' suffering have not been taken seriously. None of the STC's recommendations regarding material and moral reparation to the victims have been implemented: no official pardon on behalf of the government has been given, no national monument erected, no national holiday of remembrance instituted and no fund for compensating victims established. The victims have also so far been denied what is most important to them – to find out the truth and serious investigations into the cases.

The most extreme form of negation of the problem has been shown by some military personnel, who of course do not want to admit that children in conflictive zones systematically were abducted during the armed conflict. For example, the retired General Mauricio Ernesto Vargas made the following statement in 1995:

> (This accusation about the disappeared children) "is really like a novel by Gabriel García Márquez, or something like that . . . It never happened. Where are the children? Are they at some secret orphanage? Or did we eat the children? Fried?

[45] *Ibid*., preamble Articles III and IV.
[46] Interview M.Trabanino, *supra* footnote 21.
[47] *El día más esperado*, *supra* footnote 29, p. 294.

> Roasted? Or boiled? I really do not understand why they continue with these stories."[48]

The impunity in El Salvador arises from a lack of political will to deal with past abuses, which stems from the fact that state agents have committed or encouraged the vast majority of violations. Shortly before the presidential elections in March 2004, Antonio Saca, the ARENA party candidate, during an official visit to the PDDH declared that he considered the amnesty law necessary because the politics of 'forgiving and forgetting' so far had maintained the social harmony in the country and had contributed to national reconciliation. The human rights Procurator, Beatrice de Carrillo, did not agree, but said that the amnesty law continues to be a problem which affects human rights and the victims of human rights violations.[49] The president's attitude is a good example of the lack of political will to change the present situation. There does not seem to be any signs that the Salvadoran Government will change its view on the question of impunity and the amnesty law of 1993 will most likely not be taken away in the near future.[50]

4.3. Challenging the 1993 Amnesty Law

Soon after its enactment, the amnesty law of 1993 was challenged by human rights groups before the constitutional division of the Supreme Court. The amnesty law of 1993 clearly contravenes several provisions in the Salvadoran Constitution. The Court, abdicating from its constitutional powers, ruled that it did not have jurisdiction over purely political questions, which it considered the amnesty law to be. Since the Court viewed amnesties as political acts, they were removed from the categories of laws which could be overridden by international law. The reasoning was similar in a case before the criminal chamber of the Supreme Court, where the Court found that the amnesty law was consistent with the Salvadoran Constitution because the legislature had enacted the law through the sovereign power granted to it by the Constitution. Since the amnesty law was not an ordinary law, the Court found that it would prevail over treaty law.[51]

In 1997 and 1998 there were two new appeals, questioning the constitutionality of the amnesty law. In October 2000 the Court finally issued its decision where it ruled that the law was not unconstitutional per se, but that the amnesty law could not prevent actions in relation to violations of constitutional provisions, committed by state officials between 1 June 1989 and 1 January 1992. Therefore, Judicial officials have the discretion whether or not to prosecute.

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[48] *Ibid*., p. 25. Translation by the author.

[49] Informacion sobre las elecciones, available from http://www.elecciones2004.com.sv/NewsDetail.asp?ID=150, [accessed 31 August 2004].

[50] Interview with Efrén Arnoldo Bernal Chévez, Member of Parliament representing FMLN, 11 November 2004.

[51] *Guevara Portillo* case, Sala de lo Penal de la Corte de Justicia, San Salvador, 16 August 1995.

In 2003, the Human Rights Committee (HRC) considered the Salvadoran country report and questioned whether the amnesty law allowed victims to obtain justice. In response, the Salvadoran delegation said that the amnesty law was part of the process of reconciliation provided for by the peace accords and that the law respected all relevant international conventions to which El Salvador was a party.[52]

4.4. The PDDH and the Disappeared Children

In 1996, the PDDH received a complaint from Pro-Búsqueda, which included a total of 145 cases of disappeared children. As a response, the PDDH carried out an investigation. On 30 March 1998, the PDDH signed a resolution calling on the Salvadoran military and judicial authorities to undertake an investigation of the fate of the disappeared children.[53] Specifically, the PDDH issued a decision in five of the 145 cases, in which the enforced disappearance of eight children was established. Responsible military units were identified and two local court judges were accused of not having properly handled cases concerning disappeared children. The PDDH urged the National Defence Minister and the Joint Chief of Staff to order investigations and present the results to the competent judges in order to determine the relevant criminal responsibilities and to establish the whereabouts of the children and return them to their families, if such a measure would be in the best interest of the child. The PDDH also ordered material and moral reparation for damages caused to the victims and encouraged the government to sign and ratify the Inter-American Convention on Forced Disappearance of Persons.[54] The report and its recommendations were ignored by the Salvadoran state.

Since the end of 2001, Pro-Búsqueda has collaborated on a permanent basis with the PDDH. In March 2002, Pro-Búsqueda submitted information on four new cases to the PDDH and in February 2003, the PDDH issued another resolution regarding the disappeared children. This resolution mainly considers the state's obligations to deal with past violations of human rights. Among its recommendations the PDDH urges the Salvadoran state and the concerned authorities to investigate and inform the affected families, as well as the society, about the truth and facts of the disappearances, to sanction those found responsible and to afford the victims with adequate reparation.[55]

In February 2004 Pro-Búsqueda presented a communication to the PDDH, reporting its concern about the *Serrano Cruz* case before the Court of First Instance in Chalatenango. There were indications that due process had not taken place, especially regarding the investigative actions of the prosecutor. For this reason, Pro-Búsqueda requested the PDDH to verify that the rules of due process were being observed in the case and that the Procurator should comment on the results of this

[52] UN Press release: HRC considers civil and political situation in El Salvador, HRC 78th Session, 23 July 2003
[53] Popkin, *supra* footnote 6, 174
[54] PDDH Resolución sobre las Ninas Serrano Cruz, 30 March 1998, caso SS-0449-96
[55] PDDH Resolución, 10 February 2003, SS-0449-96, pp. 3, 22–23.

verification. In September 2004, the PDDH published a comprehensive report regarding the *Serrano Cruz* case, which was based on an investigation of the disappearance and how the Salvadoran authorities had handled the case.[56]

4.5. Habeas Corpus

The constitutional division of the Supreme Court has on various occasions issued decisions in relation to writs of *habeas corpus*[57] filed by the families of disappeared children. Between 1995 and 1998 three families have filed a writ of *habeas corpus*. The first to do so was the mother of the Serrano Cruz sisters. In the Supreme Court decision it was stated that *habeas corpus* is a means to obtain liberty for a person who has been detained against the law and not a means to investigate the whereabouts of a person illegally detained thirteen years ago. Since the *Batallón Atlacatl*, which was responsible for the disappearance, did not exist anymore, the military in chief could not be held responsible. In addition to this, there were no known cases of persons who were continuously held at military installations. Due to this reasoning, the Supreme Court found that *habeas corpus* was not an appropriate way to address problems of disappearances, which occurred during the conflict. The outcome was the same in the following two Supreme Court resolutions regarding disappeared children.[58]

In October 2002, the mother of the Contreras children filed a writ of *habeas corpus*. In its decision, the Supreme Court recognised the "constitutional violation of the right to physical freedom" of the three children, and urged the Attorney General's Office "to take the necessary measures, in line with its constitutional powers, to establish the condition and whereabouts of the disappeared children, with the aim of safeguarding their fundamental right to freedom". To date the Attorney General's Office has not taken any measures in this regard.[59]

4.6. National Search Commission

4.6.1. The Efforts of Pro-Búsqueda

Pro-Búsqueda has endeavoured to convince the Salvadoran government that it should take on its responsibilities in terms of resolving the important issue of disappeared children. In 1999, Pro-Búsqueda published a report about its

[56] Interview with S. Flores, *supra* footnote 23.

[57] *Habeas corpus* (or remedy of *amparo*) means that any person may present an appeal to a competent court for a writ of *amparo* on behalf of a person subject to illegal detention. The court may order the detainee to be brought before it and may order his/her immediate release after investigation of the legal situation, rectify the irregularities of his arrest or place him at the disposal of a competent judge. According to Article 11 of the Salvadoran Constitution all persons have the right to a *habeas corpus* when any individual or authority illegally or arbitrarily has restricted his/her freedom.

[58] *Agotamiento de los recursos internos como requesito para accesar al sistema interamericano de protección de los derechos humanos*, Pro-Búsqueda, pp. 2–3.

[59] 'Where are the "disappeared" children?', *supra* footnote 20.

investigations and one of the principal recommendations was that a search commission be established. This led to the presentation of a proposal for the creation of a *Comisión Nacional de Búsqueda de Niñas y Niños Desaparecidos de El Salvador* (CNB) to the legislative assembly in October 1999. This proposal set out "the need for an operating structure to be established, chaired by a council made up of the state institutions and civil society organisations competent in the issue, a technical committee with focus on law, social and psychological work and the appointment of an executive director responsible for implementing and fulfilling the council's agreements. In addition it should have a clear budget with which to operate."[60] The proposal was supported by members of the Family, Women and Children's Committee of the legislative assembly and was referred for further study and processing within that Committee. The proposal of the creation of a CNB gave hope to hundreds of families which still had not been able to find their disappeared children. Pro-Búsqueda had high hopes that future cooperation with governmental institutions and the possibility to obtain information from the armed forces would make the process of investigation considerably easier.[61] In addition to this, a CNB would have a great historical impact, since it would have been the first time that the Salvadoran state recognised the problem of disappeared persons.[62]

When the formation of a CNB was discussed in the legislative assembly, the positions of the political parties were heard. Even though the discussion indicated that all parties, except for the ARENA party, were in favour of the CNB, the result of the plenary different. This showed, not surprisingly, that there existed more powerful interests that influenced the political parties, which were more persuasive than the plea of the affected families to establish a CNB.[63] In April 2002 Pro-Búsqueda reiterated its petition of the creation of a CNB before the legislative assembly, but without success. Pro-Búsqueda has continued its efforts to make the creation of a functioning CNB a reality, which would provide legal backing to the activities of the NGO.[64]

4.6.2. The PDDH

In March 2002, the PDDH publicly expressed its position on the question of a CNB and it made clear that the adoption of judicial, legislative and administrative means in order to re-establish the identity of the disappeared children is a legal and moral imperative of the Salvadoran state, which is of great importance and urgency. The PDDH stated that state mechanisms had not functioned and that it was only thanks to the work of Pro-Búsqueda that some cases had been solved. The PDDH recognised the fact that the identity of those affected was not even close to being re-established and concluded that there had not existed any political will to make the state mechanisms work. The creation of a CNB would be a viable alternative for the

[60] *La Paz en Construcción*, supra footnote 19, p. 45.
[61] Interview V. Ardón, *supra* footnote 32.
[62] *La Paz en Construcción*, *supra* footnote 19, p. 67.
[63] *El día más esperado*, *supra* footnote 29, pp. 292–294.
[64] PDDH Resolución, *supra* footnote 55, pp. 5–6; Interview V. Ardón, *supra* footnote 32

Salvadoran state with the purpose of fulfilling its obligations towards victims. The PDDH also pointed out that resolved cases have showed that finding the disappeared children does not cause social instability and therefore, creating a CNB to provide the victims with the truth is the least the Salvadoran state should do.[65]

4.6.3. An Inter-institutional Commission

On 5 October 2004 the creation of an Inter-institutional Commission for the Search of the Disappeared Children was ordered by executive through a decree. This decree acknowledges that children were separated from their families during the armed conflict, but does not attribute any of the responsibility to the armed forces nor mentions that children were systematically abducted. The objective of this Commission is that various public institutions, such as the National Defence Ministry, the National Civil Police, the Office of the Public Prosecutor and the Procurator General of the Republic, should cooperate in the search for children who are still missing. The Commission will function for a period of four years.[66]

However, this Commission will probably not contribute much to finding the truth, since the institutions involved have not shown any interest in solving the issue. Those who know most about the disappeared children, i.e. civil society in general and Pro-Búsqueda in particular, have not been included in the Inter-institutional Commission. To publicly express their rejection of the recently formed Commission, several human rights organisations, with Pro-Búsqueda in the lead, had a demonstration on 4 November 2004. Pro-Búsqueda demanded that it should be integrated into the Commission, in order to give it some credibility. The demonstration march was intended to head for the Presidential House, but was hindered by police forces.[67] The Commission will most likely not be transparent or impartial enough to reach any satisfactory results. The creation of an Inter-institutional Commission was probably only a consequence of the *Serrano Cruz* case, which was to be considered by the Inter-American Court, and an argument that the Saladoran state could use as a defence before that Court.[68]

5. THE SERRANO CRUZ CASE

On 2 June 1982, sisters Erlinda and Ernestina Serrano Cruz (three and seven years old) were abducted by government armed forces during an attack on their village. Their older sister witnessed the abduction and it has been confirmed by a witness that the sisters were taken in a helicopter to the city of Chalatenango, where they

[65] PDDH Resolución, *supra* footnote 55

[66] Ley de una Comisión Inter-institucional, Decreto no. 45, 6 October 2004, p. 12.

[67] 'Buscan Ninos Desaparecidos de la Guerra', *La Prensa Grafica*, 4 November 2004 available from http://archive.laprensa.com.sv/20041104/nacion/36715b.asp>, [accessed 2 February 2005.

[68] Interviews with V. Ardón, supra footnote 32; S. Flores, *supra* footnote 23; R. Montenegro, *supra* footnote 35; M. Delgado, *supra* footnote 35; Pedro Cruz, IDHUCA, 15 January 2005; Engracia Chavarría, CPDH, 15 December 2004; B. Chévez, *supra* footnote 50.

were taken care of by staff from the Salvadoran Red Cross. After that, the fate of the sisters is unknown.[69] The Serrano Cruz family could not report the disappearance of Erlinda and Ernestina before competent authorities until 1993. However, the judge decided to archive the case, without having conducted any serious investigation. In 1995, the mother of the children filed a writ of *habeas corpus* before the Supreme Court, which decided that *habeas corpus* was not an appropriate way to deal with the disappearance. As such, the case was remitted to the Court of First Instance for further investigations. In 1996, the case was reopened, but when the court could not access information the case was archived a second time.[70]

Pro-Búsqueda, in cooperation with CEJIL (Center for Justice and International Law), filed a complaint to the IACHR in February 1999, alleging that El Salvador was responsible for the enforced disappearance of the sisters and for the subsequent failure to investigate the matter and provide reparation, thereby violating several rights contained in the American Convention on Human Rights. The Salvadoran state maintained that judicial proceedings were still open in the Court of First Instance of Chalatenango (the case had been reopened a second time in June 1999) and therefore requested the IACHR to find the case inadmissible for failure to exhaust domestic remedies. In February 2001, the IACHR found the case admissible. It concluded that "domestic remedies had not operated with the effectiveness required to investigate a complaint of forced disappearance – a category of serious human rights violations. In fact, nearly eight years have passed since the first complaint was lodged with the authorities in El Salvador, with no definitive finding of how the events transpired."[71] The IACHR tried to reach a friendly settlement, which was accepted by both Pro-Búsqueda/CEJIL and the Salvadoran state. However, the petitioners withdrew in January 2002, since there was not any political will on part of the state to reach a friendly settlement.[72]

In March 2003, the IACHR issued a report on the *Serrano Cruz* case, where it recommended the Salvadoran state investigate the case in a complete, impartial and effective manner, in order to establish the whereabouts of the sisters and in the event they are found, the state should provide reparation. The IACHR also recommended that the responsibility of the violation of human rights should be determined.[73] The Salvadoran state did not comply with any of the recommendations, claiming they were not binding upon the state. Because of this, the IACHR referred the case to the Inter-American Court in June 2003. As a response to the fact that the *Serrano Cruz* case was brought to the Inter-American Court, the Salvadoran judicial authorities

[69] PDDH Report, supra footnote 23, pp. 39–42.
[70] 'Agotamiento de los Recursos Internos como Requisito para Accesar al Sistema Interamericano de Protección de los Derechos Humanos', pp. 1–3.
[71] *Serrano Cruz* v. *El Salvador*, Report no. 31/01, 23 February 2001, para. 23.
[72] 'El caso de las hermanas Serrano Cruz: Una luz de esperanza para cientos de niños y niñas desaparecidas en el conflict armado de El Salvador', CEJIL, Primer Congreso Internacional sobre Derechos Humanos "Herbert Anaya Sanabria", San Salvador 25–26 October 2004, p. 6.
[73] *En Búsqueda, Identidad – Justicia – Memoria, Pro-Búsqueda*, época 2, vol. 6, September 2003, p. 5

attempted to prove that the sisters had never existed and the prosecutor intimidated a witness to give false testimony before the Inter-American Court. On request from Pro-Búsqueda, the PDDH investigated the case and wrote a comprehensive report on how it had been handled by the judicial authorities.[74]

The Inter-American Court decided that it was only competent to judge on facts that had taken place after the date El Salvador recognised the jurisdiction of the Court, which was 6 June 1995.[75] This implied that the Court could not judge on the question whether the Salvadoran state was responsible for the enforced disappearance of the Serrano Cruz sisters. In the judgment on the merits, the Court examined the national legal processes in order to determine whether El Salvador had breached Articles 8 (the right to a fair trial) and 25 (the right to judicial protection) of the ACHR. The Court found that El Salvador had violated these Articles to the detriment of both the sisters and their family. As a consequence of this breach, the Court also found that the family's right to personal integrity (Article 5 of the ACHR) had been violated.[76] Regarding reparation, the Court ordered the Salvadoran state to pay compensation mainly for mental harm caused to the victims and that other forms of reparation would be appropriate. Other forms of reparation included proper investigations, identifying and sanctioning responsible persons and searching for the victims. The Court also called for a functioning search commission, the creation of a search web page, the creation of a genetic information system, a public act where the state recognises its responsibility and medical and psychological assistance.[77]

The *Serrano Cruz* case, which is the first Salvadoran case brought before the Inter-American Court, is a significant case because it may have opened the door to overcoming impunity. However, the fight against impunity does not succeed over night; it is a long process. The *Serrano Cruz* case is a very concrete development and gives hope and strength to civil society to continue its efforts to fight impunity. This case is only the first step in making the Salvadoran state comply with its international legal obligations.[78] For Pro-Búsqueda and CEJIL the *Serrano Cruz* case is of significance in making the Salvadoran state comply with its obligations in this particular case as well as contributing to finding the truth about other cases of disappeared children. Human rights activists also point out that the *Serrano Cruz* case not only is important for the victims of enforced disappearance of children but for all victims of human rights violations which took place during the armed conflict. All parts of Salvadoran civil society have high hopes on the *Serrano Cruz*

[74] PDDH Report, *supra* footnote 23.
[75] *Serrano Cruz* v. *El Salvador*, Excepciónes preliminares, Sentencia de 23 de Noviembre de 2004, ser. C no. 118 p. 29.
[76] *Serrano Cruz* v. *El Salvador*, judgment of 1 March 2005, ser. C no. 120, paras. 107 and 115.
[77] *Ibid*., para. 218.
[78] Licenciado Aguilar, the PDDH, Seminario Regional "Víctimas y Justicia", IDHUCA, 12 November 2004.

case and what it will lead to regarding truth, justice and reparation at the national level.[79]

6. INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

6.1. The Right to an Effective Remedy and Reparation

In the event of human rights violations there is a right to an effective remedy before domestic authorities, which is laid down in numerous general human rights conventions, for example Article 2(3) of the ICCPR[80] and Article 25 of the ACHR.[81] The right to an effective remedy is also recognised in the UN Declaration on the Protection of All Persons from Enforced Disappearances (Article 9).

At the procedural level states undertake to establish suitable institutions to make decisions on alleged human rights violations. At the substantive level, reparation shall be provided to the victims.[82] The victim's right to a remedy for violations of international human rights includes the right to access to justice, which entails all available judicial, administrative or other public processes; adequate, effective and prompt reparation for harm suffered; and access to the factual information concerning the violations.[83] Regarding the requirement that the remedy should be effective, the Inter-American Court has stated that it is not sufficient that a remedy exists, but it must be truly effective in establishing whether there has been a

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[79] Interviews with V. Ardón, Pro-Búsqueda *supra* footnote 32; Gisela de Leon, CEJIL, 1 February 2005; E. Chavarría, *supra* footnote 68; P. Cruz, *supra* footnote 68; M. Delgado *supra* footnote 35; R. Montenegro, *supra* footnote 35.

[80] Article 2(3) of the ICCPR**: "**Each State Party to the present Covenant undertakes: a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; c) to ensure that the competent authorities shall enforce such remedy when granted.**"**

[81] Article 25 of the ACHR: "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake: a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b) to develop the possibilities of judicial remedy; and c) to ensure that the competent authorities shall enforce such remedies when granted."

[82] Nowak, M., *Introduction to the Human Rights Regime*, Leiden/Boston: Martinus Nijhoff, 2003, pp. 63–64.

[83] Bassiouni, C. M., *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, 18 January 2000, E/CN.4/2000/62.

violation of human rights and in providing redress.[84] The HRC has expressed that complaints concerning human rights violations must be investigated promptly and impartially by competent authorities in order to make the remedy effective.[85]

The distinction between remedy and reparation is that a victim's right to a remedy concerns the availability of avenues to obtain relief from a violation and the right to reparation concerns the particular form and measure of relief.[86] The different forms of reparation include restitution, compensation, rehabilitation and satisfaction. There is no legal requirement that all of these forms of reparation should be used, but the form and measure of reparation should be selected in accordance with the principle of proportionality, taking into account the nature of the violation and the harm suffered.[87]

In the context of remedy and reparation it is appropriate to deal with the mechanism in Article 63(1) of the ACHR, which establishes the right to 'international' reparation in favour of individuals. The provision provides for the possibility that the Inter-American Court can directly require a wrong-doing state to make reparation to the injured individual.[88] The individual does not appear to have an actual right to reparation on the international level prior to the judgment of the Inter-American Court. The victims of human rights violations have a right to remedy and reparation usually within their national legal order and only rarely at the international level. Moreover, even when individuals obtain a right to reparation through a judgment of the Inter-American Court, their only possibility to actually enforce that right is through the national legal order.[89]

6.2. Obligations of the State

6.2.1. The Obligation to Guarantee Human Rights

International human rights law imposes two categories of obligations on the state: the duty to refrain from violating human rights and the duty to guarantee respect for such rights. The first category comprises those obligations which are directly related

[84] *Villigrán Morales* v. *Guatemala*, Inter-American Court, 19 November 1999, ser. C no. 63, para. 235.
[85] HRC General comment No. 20 (44) on Article 7.
[86] Bassiouni, C. M., 'Proposed Guiding Principles for Combating Impunity for International Crimes', in Bassiouni, C.M. (ed.), *Post-conflict Justice*, New York: Transnational Publishers, 2002, p. 263.
[87] *Ibid*., p. 265.
[88] Article 63(1) of the ACHR: "If the Court finds that there has been a violation of a right or freedom protected by this convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."
[89] Pisillo-Mazzeschi, 'International Obligations to Provide for Reparation Claims?', in Randelzhofer and Tomuschat (eds.), *State Responsibility and the Individual: reparation in instances of grave violations of human rights*, The Hague: Kluwer Law International, 1999, pp. 170–171.

to the duty of the state to refrain, by act or omission, from violating human rights, which means ensuring that suitable measures are taken to ensure that such rights can be freely enjoyed. The second category refers to the state's obligations to prevent and investigate violations, bring to justice and punish perpetrators and provide reparations for harm and injuries caused. Legally speaking, the state is the guarantor of human rights and assumes basic obligations with regard to the protection and safeguarding of these rights.[90]

The duty to guarantee human rights has its legal basis in several human rights treaties. The provisions that are important for this study are Article 2(1) of the ICCPR[91] and Article 1(1) of the ACHR[92], which require states to respect the rights recognised in the conventions and to ensure to all persons within their jurisdiction the free and full exercise of those rights. These provisions implicitly suggest that human rights violations should be investigated and that victims should be afforded reparation for the wrongs done to them.[93] The jurisprudence developed by the Inter-American Court, the IACHR and the HRC views the duty to ensure and guarantee human rights as consisting of five basic obligations: to investigate; to bring to justice and punish the offenders; to provide an effective remedy; to provide reparation to the victims; and to establish the truth about what happened.

In its first contentious case, the *Velásquez Rodríguez* case, the Inter-American Court interpreted Article 1(1) in a comprehensive manner. The Court, in relation to the second obligation to ensure rights, stated that "as a consequence of this obligation, the States must prevent, investigate and punish any violations of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violations". The Court stated that there is a legal obligation "to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim

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[90] 'Argentina: Legal Memorandum on the Full Stop and the Due Obedience Laws submitted by Amnesty International and the International Commission of Jurists', ICJ, 26 February 2004, available from http://www.icj.org/news.php3?id_article=3246&lang=en, [accessed 15 March 2005].

[91] Article 2(1) of the ICCPR: **"**Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**"**

[92] Article 1(1) of the ACHR: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.**"**

[93] O'Shea, A., *Amnesty for Crime in International Law and Practice*, The Hague: Kluwer Law International, 2002, pp. 271–272.

adequate compensation".[94] In a case before the IACHR in 1996 the Court stated that "the duties of the States, to respect and to guarantee, are the cornerstone of the international protection system since they comprise the States' international commitment to limit the exercise of their power, and even of their sovereignty, vis-à-vis the fundamental rights and freedoms of the individual. The duty to respect entails that the States must ensure the effectiveness of all the rights contained in the Convention by means of a legal, political and institutional system appropriate for such purposes. The duty to guarantee, for its part, entails that the States must ensure the effectiveness of the fundamental rights by ensuring that the specific legal means of protection are adequate either for preventing violations or else for re-establishing the said rights and for compensating victims or their families in cases of abuse or misuse of power."[95]

The HRC to a larger extent than the Inter-American Court and the IACHR derives the obligation of states to take action on alleged human rights violations from the duty to provide an effective remedy, but it seems clear that the obligation to ensure the rights contained in the ICCPR also plays an important role. In the mid 1990s the HRC, in individual communications, started to refer to Article 2(1) of the ICCPR and the obligation to ensure the rights recognised in the Covenant. This is done in connection to statements about the state's obligations to take certain action on alleged violations.[96]

6.2.2. The Obligation to Provide an Effective Remedy

The ICCPR and the ACHR do not mandate state parties to pursue a specific course of action to remedy the violation of protected rights, but the provision clearly envisions that the remedy should be effective, which normally requires, in addition to a thorough investigation, access to court and fair compensation.[97] The right to an effective remedy is intended to ensure that a victim has a fair forum to present and pursue a claim that is free from unreasonable impediments and procedures that might foreclose a particular avenue. If a fair and free forum does not exist, the state must establish a new remedy to meet the concerns of the particular circumstances. Not only must states provide remedies that victims may pursue, but they must also ensure that victims are fully aware of their options and how to take advantage of them.[98]

The HRC has repeatedly stressed that state parties must comply with the fundamental obligation under Article 2(3) to provide a remedy that is effective. In addition to stating that state parties are under an obligation to take effective

[94] *Velásquez Rodríguez* v. *Honduras*, Inter-American Court, 29 July 1988, ser. C no. 4, paras. 165–166 and 174.
[95] *Chumbivilcas* v. *Peru*, IACHR, Report no. 1/96, 1 March 1996.
[96] *Vicario* v. *Argentina*, HRC, 27 April 1995, no. 400/1990, para. 11.3; *Bautista* v. *Colombia*, HRC, 13 November 1995, no. 563/1993, para. 11; *Laureano* v. *Peru*, HRC, 16 April 1996, no. 540/1993, para. 11.
[97] O'Shea, *supra* footnote 93, pp. 271–272.
[98] Bassiouni, *supra* footnote 86, p. 263.

measures to remedy violations, the HRC has spelled out specific types of remedies that are called for, depending on the nature of the violation and the condition of the victim. It has expressed the view that states are under an obligation to investigate serious violations; take appropriate action; bring to justice those who are found responsible; and to provide reparation to victims or to his or her family.[99] The Inter-American Court has stated that "everyone has the right to a simple and prompt recourse, or any other effective recourse, to a competent court or judge for protection against acts that violate his fundamental rights . . .". The Court further stated that Article 25 assigns "duties of protection to the States Parties through their domestic legislation, from which it is clear that the State has the obligation to design and embody in legislation an effective recourse, and also to ensure the due application of the said recourse by its judicial authorities".[100]

6.3. Enforced Disappearances

There are no universal conventions regarding enforced disappearances, but since enforced disappearances were widespread in Latin America under repressive governments, the OAS (Organization of American States) concluded an Inter-American Convention on the Forced Disappearance of Persons in 1994.[101] Article II defines enforced disappearances as "the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees". There is also a non-binding UN Declaration[102] and a draft international convention[103] on the issue of enforced disappearances. The UN Working Group on Enforced or Involuntary Disappearances was established 1980 and El Salvador is one of the countries with the highest number of reported cases.[104]

An enforced disappearance is a complex and cumulative violation of fundamental human rights. This is confirmed both in the Inter-American Convention on the Forced Disappearance of Persons, the UN Declaration and the draft convention, as well as in case law from the HRC and the Inter-American Court. The relevant rights in the ICCPR are: the right to life (Article 6); the prohibition of

[99] Boven, *supra* footnote 2, pp. 310–311.
[100] *Villigrán Morales* v. *Guatemala*, *supra* footnote 84, paras. 234 and 237.
[101] The Inter-American Convention on the Forced Disappearance of Persons, 6 September 1994, came into force 1996. Eight countries have ratified it, but El Salvador is not one of these.
[102] Approved by the General Assembly of the UN, resolution 47/133, 18 December 1992.
[103] Draft International Convention on the Protection of all Persons from Forced Disappearance, E/CN.4/Sub.2/1998/19, (1998).
[104] Nowak, M., *Report on Civil and Political Rights, Including Questions of: Disappearances and Summary Executions*, 8 January 2002, E/CN.4/2002/71, pp. 7–8.

torture, cruel, inhuman or degrading treatment or punishment (Article 7); the right to liberty and security of person (Article 9); the right of detainees to be treated with humanity and respect for dignity (Article 10); and the right to recognition as a person before the law (Article 16). The following provisions of the ACHR have proved to be relevant in disappearance cases: the right to juridical personality (Article 3); the right to life (Article 4); the right to humane treatment (Article 5); the right to personal liberty and security (Article 7); the right to a fair trial (Article 8). The Inter-American Convention on the Forced Disappearance of Persons mentions the abduction of children, but only in connection with the enforced disappearance of the parents.[105] The UN Declaration, like the Inter-American Convention, deals with the abduction of children of parents subjected to enforced disappearance and also the abduction of children born during their mother's enforced disappearance.[106] Article 18 of the draft convention addresses one of, what it considers, the most serious aspects of enforced disappearances, namely, the abduction of children and their subsequent adoption.

What distinguishes the enforced disappearance of children is that it violates the child's right to an identity, including nationality, name and family relations. In the case of the disappearance of an Argentinean child before the HRC, it was established that the abduction, falsification of the birth certificate and adoption entailed numerous acts of arbitrary and unlawful interference with the child's and family's privacy and family life, in violation of Article 17 of the ICCPR. These events were also held to be in violation of Article 23(1), which protects the family unit, Article 24(1) and (2) which recognise the right of every child to special measures of protection, including the recognition of the child's legal personality.[107] The Inter-American Court has also confirmed that the rights of the child (Article 19) are violated in cases where children are abducted.[108]

An enforced disappearance is not only directed against the person who disappears, but equally against their families, friends and the society in which they live. The families continue to live in a situation of extreme insecurity, anguish and stress, torn between hope and despair.[109] Both the HRC and the Inter-American Court have decided that an enforced disappearance can be seen as a form of inhuman and degrading treatment for the parents.[110]

[105] Article XII of the Inter-American Convention.
[106] UN Declaration on the Protection of All Persons from Enforced Disappearance, Article 20, para. 1.
[107] *Vicario* v. *Argentina*, *supra* footnote 95, paras. 10.4–10.5.
[108] *Villigrán Morales* v. *Guatemala*, *supra* footnote 84, para. 198.
[109] Nowak, *supra* footnote 104, p. 4.
[110] *Quinteros* v. *Uruguay*, HRC, no. 107/1981, 21 July 1983, para. 14; and *Blake* v. *Guatemala*, Inter-American Court, 24 January 1998, ser. C no. 36, para. 97.

6.4. Enforced Disappearances and State Obligations

In the first 'enforced disappearance' communication of the HRC, the Uruguayan Government was urged to take effective steps to establish what had happened to the disappeared person, to bring to justice any persons found to be responsible for his death, disappearance or ill-treatment, and to pay compensation to the disappeared person or his family for any injury which he had suffered. The HRC also urged that the state should ensure that similar violations did not occur in the future.[111] In a case concerning the disappearance of a minor, the Peruvian state was urged to provide the victim with a similar effective remedy, including proper investigation, compensation and bringing those responsible to justice.[112] In yet another disappearance case, the HRC said that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2(3) of the ICCPR . . . the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances and violations of the right to life, and to prosecute criminally, try and punish those held responsible . . .".[113] In the case of a disappeared Argentinean child, the HRC encouraged the government to "persevere in its efforts to investigate the disappearance of children, determine their true identity, issue to them identity papers and passports under their real name, and grant appropriate redress to them and their families in an expeditious manner".[114]

In the *Velásquez Rodríguez* case, the Inter-American Court urged the state to use all means at its disposal to carry out a serious investigation, to identify and punish those responsible and to ensure compensation to victims.[115] In another disappearance case, the Court further developed state obligations when it ruled that the right to a fair trial (Article 8 of the ACHR) "recognises the rights of the victim's relatives to have his disappearance and death effectively investigated by the Guatemalan authorities; to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained". In the judgment, the Court declared that Guatemala was obliged to use all means at its disposal to investigate the acts denounced and punish those responsible for the disappearance and death of the victim and ordered the state to pay fair compensation to his relatives.[116] In a case, which concerned the disappearance of Guatemalan street children, the Court discussed the obligations of the state in relation to Articles 8 and 25: "it is clear from Article 1(1) that the State is obliged to investigate and punish any violation of the rights embodied in the Convention in order to guarantee such rights; and, in the circumstances of the instant case, this obligation is related to the

[111] *Bleier* v. *Uruguay*, HRC, no. 30/1978, 29 March 1982, paras. 14–15.
[112] *Laureano* v. *Peru*, *supra* footnote 96, para. 10.
[113] *Bautista* v. *Colombia*, *supra* footnote 96, paras. 8.2, 8.6 and 10.
[114] *Vicario* v. *Argentina*, *supra* footnote 96, para. 12.
[115] *Velásquez Rodríguez* v. *Honduras*, *supra* footnote 94, para. 174.
[116] *Blake* v. *Guatemala*, *supra* footnote 110, paras. 97 and 124.

rights to be heard by the courts and to a prompt and effective recourse, established in Articles 8 and 25 of the Convention". The Court judged that the state had violated Article 1(1) according to which it was obliged to conduct a real and effective investigation to determine the persons responsible for the human rights violations referred to in the judgment and eventually punish them. The Court also ordered that the phase of reparations should be opened.[117]

6.5. The Legality of Amnesty Laws

The issue of amnesty was addressed by the HRC at an early stage, responding to the Chilean amnesty law of 1978, when the HRC questioned the validity of applying the amnesty to any person responsible for gross violations of human rights, particularly enforced disappearance. In its general comment on Article 7 of the ICCPR, the HRC concluded that: "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible." The HRC has repeatedly reaffirmed this precedent when examining amnesties passed by States parties to the ICCPR. For example, in its concluding observations to the state report of El Salvador, the HRC expressed its "concern at the General Amnesty Law of 1993 and the application of that Law to serious human rights violations, including those considered and established by the Truth Commission . . . the Committee considers that the Law infringes the right to an effective remedy set forth in article 2 of the Covenant, since it prevents the investigation and punishment of all those responsible for human rights violations and the granting of compensation to the victims."[118]

In a series of decisions, the IACHR has developed a fairly consistent view on the question of the international legality of transitional amnesty laws, finding its legal foundation in the *Velásquez Rodríguez* case.[119] In a case against Argentina, the IACHR considered whether violations of the ACHR had occurred as a result of the Argentinean amnesty laws. Argentina was held to have violated the petitioners' right to a fair trial under Article 8(1) read in the light of Article 1(1) when it denied their right to recourse, to a thorough and impartial judicial investigation to ascertain the facts. The IACHR also found that Article 25 of the ACHR had been violated and it held that Argentina had violated its obligation to ensure the free and full exercise of the rights recognised by the ACHR in terms of Article 1(1).[120] In a case against El Salvador, the IACHR found that the 1987 amnesty law violated Article 1(1) and the right to judicial protection under Article 25 of the ACHR. It further pointed out that

[117] *Villigrán Morales* v. *Guatemala*, *supra* footnote 84, paras. 225 and 253.
[118] Concluding Observations of the HRC: El Salvador, UN document CCPR/CO/78/SLV, 22 August 2003, para. 6.
[119] O'Shea, *supra* footnote 93, pp. 64–65.
[120] *Consuelo et al.* v. *Argentina*, IACHR, Report no. 28/92, 2 October 1992, paras. 37, 39 and 41.

the protection of the right to life and the right to personal integrity in Articles 4 and 5 are non-derogable and that Article 27 of the ACHR prohibits the suspension of guarantees indispensable to the protection of non-derogable rights.[121] In another case against El Salvador, the IACHR examined the Salvadoran amnesty law of 1993. Articles 8, 25 and 1(1) were held to have been violated. The IACHR also stated that "in expressly eliminating all civil liability, this law prevented the surviving victims and those with legal claims on behalf of the victims from access to effective judicial recourse and a decision on their possible efforts to seek civil compensation".[122]

7. ANALYSIS AND CONCLUSIONS

7.1. The Obligations of El Salvador

In general terms, the obligations of the state are to guarantee human rights within its territory and provide victims with an effective remedy when their rights, according to international human rights law, have been violated. These obligations are clear under both the ICCPR and the ACHR, to which El Salvador is a state party. However, the difference is that when a violation of a right contained in the ICCPR or the ACHR has occurred, the HRC tends to rely more on the obligation to provide an effective remedy and the IACHR and the Inter-American Court rely more on the obligation to guarantee rights in order to determine what action the state should take.

So, what are the obligations of El Salvador regarding the enforced disappearance of children, which constitutes a violation of human rights and has been committed within its jurisdiction? Before analysing this question it is important to point out that non-state actors, such as the FMLN, cannot commit the crime of enforced disappearance. However, this does not mean that the Salvadoran state does not have certain obligations towards the victims of human rights violations committed by private persons. It can be concluded that where the human rights of a person within the jurisdiction of El Salvador have been violated, either by a state-agent or by a private person, the state has an obligation to provide the victim with an effective remedy within the national legal system. Thus, in this case both victims of the practice of the armed forces and victims of the FMLN-abductions should be guaranteed their human rights and given an effective remedy by the Salvadoran state.

The two general obligations give rise to certain duties, which the state must comply with. This has been developed through the jurisprudence of the HRC, the IACHR and the Inter-American Court, since the ICCPR and the ACHR explicitly do not express what action the state has to take when responding to human rights violations. The state's duties are to investigate, bring to justice and punish those responsible; to provide reparation to the victims; and to establish the truth. In other words, the state is obliged to provide the victims of human rights violations with truth, justice and reparation.

[121] *Masacre Las Hojas* v. *El Salvador*, IACHR, Report no. 26/92, 24 September 1992.
[122] *Lucio Parada* v. *El Salvador*, IACHR, Report no. 1/99, 27 January 1999, para. 128.

Regarding the victims of enforced disappearance of minors this implies that they should be able to report the violations of human rights to the Salvadoran authorities, who then are obliged to carry out serious investigations. If the responsible person (or persons) is found in these investigations, he or she should be prosecuted and punished according to the national legal order. Since an enforced disappearance is a particularly serious human rights violation, disciplinary and administrative remedies do not satisfy the state's obligation to provide a remedy that is effective. The victims, which include the families of the abducted children, should be provided with access to the truth about what happened, both about the abduction and subsequent happenings. This obligation could be realised by a national search commission. Finally, the victims should be provided with fair reparation. In the cases where children were abducted by government armed forces, it is clear that the Salvadoran state is obliged to provide this. In the cases where persons within the FMLN were involved, the state must ensure that the victims have access to a fair forum where the victims can present and pursue a claim for reparation.

When dealing with the concept of fair reparation, which should be adequate, effective and prompt, the principle of proportionality is important. This means that the measure of reparation should be selected, taking into account the nature of the violation and the harm suffered. Since an enforced disappearance is considered to violate several fundamental human rights contained in the ICCPR and the ACHR, it must be held that enforced disappearances are of a grave nature. In addition, as stated in the draft convention on the enforced disappearance of persons, abduction of children and their subsequent adoption is one of the most serious aspects of enforced disappearances. Looking at the perpetrators' conduct, this does not make the nature of the violations less grave, at least concerning the conduct of government armed forces, where children usually were abducted during cleansing operations during which the civil population was indiscriminately attacked. Regarding the harm suffered by victims, it can be concluded that it has been extensive, both for children and families, and can be said to be of a moral nature. The next step is to see what form of reparation the victims are entitled to at the national level.

Many of the principles relating to the right to reparation in cases of enforced disappearance are in the process of being developed by the case law of monitoring bodies and courts and in the framework of the UN Human Rights Commission's principles and guidelines. The drafting of a legally binding instrument on enforced disappearances might contribute to the concept of the right to reparation. However, some conclusions regarding reparation for the enforced disappearance of children can be drawn, having the principle of proportionality in mind. Regarding restitution, those children, now adults, who are found should have the right to have their true identity determined and be issued identity papers and passports under their real name. However, in many cases the abducted children have built new lives with new identities, which makes restitution meaningless. Family reunions should be promoted in those cases where the child has been found, but the fact remains: what was taken away from the children – their identity – cannot be given back to the victims.

In order to provide victims with adequate reparation, it is clear from case law that compensation plays an important part. In cases of enforced disappearance of minors, effective reparation should include compensation for the mental suffering and pain of the children and their families. It is not an easy task to determine the amount of compensation, because it can never replace what has been lost, since the harm done to the victims is not material, but moral. Rehabilitation is one of the forms of reparation and in the case of disappeared children, what should be a part of any meaningful reparation is psychological care, mainly for found children but also for their families, as well as legal and social services.

Severe human rights violations, especially those that are part of a systematic pattern, understandably arouse demands for more than just compensation. Therefore, in order to provide the victims with adequate reparation, some measures of satisfaction are necessary. Satisfaction is a very broad category of reparation and some of the measures of satisfaction are already part of what constitutes an effective remedy, such as the establishment of the truth, including the fate and whereabouts of disappeared children, and measures against individual perpetrators. In this case the victims should have full and public disclosure of the truth about the practice of abducting children. In the cases where the FMLN was involved, the truth should be revealed about the facts that led to children being brought to so called 'houses of security'. The victims should also be afforded an official apology, including acceptance of responsibility. Furthermore, guarantees of non-repetition should be given and the victims' suffering should be remembered in special commemorations and tributes, which could take the form of a monument and/or a national day.

7.2. Is El Salvador in Breach of its Obligations?

Regarding the obligation to provide the victims with the truth, this has not been taken seriously by the Salvadoran state. The first chance for the victims to have some sort of over-all truth about what happened to the abducted children came with the Truth Commission. However, its report did not contribute to finding truth for this specific group of victims. On the contrary, they were the ignored victims of the armed conflict. The Inter-institutional Search Commission recently created by the Salvadoran government does not seem to have been established as a sincere effort to find the truth, but rather as a mechanism of protection before the Inter-American Court. So far it has not produced any results and it will most likely not do so, partly because the state still does not admit that children were subject to enforced disappearances because of the state's strategy to fight the guerrillas and partly because civil society is not involved in the work of the Commission. It is only thanks to the efforts of Pro-Búsqueda that the truth has been revealed in some cases.

When it comes to justice in the sense of conducting serious criminal investigations, bringing those found responsible to justice and punishing them according to law, the Salvadoran state has failed once again. The broad amnesty law of 1993, which is clearly contrary to the obligations to guarantee human rights and provide effective remedies, effectively hinders justice being done. The impunity

works from the government down to the judiciary, which makes it extremely hard to have the cases properly investigated. The *Serrano Cruz* case is illustrative of how difficult it is for victims to seek recourse. The lower court does not conduct a proper investigation and the remedy of *habeas corpus* does not give any result. It has even gone so far that the authorities are trying to prove the inexistence of the sisters. This means that the Salvadoran state has not ensured that the victims have had access to a fair forum, where they could present their claims, which is in violation of international and regional human rights law.

When the victims are denied truth and justice, the prospects for obtaining reparation are minimal. The Salvadoran state completely ignored the Truth Commission's proposal for a compensation scheme and the amnesty law also bars civil claims. All measures of satisfaction seem distant since the government does not admit its responsibility concerning the disappeared children, which makes it unlikely that an official apology will be given.

In conclusion, the Salvadoran state has breached its obligations according to the ICCPR and the ACHR to guarantee human rights within its territory and provide the victims of the enforced disappearance of children with an effective remedy, in the form of truth, justice and reparation. Impunity for past human rights violations, has prevailed in Salvadoran society ever since the conflict ended.

This refusal to comply with its international obligations means that El Salvador can be held internationally responsible. In this case it is the Inter-American Court that can judge on the question of responsibility of the Salvadoran state and that is what the Court has done in the *Serrano Cruz* case. It is clear that El Salvador is in breach of its obligations according to the ACHR and there are no problems of attributing the unlawful acts or omissions to the Salvadoran state, since the state is the guarantor of human rights within its territory and must provide effective remedies to victims. Consequently, the Salvadoran state is responsible for not complying with its international obligations. A judgment of the Inter-American Court, establishing state responsibility, does not have many implications for the victims at the national level, except for the family of the Serrano Cruz sisters, which will obtain international reparation according to Article 63(1) of the ACHR. However, even when individuals obtain a right to reparation through the Inter-American system of human rights, they only have the possibility to enforce that right at the national level.

7.3. Why does El Salvador not comply with International Law?

It is obvious from this study that the Salvadoran state has not acted in accordance with its obligations according to international human rights law. Not only has it failed to respect human rights, it has also denied the victims of the enforced disappearance of children access to an effective remedy, thereby failing to guarantee these rights.

The enforced disappearance of children was not mentioned in the STC's report, but the victims could at least hope that the report would open the doors to achieve

justice and obtain reparation. It is important to keep in mind that truth commissions are as effective as governments are prepared to make them, but the STC report did not seem to encourage the Salvadoran judicial authorities to undertake investigations, even where responsible individuals had been named. The STC recognised the moral imperative of punishment, but recommended that overcoming the dismal system of administration of justice should be a primary objective for the Salvadoran society. In addition, it did not take a strong line against the possibilities of a new amnesty law being passed. Because of this, the STC's report can be criticised for not putting more emphasis on the Salvadoran state's obligations according to international law. In failing to do so, it was easier for the Salvadoran authorities to avoid their obligations. It is important to bear in mind that a truth commission cannot substitute for the state's obligation to investigate violations within its territory, identify and punish those responsible and repair the victims' suffering.

However, as written above, to a large part it was up to the Salvadoran Government to comply with the recommendations of the STC's report, in order to make it successful. The government obviously did not find itself obliged to follow the recommendations of the STC, even though they had agreed to do so when they signed the Peace Accords. Instead a new, broader and unconditional amnesty law was hastily passed in the name of national reconciliation. This law and the politics of negation uphold the impunity, which hinders the victims from having independent investigations of their cases, achieving justice and obtaining reparation through the Salvadoran judicial system.

The reason for holding on to the politics of 'forgiving and forgetting' is that the Salvadoran state itself, or an arm of the state, the military, has committed or encouraged the vast majority of violations. It is quite clear that the Salvadoran Government does not recognise the victims and their right to reparation because of fear that this could lead to demands of prosecuting those who so far have been effectively protected by the mechanisms of impunity. This is probably the main reason why the victims are being denied reparation – the fear of the consequences of recognising the victims and their rights according to standards of international law. This fear is also most likely the reason why the Salvadoran government has not even established a compensation fund, created a national monument in remembrance of the victims or given a public apology, according to the recommendations of the STC. The government has decided that 'forgiving and forgetting' is the best option for everyone in order to reach national reconciliation, but the question is reconciliation for whom? The families which still have one or more children disappeared cannot just forget and go on with their lives as if these children had never existed.

The politics of negation has also strongly affected the Salvadoran judiciary. As the STC pointed out, the administration of justice did not work independently from the executive and still has not dared to challenge the prevailing impunity for past human rights violations. The Supreme Court's decision to abdicate from its power to rule the amnesty law as unconstitutional, by claiming the law is an entirely political

act, speaks for itself. In its last decision in 2000, the Supreme Court considered the question of constitutionality and found that the law was not unconstitutional per se and then exempted a period of time from the scope of the law. However, the Supreme Court made it clear that judicial officials should make the decision whether or not to prosecute, which poses yet another obstacle for the victims to obtain reparation. The Salvadoran Supreme Court has not worked sufficiently independent from the executive and this contributes to the fact that El Salvador has not complied with its international obligation to provide victims of human rights with an effective remedy. However, the decisions issued by the Supreme Court relating to writs of *habeas corpus*, filed by families of disappeared children, have shown that there has been a change in attitude, since the Supreme Court in its last decision urged the Attorney General's Office to take measures concerning the whereabouts of the Contreras children. However, the passivity of the Attorney General indicates that there still are many obstacles to overcome before impartial investigations and justice finally can be done.

The PDDH has on various occasions tried to influence the government to take on its responsibilities according to international law regarding the disappeared children. Even though the PDDH is a government institution it is hard for them to work against the strong powers that support impunity. The major problem of the PDDH is its lack of an effective follow-up mechanism to ensure that its recommendations are really being implemented. Therefore, when it comes to issues concerning impunity for past human rights violations, the Salvadoran institutions and authorities, to which recommendations are directed, rarely comply. The work of the PDDH is probably more effective when it comes to human rights violations at the present time, since it is not as politicised. In any case, the work of the PDDH concerning the disappeared children is important for the victims in the sense that it at least is trying to bring a change to prevailing impunity.

7.4. Will the Victims obtain Truth, Justice and Reparation?

Recently, the judgment on the merits of the first Salvadoran case before the Inter-American Court of Human Rights was issued and hopes are high in Salvadoran civil society that the impunity that has prevailed so far will weaken. For the victims of human rights violations the *Serrano Cruz* case could mean that the state will begin to realise that it has responsibilities towards the victims, since this judgment could put some pressure on the Salvadoran state to act in accordance with international law. Unfortunately, the Inter-American Court did not have competence *rationae temporis* to deal with the question whether El Salvador was responsible for the enforced disappearance of the Serrano Cruz sisters. A judgment on this matter could have placed even stronger pressure on the Salvadoran state to take on its responsibilities.

However, there are strong indications that the Salvadoran state will not be strongly influenced by the judgment of the Inter-American Court. First of all, it is rather worrying that the Salvadoran state has tried to prove the non-existence of the

Serrano Cruz sisters in front of the Court. The manner in which witnesses in the case have been treated by the Salvadoran authorities is also appalling. It is unlikely that the Salvadoran state, which began by totally ignoring the victims and claiming that they lied about their disappeared children, will recognise the rights of the victims. Secondly, this is the first Salvadoran case, which has been accepted by the Inter-American Court and usually it takes more than one case to make a state recognise its responsibilities according to international law. Thirdly, the fact that the Salvadoran government has not even acknowledged that children were abducted as a consequence of the government's counter-insurgency warfare is another obstacle for the prospect of achieving justice, truth and reparation.

Above all, the victims want the truth, serious investigations into the disappearances and some measures of moral and material reparation, such as an official apology and a reparation fund. They do not even talk about bringing those responsible to justice, even though this is one of the state's obligations according to international law. As written above, the Salvadoran state is not ready to comply with these demands, since doing so would recognise the rights of victims, which could lead to further demands of bringing responsible individuals to justice. In the view of the government, national reconciliation means that offenders of human rights law should be afforded protection from being prosecuted and that the victims should 'forgive and forget'. The Salvadoran state has not taken into account that every reconciliation must start with an apology and then move from there. There are no indications that the president Tony Saca, who was elected 2004, views the matter differently than his predecessors, so a change in the attitude of the government seems far away.

Lately the focus has been put on the creation of a Search Commission. For the victims the creation of an independent and credible CNB would be the best thing that could happen right now, since truth is what they want most. Pro-Búsqueda has dedicated much of its work to lobbying for a CNB and still it has not given up hope on the formation of a functioning CNB. The creation of an Inter-institutional Search Commission on behalf of the Salvadoran Government seems to be a step in the right direction when it comes to providing the victims with the truth about the disappearance of children. But looking more closely at the structure of this Commission, it will probably not function effectively since civil society is not included in it. In addition, the reason for creating the Inter-institutional Commission is ambiguous. It was most likely not created with a genuine wish to provide the victims with the truth, but because of the *Serrano Cruz* case, which is before the Inter-American Court. In conclusion, all this shows that the human rights movement's demands for truth, justice and reparation at the national level have so far not won over the government's politics of negation and impunity, which remain strong. However, civil society has not given up hope and has been inspired by the *Serrano Cruz* case. The persistent efforts of civil society, in combination with international pressure on the Salvadoran state, will hopefully weaken prevailing impunity, so that victims finally can obtain truth, justice and reparation.

7.5. Conclusions

According to international human rights law El Salvador has the obligation to guarantee human rights and provide victims with effective remedies when violations have occurred. These obligations apply in cases where children have been abducted by government forces, as well as in cases where the FMLN has been involved. These obligations lead to certain duties, namely providing victims with truth, justice and reparation. When determining what constitutes adequate reparation, the principle of proportionality is of significance. The true identity of the person should be legally established, if the found person so wishes. Compensation should be afforded to abducted children and their families for mental harm. Because of the gravity of the violation and the suffering caused to the victims, measures of rehabilitation and satisfaction should be taken.

It is clear that El Salvador is in breach of its international obligations to provide the victims of the enforced disappearance of children with truth, justice and reparation at the national level. This breach can lead to El Salvador being held internationally responsible. In this case it is the Inter-American Court that can judge on the question of state responsibility and that is what the Court has done in the *Serrano Cruz* case. However, such a judgment does not have direct implications for the victims at the national level, except by putting pressure on the state to comply with international law.

It can be concluded that the report of the STC did not put enough pressure on the Salvadoran state to provide victims with truth, justice and reparation in accordance with international law. However, the recommendations of the STC are as effective as the government is prepared to make them and in this case the politics of negation and the broad and unconditional amnesty law uphold impunity, which works to the detriment of victims. The main reason why victims are being denied reparation is probably fear of the consequences of recognising them and their rights according to international law. Therefore, the government claims that to 'forgive and forget' is best for national reconciliation. Misinterpretations and lack of respect for international law in order to justify the politics of negation can be seen as reasons why El Salvador does not comply with international law. In addition, the administration of justice has not been working independently from the executive and still has not dared to challenge the prevailing impunity for past human rights. The only government institution which tries to change the prevailing impunity for past human rights violations is the PDDH, but since it lacks effective follow-up mechanisms, the Salvadoran institutions and authorities rarely comply with the recommendations.

The *Serrano Cruz* case could put some pressure on the Salvadoran state to act in accordance with international law, but there are strong indications that the Salvadoran state will not be influenced significantly by the judgment. A change in the government's attitude regarding the politics of negation seems far away and as long as the state refuses to take on any responsibility for the disappearances of children, it will be difficult for the victims to be afforded reparation, and impunity

will remain strong. The Inter-institutional Commission created by the government will probably not function effectively; it was not created with a genuine wish to provide the victims with the truth. All this put together shows that the human rights movement's demands for truth, justice and reparation at the national level have so far not defeated the government's politics of negation and impunity, which remain strong.

WHAT IS THE ROLE OF PROFESSIONAL AND CIVIL SOCIETY ORGANISATIONS BEYOND INTERNATIONAL LEGAL MECHANISMS OF IMPLEMENTING HUMAN RIGHTS TREATIES?

Vincents Okechukwu Benjamin[*]

1. THE CHALLENGES OF IMPLEMENTING HUMAN RIGHTS TREATIES

International law authors approach the historical development of international human rights law from various perspectives[1] but consensus seems to converge around the atrocities of the Second World War as providing the immediate backdrop for the contemporary treaty regime on the subject. "[N]azi expansion and extermination practices under Hitler, coinciding with Stalin's reign of terror in the Soviet Union. These developments laid the groundwork for a broad consensus that a new humanistic legal order would be established."[2] This broad consensus found its first detailed expression in the adoption of the Universal Declaration of Human Rights (UDHR) on the 10 December 1948. Since the UDHR, the international community has embarked on a vigorous process of human rights standard setting. This has resulted in the adoption of many treaties including the six United Nations treaties, which are the focus of this paper. The said six treaties are, the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) (1965); the International Covenant on Economic, Social and Cultural Rights (CESCR) (1966); the International Covenant on Civil and Political Rights (ICCPR) (1966) and its first Optional Protocol (OP1); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); and the Convention on the Rights of the Child (CRC) (1989). Each of these treaties has set up a specific body to monitor and enforce compliance with the

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[1] *See* Shaw; M. N., *International Law*, Cambridge: Cambridge University Press, 2003, pp. 252–253; Henkin, L., 'International Law: Politics, Values and Functions', in Steiner, H. and Alston, P., *International Human Rights in Context*, Oxford: Oxford University Press, 2000, pp. 127–130; Eide, A. and Alfredsson, G., 'Introduction', in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights*, The Hague: Kluwer Law International, 1999, pp. xxv–xxviii.

[2] *Ibid.* p. xxvii.

treaty provisions.[3] The system of monitoring and implementation generally employed by the treaty bodies – the international legal mechanisms – include: reporting; inter-state and individual complaints; and studies and investigations.

1.1. The Challenge

Today, standard setting for the protection of human rights has largely matured. "The challenge now is to ensure that the promises contained in the treaties and affirmed through ratification are realised in the lives of ordinary people around the world. A paradigm shift to the true 'customers' of the system is necessary."[4] The enormity of the challenges of implementation become all too clear when the treaty regimes are put in proper perspective with the emphasis that the treaties were designed to be implemented at two levels: municipal and international, the municipal being the envisaged primary level of implementation. Using the ICCPR as an example,

> "Though the ICCPR imposes duties upon states in the international plane of law, it is envisaged that the implementation of the rights therein is primarily a domestic matter . . . International enforcement measures such as the supervisory mechanisms of the HRC, are designed to be a secondary source of ICCPR rights protection."[5]

This is probably a correct interpretation of Article 2 of the ICCPR.[6] In my view, despite the inherent inefficiencies of the international mechanisms (backlogs, overlaps, vagueness in findings and the routine disregard of findings by states when domestic convenience so dictates),[7] the major challenges of implementation of the treaties are to be found in domestic mechanisms. It can even be argued that part of the inefficiencies in the international mechanisms is a direct result of low-level implementation at the domestic sphere in some states. "A low level of domestic implementation of human rights norms in a particular country makes international supervision more important . . . in order for international human rights treaties to have an impact; an enabling domestic environment is required."[8] As such, it is

[3] Committee on Elimination of all Forms of Racial Discrimination; Committee on Economic Social and Cultural Rights; Human Rights Committee; Committee on Elimination of Discrimination Against Women; Committee Against Torture and Committee on the Rights of the Child.

[4] *See generally* Heyns, C. and Viljoen, F., 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', 2001, 23 *Human Rights Quarterly*, pp. 483–484.

[5] Joseph, S. *et al*., *The International Covenant on Civil and Political Rights Cases, Materials, and Commentary*, New York: Oxford University Press, 2000, p. 9; *See also* Pennegård, A., 'Article 5' in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights*, The Hague: Kluwer Law International, 1999, p. 122; Mose, E., 'Article 8' in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights*, The Hague: Kluwer Law International, 1999, pp. 187.

[6] *See also* Article 2 CESCR, Article 2 CERD, Article 2 CEDAW, Articles 2 and 4 CAT, Article 2 CRC

[7] *See* Heyns, *supra* footnote 4, p. 488

[8] *Ibid*, p. 518

crucial to examine the domestic level when exploring the extent of treaty implementation.

1.1.1. A Low Level of Domestic Implementation?

The question then is whether there is indeed generally a low level of domestic implementation of human rights. The starting point to any inquiry into implementation is the provision in all the six international human rights treaties under consideration that:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[9]

The operative term in Article 2(2) above are the words 'give effect' and as indicated, it should be by way of legislation and other measures. Other measures would necessarily include judicial recognition and enforcement of the treaty rights as well as implementation by the executive arm of the state.

The task of verifying wholesome implementation by these three arms of the government in each state is not a very easy one since the traditional reports on state human rights practices are not always so clearly demarcated. Fortunately, however some scholarly efforts provide some insight. A study initiated in January 1999 in collaboration with the Office of the UN High Commissioner for Human Rights, and concluded in June 2000 is useful for this purpose. The findings of the study are published in Christof Heyns and Frans Viljoen's *The Impact of the United Nations Human Rights Treaties on the Domestic Level.*[10] Twenty countries were surveyed, four from each of the five UN regions.[11] But the excerpts below are for the first five of the twenty countries based on the level of awareness of the major UN human rights treaties by the government (executive) and lawyers (including judges in some cases); as well as legislative reforms and judicial decisions:

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[9] Article 2 International Covenant on Civil and Political Rights, 16 December 1966; *See also* Article 2 CESCR, Article 2 CERD, Article 2 CEDAW, Articles 2 and 4 CAT, Article 2 CRC.

[10] The Hague: Kluwer Law International, 2002, also available in Heyns, C. and Viljoen, F., 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', 2001, 23 *Human Rights Quarterly* available from muse.jhu.edu/journals/human_rights_quarterly/v023/23.3 heyns.html, [accessed 30 June 2004].

[11] Africa; Asia; Eastern Europe; Latin America and the Caribbean; and Western Europe.

Australia:
"Government: Generally speaking, the level of awareness of the six human rights treaties throughout the Australian governments, both ministerial and bureaucratic levels, is not high, there are exceptions to the rule."[12]

Lawyers: "The human Rights treaties play no part in the work of legal practitioners in Australia. Even amongst lawyers in private practice who undertake discrimination cases the focus is wholly on the relevant domestic legislation . . . A number of judges – exclusively in the superior court – are also conversant with the treaties and have demonstrated that they are receptive to arguments based on them." [13]

Legislative Reform: "All law reform bodies in Australia (federal, state and territory) refer to and analyse international human rights treaties where they are relevant to their particular inquiries."[14]

Brazil:
Government: "The general level of awareness and commitment among officials of the state is still relatively low."[15]

Lawyers: "The level of awareness of the core treaties is relatively low. However this scenario has gradually begun to change in recent years. Some attorneys and judges have started to apply international human rights norms in contentious litigation."[16]

Judicial Decisions: "Although treaties are rarely invoked in courts, some references were found in cases before the national courts."[17]

Canada:
Government: "The general awareness of the treaties among government officials tend to be localised within those departments and jurisdictions with primary responsibility for preparing Canada's reports to the treaty bodies and those with mandates similar to the principles of the treaties."[18]

Lawyers: "Generally, awareness by lawyers of the treaties is localised among those whose areas of expertise include human rights and international law."[19]

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[12] Heyns, C. and Viljoen's, F., *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, The Hague: Kluwer Law International, 2002, p. 56.
[13] *Ibid.*, p. 60.
[14] *Ibid.*, p. 61.
[15] *Ibid.*, p. 97.
[16] *Ibid.*, p. 100.
[17] *Ibid.,* p. 103.
[18] *Ibid.,* p. 119.
[19] *Ibid.,* p. 122.

Legislative Reforms: "Limited legislative reforms were made at the time of the ratification of the treaties."[20]

Judicial Decisions: "Canadian courts do not rely heavily on human rights treaties as the basis of judicial decision-making; even the use of the treaties by the courts as interpretative guides is rare."[21]

Columbia:
Government: "knowledge of the treaty system is confined largely to those who participate in the reporting process, who see their task as responding to the formal demands of the process."[22]

Lawyers: "Only those lawyers – in government, private practice or NGOs – with some exposure to the treaty system are familiar with it."[23]

Legislative Reform: "There is very little indication of a conscious effort by the legislature to implement international human rights norms."[24]

Judicial Decisions: "In sharp contrast to the legislature, parts of the judiciary – in particular the constitutional court – play a very active role in implementing the treaties by testing laws against the "block of constitutionality . . ."[25]

Czech Republic:
Government: The general level of awareness differs among the treaties as follows: CERD, high; CESCR, not very high; CCPR, relatively high; CEDAW, low; CAT, high; CRC, average.[26]

Lawyers: "Although the new generation of lawyers is more exposed to the treaties, awareness remains limited aside from the members of the constitutional court."[27]

Legislative Reform: "There is no legislation that directly refers to the treaties. However, the overriding principle of Czech policy is respect for human rights."[28]

Judicial Decisions: "Court reference to international human rights treaties occur somewhat infrequently."[29]

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[20] *Ibid*., p. 124.
[21] *Ibid*., p. 125.
[22] *Ibid.*, p. 169.
[23] *Ibid.,* p. 170.
[24] *Ibid.*, p. 171.
[25] *Ibid.*
[26] *Ibid.,* pp. 203–204.
[27] *Ibid.*, p. 207.
[28] *Ibid.,* p. 208.

From these excerpts, doubtlessly, the treaty system has had enormous influence at the domestic level. Government officials and the new generation of lawyers and judges are more aware of the treaties. Additionally, available evidence suggests that the treaties have contributed in shaping the present understanding of basic human rights all over the world.

This notwithstanding, wholesome implementation is not yet reached in a good number of states. Unfortunately, even the general best practice amongst the surveyed states shows some room for improvement. Common concerns include situations where the awareness of the treaties is localised within the departments of the government charged with the duty of preparing reports for the international monitoring mechanisms; where knowledge of the treaties is limited to the new generation of lawyers and those that deal specifically with human rights; where there is limited legislative reform upon ratification of the treaties; and infrequent references to the treaties in judicial decisions. In some other states, there are some more serious concerns like a low level of awareness in the government, the absence of the treaties in national litigation, little or no legislative reforms involving the treaties and reluctance in the judiciary to employ the treaties even for interpretative purposes. For the latter states, the level of implementation of the treaties is sadly low.

The concluding observations and comments by the Human Rights Committee on the latest reports on the implementation of the ICCPR by the five states referred to above also reveal traces of a low level of domestic implementation in some of the states and areas of concern for others. The conclusions range from a catalogue of widespread human rights violations in Colombia[30] and Brazil[31] to lamenting the absence of a constitutional Bill of Rights in Australia[32] and gaps between the protection of rights under the Canadian charter and other federal and provincial laws and the protection required under the Covenant.[33] Furthermore, concluding observations and comments from all the treaty monitoring bodies and country

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[29] *Ibid.,* p. 210.

[30] *See* Concluding observations of the Human Rights Committee: Colombia, CCPR/CO/80/COL, 26/05/2004, available from www.unhchr.ch/tbs/doc.nsf/(Symbol)/25801461ec26db5d c1256ead00300713?Opendocument, [accessed 13 July 2004].

[31] *See* Concluding Observations of the Human Rights Committee: Brazil, CCPR/C/79/Add.66; A/51/40, 24/07/96, paras.306–338, available from www.unhchr.ch/tbs/doc.nsf/(Symbol)/9d8f4abc5536855fc12563ea0057e768?Opendocument, [accessed 13 July 2004].

[32] *See* Concluding observations of the Human Rights Committee: Australia, A/55/40, 24/07/2000, paras.498–528, available from www.unhchr.ch/tbs/doc.nsf/(Symbol)/e1015b8a76fec400c125694900433654?Opendocument, [accessed 13 July 2004].

[33] *See* Concluding observations of the Human Rights Committee: Canada CCPR/C/79/Add.105, 07/04/99, available from www.unhchr.ch/tbs/doc.nsf/(Symbol)/e656258ac70f9bbb80 2567630046f2f2?Opendocument [accessed 13 July 2004].

reports on human rights[34] contain reports of gross and continuous violations of human rights in some of the countries that have ratified the six human rights treaties under consideration. In varying degrees, therefore, low-level domestic implementation of the treaties remains very much a challenge in the contemporary human rights field.

1.2. The Limitations that Necessitate the Quest for Alternative Ways to Implement the Treaties

Given that *international* human rights treaties are designed to protect individuals who are primarily subjects of domestic laws and the consequent expectation of domestic implementation, it is difficult to mark a clear boundary between national and international institutions and processes.[35] This interrelationship of international and domestic law entails an interesting implementation challenge. Unfortunately, the commitment to implementation on the part of many states does not always parallel treaty expectations. Put more directly: the motivation for the treaties implementation is international but international law with its mechanisms is limited in its reach into domestic jurisdictions to stimulate implementation. The reasons include: independence/sovereignty of states, lack of incentive for inter-state complaints, and incorporation of human rights treaties. These will be discussed below.

1.2.1. Independence/Sovereignty of States

Independence is "the capacity of a state to provide for its own well-being and development free from the domination of other states, providing it does not impair or violate their legitimate rights".[36] It is perhaps the most outstanding characteristic of statehood.[37] In international law, the main corollaries of sovereignty include the right of a state to exercise jurisdiction over its territory and permanent population, the right of self-defence, and the duty not to interfere in the internal affairs or the exclusive jurisdiction of other sovereign states.[38] "At its very threshold and to this day, the human rights movement has inevitably confronted claims based on conceptions of sovereignty."[39] Of all the implications of sovereignty, domestic jurisdiction or non-interference thereof has been the most utilised. For example, "[t]he HRC initially refused to interpret its Article 40 mandate as authorising the issue of a consensus evaluation on a particular state's report and subsequent dialogue. Some early HRC members . . . felt that such a practice would unduly interfere with a state's internal affairs."[40] Today it is believed that issues related to

[34] *See e.g.*, Amnesty International Report 2004, available from web.amnesty.org/report2004/index-eng [accessed 15 July 2004].
[35] *See* Steiner, H., 'International Protection of Human Rights' in Evans, M. (ed.), *International Law*, Oxford: Oxford University Press, 2003, p. 758.
[36] *See* Shaw, *supra* footnote 1, p. 189.
[37] *Ibid.*
[38] *See generally* Shaw, *ibid.*
[39] Steiner and Alston, *supra* footnote 35, p. 572.
[40] Joseph *et al*, *supra* footnote 8, p. 12.

human rights and racial oppression do not fall within the closed category of domestic jurisdiction.[41] Regarding human rights, international law has begun to affect the hitherto exclusive jurisdiction of a state's treatment of its nationals. Judge Krylov in his dissenting opinion in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,*[42] maintained that the question of human rights and fundamental freedoms, which Bulgaria, Hungary and Romania were alleged to have failed to observe, was a problem of the functioning of the judicial and administrative authorities of those states. That there was no doubt that the question so defined belonged to the essentially domestic jurisdiction of the state and, as such, was out of the jurisdiction of the ICJ.[43] It is doubtful that this position would enjoy similar support today, as I believe it did then. In the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*[44] Judge Schwebel stated that

> "There is nothing to debar a State − or a revolutionary junta entitled to bind the State − from undertaking obligations towards other States in respect of matters which otherwise would be within its exclusive jurisdiction. Thus, under the Statute of the Council of Europe, every Member of the Council of Europe 'must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms' (Art. 3). Any Member which has seriously violated Article 3 may be suspended from its rights of representation. The history of the Council of Europe demonstrates that these international obligations are treated as such by the Council; they may not be avoided by pleas of domestic jurisdiction and non-intervention."[45]

This statement fairly represents the contemporary view on the position of human rights as they relate to exclusive domestic jurisdiction. Whether the truthfulness of this view supports the argument proffered by Judge Schwebel in the case is a different matter. Unfortunately, in practice, state sovereignty remains a barrier to the reach of the international human rights system into the domestic sphere.

1.2.2. Lack of Incentive for Inter-State Complaints

Connected to the foregoing are the problems relating to the distinctive features of enforcing international law. Generally, violations of treaty norms are primarily responded to via inter-state action. A state or group of states would bring the violation to the attention of either an international tribunal like the ICJ or international institutions like the organs of the UN to apply political and other pressures on the violating states. Accordingly, the six human rights treaties under consideration made special provisions for inter-state complaints. The inter-state complaints mechanisms have however never been used regarding the six treaties, partly because human rights treaties are very different from, for example, trade

[41] Shaw, *supra* footnote 1, p. 191.
[42] 1950 I.C.J. 65 para. 105.
[43] *Ibid.,* para. 111.
[44] 1986 I.C.J. 14.
[45] *Ibid.,* para. 383.

agreements. Therefore, state parties to human rights treaties lack the material incentives to act against treaty violating states.[46] For instance, if

> "The violation consists in Y's abuse of *its own* citizens. Why should state X invest its energies in trying to persuade state Y to stop such conduct? It would generally be foolish to assume that sustained inquiry into Y's abuses, let alone serious pressures and sanctions against Y, would originate in X or other state parties, which at most might suspend economic or military aid to the delinquent state."[47]

There are however many examples of inter state action emanating from other major human rights instruments and other judicial procedures.

1.2.3 Incorporation of Human Rights Treaties

The best and primary practice under the obligation to 'give effect' to the treaties is the incorporation of the treaties into the domestic legal system for dualist states[48] and if incorporation is used as one of the indices of domestic implementation, the 1999–2000 study[49] will reveal an implementation challenge. Out of the seven[50] dualist states surveyed, only one[51] had incorporated the human rights treaties into domestic law.[52] The absence of direct incorporation leaves a good part of the treaties, the treaty monitoring bodies' jurisprudence and procedure outside the purview of the judicature. A number of Canadian cases buttress this point; an example is *Ahani* v. *R*[53] where Dambrot J. Stated:

> "Canada has ratified, but not implemented into domestic legislation the *International Covenant on Civil and Political Rights, 1966*. It has also acceded to the *Optional Protocol* to the *Covenant* . . . While Canadian courts often look to international law when seeking the meaning of the Canadian Constitution, it is beyond dispute that international treaties and conventions are not part of Canadian law, and international treaty norms are not binding in Canada, unless they have been incorporated into Canadian law by enactment."[54]

The court went ahead and upheld the removal of Mr. Ahani, a convention refugee whose appeal against removal was pending before the Human Rights Committee, which requested Canada to stay the execution of the removal pending the examination of Mr. Ahani's communication.

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[46] Steiner and Alston, *supra* footnote 35, p. 562.
[47] *Ibid.*
[48] Dualist states are those in which treaties do not become part of the national law upon ratification or accession but needs formal incorporation by an act of parliament.
[49] Heyns, *supra* footnote 4, p. 490 (the entire article is on the findings of the study).
[50] Australia, Canada, Finland, India, Jamaica, South Africa, Zambia.
[51] Finland.
[52] *See* Heyns, *supra* footnote 4, p. 490 (the entire article is on the findings of the study).
[53] 2002 CarswellOnt 83.
[54] *Ibid.*, paras. 17–19.

1.3. Meeting the Challenge

What further steps can then be taken to meet the challenges of implementing modern international human rights law? Doubtlessly, no one scholarly work can provide all the answers to the above question. However, one way forward is concerted action on the part of professional and civil society organisations to complement governmental efforts at the domestic level. However, primary responsibility for implementation remains that of each government.

Some of the advantages of focusing on civil society include the building of a pervasive expectation in the general public through education without the need for formal state action. The resultant human rights based public opinion has the potential to positively influence formal implementation measures from the government. Examples of this abound. "Pressure and lobbying from civil society have facilitated ratification of treaties (e.g. India with respect to CEDAW and CRC; Jamaica with respect to CEDAW)."[55] It is my belief also that professional organisations like law teachers associations can autonomously improve the effectiveness of the implementation of the treaties. One way is by facilitating a human rights culture that would in turn influence the general implementation climate in a state. In a number of countries for example, the courts have taken the view that human rights treaties do not need special incorporation to have effect after they have been ratified by the state, provided such a treaty is not totally against the law. On the effect of lack of incorporation Ramadhani J. A., in the Tanzanian case of *Transport Equipment and another* v. *D, P. Valambhia*,[56] held:

> "Although Tanzania has ratified the international covenant on civil and political rights, admittedly, our legal position is that these instruments are not self executing. There has to be an act of parliament to make them operative . . . The fact that an international convention to which Tanzania is a party is not incorporated into Tanzanian law does not absolve the government of its duty to adhere to its undertakings in the agreement."[57]

This represents a change of course since Tanzania is one of those countries where judges traditionally refuse to implement treaties they consider non-self-executing. However, it is an example of the attitude shift that law teachers can and should hope to influence alongside the other efforts of the state.

2. THE LEGAL BASIS IN INTERNATIONAL LAW FOR THE PARTICIPATION OF PROFESSIONAL AND CIVIL SOCIETY ORGANISATIONS

The major human rights treaties including the ones under consideration were adopted by the UN General Assembly and the bulk of the institutions that form the

[55] Heyns and Viljoen, *supra* footnote 4, p. 494.
[56] Civil Application No. 19 of 1993 Court of Appeal, Dar es salaam.
[57] *Ibid.*

international mechanisms of implementation and monitoring are part of the UN system. Furthermore, some of the clearest mandates in international law for the said participation are contained in a number of resolutions and declarations of the organs of the UN, notably the General Assembly and the Economic and Social Council. I will accordingly begin this section by outlining the relevant provisions of the UN Charter. This will aid in bringing out the authority and value of those 'soft laws' and the weight to be attached to them.

2.1. The Charter Provisions

Article 1(3) stipulates one of the purposes of the United Nations as being "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . ".[58] Article 1(4) of the Charter makes it clear that the UN is to be a centre for harmonizing the actions of nations for the common ends of the UN including notably, respect for human rights.[59] As part of the provisions on the functions and powers of the General Assembly, Article 13(1)(b) empowers it to initiate studies and make recommendations for promoting international cooperation in the economic, social, cultural, educational, and health fields. In addition, it is to assist in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[60]

Viewed from the perspective of the above provision, the various General Assembly declarations and resolutions that explicitly provide for the participation of professional and civil society organisations in the implementation of the treaties are themselves part of the implementation of the UN Charter and are also interpretative guides.

2.2. The UN Declarations and Resolutions

It is important to note here that declarations and resolutions are generally not legally binding instruments. However, they contain principles and rights that are based on human rights standards enshrined in other legally binding international instruments.[61] Some of the declarations to be examined are inextricably linked to the mandate of organs created by the UN Charter. It is sometimes argued that these 'non-binding instruments' form a special category termed 'soft law'.[62] "This terminology is meant to indicate that the instrument or provision in question is not

[58] Charter of the United Nations 1945.
[59] *Ibid.*
[60] UN Charter, s*upra* footnote 68, Article 13(1)(b).
[61] *See generally* OHCHR 'Declaration on Human Rights Defenders' available from www.ohchr.org/ english/issues/defenders/declaration.htm, [accessed 29 July 2004].
[62] *See generally* Shaw, *supra* footnote 1, p. 110.

itself 'law', but its importance within the general framework of international legal development is such that particular attention requires to be paid to it." [63]

2.2.1. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

The elaboration of this Declaration, frequently abbreviated as 'The Declaration on human rights defenders', began in 1984 and ended with the adoption of the text by the General Assembly in 1998 on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights.[64] It has been said to be a strong, very useful and pragmatic text.[65] The Declaration succinctly captures the essence of our discourse and contains the clearest provisions on the participation of professional and civil society organisations in the implementation of international human rights treaties. Article 16 of the declaration emphasises the important role of individuals, non-governmental organisations and relevant institutions (which of course include professional organisations) in contributing to public enlightenment on questions relating to all human rights and fundamental freedoms through education, training, research and similar activities.[66] If properly employed, this Article provides the necessary background for the participation of organisations providing the type of human rights education that would facilitate implementation. Article 18(2) emphasises the role and *responsibility* of individuals, groups, institutions and non-governmental organizations in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.[67] Paragraph 3 of the same Article in turn emphasises the role and responsibilities of the same individuals and groups to promote a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.[68]

The two paragraphs necessarily translate into activities such as social and political pressures, lobbying and other democratic processes that would bring about apposite reforms, including legislative and judicial reforms, which would in turn amount to a more effective implementation of the treaties. Article 17 precludes states from imposing on individuals and groups limitations other than those that "are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".[69] A careful reading of the articles

[63] *Ibid.*
[64] *Supra* footnote 61.
[65] *Ibid.*
[66] *Ibid.,* Article 16.
[67] *Ibid.,* Article 18(2).
[68] *Ibid.*, para. 3.
[69] *Ibid.*, Article 17.

quoted above begins to reveal at least a moral and political duty or responsibility on civil society to play a role in promoting human rights, including treaty implementation. This duty will be further analysed below.

2.2.2. Basic Principles on the Role of Lawyers

These principles were adopted by the eighth United Nations Congress on the prevention of crime and the treatment of offenders. They were formulated to assist member states of the UN in their task of promoting and ensuring the proper role of lawyers in view of one of the Charter purposes of achieving international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without discrimination.[70]Article 9 stipulates that

> "Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law."[71]

The Article, in addition to governments, directly addresses professional associations of lawyers and educational institutions. It underscores the importance of lawyers in the global human rights movement and clearly indicates the role of professional associations of lawyers and legal education providers, which includes all the law faculties in member states' universities and the various bar schools and courts that provide training in procedural law. Although the Basic Principles do not constitute a binding legal instrument, Article 9 above articulates the role expected of legal professional organisations. That is, no such organisation or institute could reasonably graduate students that are not grounded in the ethical duties of lawyers and the ideals of human rights and fundamental freedoms.

2.2.3. The Vienna Declaration and Programme of Action

The UN World Conference on Human rights adopted the Declaration on 25 June 1993. The Conference and the resultant declaration is not always lauded as a resounding success particularly by NGOs not least because of a limiting clause in paragraph 38 that encourages state protection for NGOs and their members *genuinely involved* in human rights.[72] According to M. Schechter, "the notion that national governments will decide upon the genuineness of their own human right organisations and make that the basis for affording or denying them the protection of national law is especially worrying in the field of human rights".[73] Notwithstanding, the Declaration contains provisions that can inspire professional and civil society

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[70] *See* Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), Preamble, para. 1 and 11.
[71] *Ibid.*, Article 9.
[72] *See e.g.,* Schechter, M., 'UN-Sponsored world Conference in the 1990s' in Schechter, M. (ed.), *United Nations-sponsored world conferences: Focus on impact and follow-up* Tokyo: United Nations University Press, 2001, p. 35.
[73] *Ibid.*

organisations participation in the implementation of the treaties. The Declaration is unequivocal regarding the role of civil society organisations, particularly NGOs towards the full realisation of human rights. Beyond governments and intergovernmental organisations; groups, individuals, institutions and non-governmental organisations are strongly urged by the declaration to *inter alia*: cooperate in creating favourable conditions for the full and effective enjoyment of human rights at the national, regional and international levels,[74] to intensify efforts towards eliminating all forms of racial discrimination[75] and to intensify their efforts for the protection and promotion of human rights of women and the girl-child.[76]

Paragraph 38 specifically "recognizes the important role of non-governmental organizations in the promotion of all human rights and in humanitarian activities at national, regional and international levels".[77] The conference in the same paragraph also appreciated the contribution of NGOs to increasing public awareness of human rights issues, the conduct of education, training and research, and the promotion and protection of all human rights and fundamental freedoms.

2.2.4. The Universal Declaration of Human Rights and the VDPA

The UDHR upheld the right to education in Article 26 and in paragraph 2 of the same Article, outlined the content of education as follows:

> "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace."[78]

Undoubtedly, Article 26(2) above *inter alia* calls for human rights education.[79] However, neither the travaux préparatoires nor the language of the text gives the indication that Article 26(2) addresses professional and civil society organisations. Indeed, the VDPA, in reiterating the provisions of the UDHR and CESCR and emphasising the importance of incorporating the subject of human rights in education programmes, outlined mainly the duty of states. However, the last preambular paragraph of the UDHR removes every doubt as to the role of professional and civil society organisations as one of the addressees of Article 26. The paragraph proclaims the UDHR as a *common standard of achievement* and

[74] *See* Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14–25 June 1993, A/CONF. 157/23, para. 13, available from www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument, [accessed 29 July 2004].
[75] *Ibid.*, para. 15.
[76] *Ibid.*, para. 18.
[77] *Ibid.*, para. 38.
[78] The Universal Declaration of Human Rights, General Assembly Resolution 217A (III) of 10 December 1948, Article 26(2).
[79] *See also* Arajärvi, P., 'Article 26' in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights*, The Hague: Kluwer Law International, 1999, p. 555.

enjoins every individual and every organ of society to keep the Declaration constantly in mind while striving by teaching and education to promote respect for the rights and freedoms and their universal and effective recognition and observance.[80] According to Koskenniemi, preambles indicate with certainty what is left outside the text, but they support, encourage and explain. "When in doubt, consult the preamble! When things become blocked, the preamble opens them up. The preamble is the supplement that aids in the comprehension of the text."[81] Accordingly, the above provisions should be brought to the attention of all education providers.

2.3. Human Rights Treaties Provisions and Interpretations by General Comments

Treaties primarily regulate relations between nations; human rights treaties are no exception to this rule. Accordingly, one does not expect many references to implementation methods outside the direct involvement of states. Nevertheless, there are a few references in the rights and freedoms in some of the treaties that form a good backdrop for professional and civil society organisations participation in the implementation process of all the treaties. The references also afford protection for the participating organisations.

2.3.1. The International Covenant on Economic Social and Cultural Rights

The ICESCR devotes two articles to the right to education, Articles 13 and 14. Article 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education.[82] Article 13(1) of the CESCR provides:

> "The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace."[83]

Notably for our purpose, the Article stipulates that education shall strengthen respect for human rights and fundamental freedom. In its *General Comment No. 13*, the Committee on Economic Social and Cultural Rights, calling education an

[80] *But see* Koskenniemi, M., 'The Preamble of the UDHR', in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights*, The Hague: Kluwer Law International, 1999, p. 27. "The one thing that is certain about the preamble is that whatever it contains was not accepted as part of the text itself."

[81] *Ibid.*

[82] Committee on Economic, Social and Cultural Rights, 'General Comment No. 13', E/C.12/1999/10, 08/12/1999, para. 2

[83] International Covenant on Economic Social and Cultural Rights, 1966, available from www.unhchr.ch/html/menu3/b/a_cescr.htm, [accessed 6 August 2004].

empowerment right, noted, "[e]ducation is both a human right in itself and an indispensable means of realizing other human rights".[84] In paragraph 38, of the general comment, the Committee stated that based on its examination of states reports, it has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students.[85] Acknowledging that academic freedom is not specifically mentioned in Article 13, the Committee emphasized that staff and students throughout the education sector, particularly the higher education sector, are entitled to such freedom.

The Committee outlined the content of "academic freedom" *inter alia* as follows: "Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing".[86] The term also includes: the liberty of members of the academic community to express freely opinions about the institution or system in which they work; fulfilment of functions without discrimination or fear of repression by the State or any other actor; participation in professional or representative academic bodies; and enjoyment of all the internationally recognized human rights applicable to other individuals in the same jurisdiction.

If states parties were to respect academic freedom in line with the Committee's interpretation of the obligations of Article 13 and if members of the academic community in turn see it as their duty to direct education towards strengthening respect for human rights and fundamental freedoms as envisaged by Article 13 above and Article 26 of the UDHR there would really be no need to wait for formal governmental policy pronouncement before the members of the academic community can actively engage in the vital task of inculcating the needed human rights culture into the society. It becomes easy then to foresee a strengthened domestic environment for effective implementation of all human rights standards, particularly the treaties. The position of the academic community in each state party is further reinforced by the provision of Article 13(4), which states that:

> "No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."[87]

The Article makes non-state ownership of educational institutions subject to such minimum standards as may be laid down by the state.

[84] *Supra* footnote 82, para. 1.
[85] *Ibid.*, para. 38.
[86] *Ibid.*, para. 39.
[87] ICESCR, *supra* footnote 83, Article 13(4).

2.3.2. The International Covenant on Civil and Political Rights

The ICCPR contains some of the strongest guarantees for the participation of civil society and professional organizations in the implementation of the treaties. Articles 19, 21, 22 and 25 provide for freedom of opinion and expression, the right to peaceful assembly, the right to freedom of association and the right to take part in the conduct of public affairs respectively.[88] These rights are of general application and are indispensable to the realization of other human rights. The Human Rights Committee in its *General Comment No. 10* has stated that Paragraph 2 of Article 19 "requires protection of the right to freedom of expression, which includes not only freedom to 'impart information and ideas of all kinds', but also freedom to 'seek' and 'receive' them 'regardless of frontiers' and in whatever medium, 'either orally, in writing or in print, in the form of art, or through any other media of his choice'."[89] These rights are interrelated. For instance, the right to freedom of expression as outlined above is at the core of the enjoyment of the rights set out in Article 25, according to the HRC, in *General Comment No. 25*:

> "In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."[90]

Similarly, as the Committee has stated, "[t]he right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25".[91] In addition, the Committee, when referring to the activities mentioned in Article 25 stated: "This participation is supported by ensuring freedom of expression, assembly and association."[92] Considering this interrelatedness, it is safe then to state that the conclusions of the Committee on Article 25 are equally true for Articles 19, 21 and 22. Accordingly, the four articles of the ICCPR lie at the core of representative government.[93] Professional and civil society organisations are therefore further empowered by these rights to participate in developing the necessary climate for the implementation of the human rights treaties by taking part in popular assemblies that have the power to make the necessary decisions and in

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[88] *See* International Covenant on Civil and Political Rights 1966, available from www.unhchr.ch/tbs/doc.nsf, [accessed 10 August 2004].

[89] Human Rights Committee, General Comment No. 10: Freedom of expression (Art. 19): 29/06/83, para. 2 available from www.unhchr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument, [accessed 10 August 2004].

[90] Human Rights Committee, General Comment No. 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96, CCPR/C/21/Rev.1/Add.7, para. 25. Available from www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument, [accessed 10 August 2004].

[91] *Ibid.*, para. 26.

[92] *Ibid.*, para. 8.

[93] *Ibid.,* para. 1.

bodies established to represent citizens in consultation with the government.[94] Further, these rights empower the exerting of influence through public debate and dialogue through either representatives or the citizens' right and capacity to organise themselves.[95]

2.4. Are there Obligations on Professional and Civil Society Organisations to Play a Role?

The instruments discussed above establish a right of professional and civil society organisations to play a role in human rights promotion. The ICCPR articles discussed guarantee the freedom of these organisations to exist and operate freely, while the CESCR, in Article 13 (4), guarantees the liberty of such existing organisations to establish and direct educational institutions. Taken as a whole, the declarations and the basic principles represent a clear call and empowerment for these organisations to get on board and promote human rights, which includes facilitating the implementation of the treaties. The question then is whether there is a duty on these groups and organisations to answer the call.

Firstly, does the right of private individuals and groups to establish and run schools include the duty to teach human rights in such schools? My answer is a strong yes. The liberty to run such schools is guaranteed by Article 13(4) CESCR, this right cannot be claimed in disregard of the objective of education as enunciated in the same article at paragraph 1 to the effect that education shall be directed *inter alia* to strengthen respect for human rights. This is also reiterated in Article 29(1)(b) CRC. This duty is incumbent on all education providers within the territory of each state party to the above treaties, obviously including professional and civil society organisations.

Is there a duty for professional and civil society organisations to participate in human rights treaties implementation as I have suggested in this chapter? Article 29 UDHR, states "[e]veryone has duties to the community in which alone the free and full development of his personality is possible". Everyone includes the groups in question and this article begins to throw some light on the question of duty. In discussing this article, T. Opsahl and V. Dimitrijevic concluded that "[d]uties to the community belongs wholly to the moral and political sphere and can hardly be translated into law."[96] If this is true, it is then unnecessary to inquire into whether the instrument articulating the responsibilities of these organisations is legally enforceable or not. Accordingly, it suffices that the UDHR on education; the VDPA; the Declaration on Human Rights Defenders; the Basic Principles on the role of lawyers, all read together with the discussed treaty provisions, reveal at least a moral and political duty on professional and civil society organisations to play the

[94] *See ibid.,* para. 6.
[95] *See ibid.,* para. 8.
[96] Opsahl, T. and Dimitrijevic, V., 'Article 29 and 30' in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights*, The Hague: Kluwer Law International, 1999, p. 641.

envisaged role. It remains difficult and probably unnecessary to articulate a legally enforceable duty on these organisations. On human rights education, G. Alfredsson stated:

> "While states have undertaken the legal commitments to implement the provisions on human rights education, teachers, researchers, scientists, universities and other institutions of higher education also carry moral and political obligation to the same end."[97]

3. HUMAN RIGHTS EDUCATION AND THE ROLE OF PROFESSIONAL ORGANISATIONS

The preceding chapters have adumbrated the role of professional and civil society organisations and it is time to give some structure to the idea. The term 'civil society' encompasses a broad range of non-governmental actors and in that sense there is no real demarcation between professional organisations and NGOs. It is however necessary to draw an imaginary line between the two although in the working of society, such a line does not always exist.

3.1. Human Rights Education

Education has been identified several times as one of the more important methods of implementing human rights treaties.[98] Here the roles of the various professional organisations that form part of the general educational delivery system will be examined. This includes various teachers' unions, academic and lecturers' associations bar associations, medical practitioners' associations and other professional associations that directly or indirectly play a part in education. NGOs also play a major role in human rights education. However, I have chosen to deal with the role of NGOs in the next chapter.

In addition to the paragraphs referred to in the last chapter, the World Conference on Human Rights, in paragraph 33 of the VDPA[99] stated that human rights education, training and public information were essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace. It recommended that States should strive to eradicate illiteracy and should direct education towards the full development of the human personality and the strengthening of respect for human

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[97] Alfredsson, G., 'The Right to Human Rights Education' in Eide, A. and Crause, C. (eds.), *Economic Social and Cultural Rights A Textbook*, The Hague: Kluwer Law International, 2001, p. 282.

[98] *See e.g.,* Article 33, Vienna Declaration and programme of Action 1993; Eide, A. and Alfredsson, G., 'Introduction', in Alfredsson, G. and Eide, A. (eds.) *The Universal Declaration of Human Rights*, The Hague: Kluwer Law International, 1999, p. xxix; Arajärvi, P., 'Article 26', in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights*, The Hague: Kluwer Law International, 1999, p. 555.

[99] Vienna Declaration and programme of Action 1993.

rights and fundamental freedoms. It called on all States and institutions to include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings.

Pursuant to this suggestion, the UN General Assembly, by resolution 49/184 of 23 December 1994 proclaimed the United Nations Decade for Human Rights Education, from 1 January 1995 to 31 December 2004. The General Assembly also welcomed the plan of action for the decade as contained in the Secretary General's report. This plan *inter alia* focuses on stimulating and supporting national and local activities and initiatives and is built upon the idea of a partnership between Governments, international organizations, non-governmental organizations, professional associations, individuals and large segments of civil society.[100]

3.2. Professional Organisations at Primary and Secondary Education Levels

In most countries, the major players at this level in terms of professional organisations are the various teachers' unions and federations of such unions. Some countries have just one such union while others have several. More often, the teachers' unions consist mainly of educators at the primary, secondary, teacher training, and technical college levels. While university and tertiary institution lecturers belong to different unions, in a few cases, the two categories are involved in the same union. This section, however, is devoted to the unions of the former category. Examples of those include the Nigeria Union of Teachers, Australian Education Union, National Union of Teachers (England and Wales) and the Botswana Teachers' Union. These professional organisations generally operate as trade unions as well as professional associations. They generally focus on promoting and developing the teaching profession; provision of support and services to the members; the defence of public education and curriculum development.

Often these unions are very developed and experienced in their area of endeavour, very large and influential and in most countries, have a pronounced voice. They are usually organised with a central office and branch offices and centres throughout each country and in many cases maintain a presence at local or grass root levels. According to information on the National Union of Teachers website for example, "[t]he NUT has a network of experienced and qualified staff, including a practising solicitor, in each of its offices throughout the English regions and in Wales to give immediate cover to teachers in trouble – legal and professional advice, guidance and support."[101]

[100] *See generally* United Nation Decade for Human Rights Education (1995−2005), Office of the UN High Commissioner for Human Rights, available from www.unhchr.ch/html/menu6/1/edudec.htm, [accessed 22 October 2004].

[101] National Union of Teachers available from www.teachers.org.uk/story.php?id=2967, [accessed 26 October 2004].

3.2.1. Potential for Human Rights Promotion

Already the potential of these unions to play a major role in the promotion of human rights is evident. For one thing, there is not a single teachers' union that is not already involved in human rights, for example in the labour rights of its members. In other words, the concept of human rights will not be new to any of them. Additionally, most teachers' unions are affiliates of Education International, a global teachers' organisation that boasts of representing 29 million education personnel, 345 member organisations in 165 countries and territories. EI has stated its aims and objectives to include:

> "To further the cause of organizations of teachers and education employees, to promote the status, interests, and welfare of their members, and to defend their trade union and professional rights;
>
> to promote for all peoples and in all nations peace, democracy, social justice and equality; to promote the application of the Universal Declaration on Human Rights through the development of education and of collective strength of teachers and education employees;
>
> to seek and maintain recognition of the trade union rights of workers in general and of teachers and education employees in particular; to promote the international labour standards, including freedom of association and the right to organize, to bargain collectively, and to undertake, industrial action, including strike action if necessary;
>
> . . . to support and promote the professional freedoms of teachers and education employees and the right of their organizations to participate in the formulation and implementation of educational policies;
>
> to promote the right to education for all persons in the world, without discrimination . . .
>
> to foster a concept of education directed towards international understanding and good will, the safeguarding of peace and freedom, and respect for human dignity;
>
> to combat all forms of racism and of bias or discrimination in education and society due to gender, marital status, sexual orientation, age, religion, political opinion, social or economic status or national or ethnic origin . . ."[102]

These aims and objectives read almost like the constitution of an international human rights NGO and although EI is by its constitution precluded from interfering in the internal affairs of affiliate associations and unions, one would expect the same level of commitment to human rights promotion in the affiliate unions. Unfortunately, this is not frequently the case. Most of the Unions studied here, with

[102] Education International 'Aims and Principles' available from www.ei-ie.org/main/english/, [accessed 26 October 2004].

a few exceptions, are more involved with the labour rights and other services of members than with the overt direction of education towards strengthening respect for human rights in their pupils. To varying degrees, they also push for better study conditions in the different schools but the same bold commitment to human rights by EI is not always replicated. Nevertheless, the very structure of these unions, the experience they have gained over the years, their influence in society and the nature of the member-teachers' duties towards the students is a veritable recipe for the promotion of human rights treaty expectations.

Starting with staff training, which most of the unions already provide for their members in some form, the principles of human rights education as contained in the UDHR, CECSCR and the UN Decade for Human Rights Education can be disseminated in a way that will positively impact the future generations that the present pupils represent. Armed with apposite human rights knowledge, these unions can, in partnership with governments, embark on curricula development to reflect human rights expectations. Where necessary and to the extent allowed by the law, the unions can incorporate human rights into the education system independently of formal state action especially where bureaucracy would impede the state or in states that are yet to embrace human rights standards. Additionally, some unions are known to take formal stands on different aspects of national development and wellbeing, not unlike NGOs. In this way, teachers' unions can take a stand on human rights issues and can organise conferences and seminars or actively participate in such with the result of positive state policy.

3.2.2. Current Achievements

I admit that the above stipulations may run the risk of being considered farfetched or idealistic by some. Fortunately, however, some unions have started heading in this direction. A notable example is the Australian Education Union. The union has a section on its website devoted to human rights. The section "aims to raise awareness of Human Rights and provide knowledge and skills for members to actively advocate for human rights in their work and personal lives, as well as visibly promote the human rights work the union is already undertaking".[103] Further, in the same section, The AEU reveals a firm commitment to international involvement, achievement and protection of human rights standards as well as trade union rights. AEU also affirms that human and trade union rights are universal and indivisible.[104] The union in partnership with Amnesty International has developed a Human Rights Training Manual, which was introduced in 2000 as part of AEU's contribution to the 50th anniversary of the UDHR. For its 2004 Anti-Poverty Week, AEU asks a question: why not do something with your class or in your school? How very pertinent and precise a question, since all such union activities, to have treaty implementation consequences, must get into the classroom.

[103] Australian Education Union 'Human Rights' available from www.aeufederal.org.au/HR/index2.html, [accessed 26 October 2004].
[104] *See generally* Australian Education Union, *ibid.*

3.2.3. Professional Organisations at the Tertiary Education Level

The major professional organisations with the potential to influence human rights education at the higher education level are the various lecturers' unions and associations. Examples include the Academic Staff Union of Universities (Nigeria), National Tertiary Education Union (Australia) and the Canadian Association of University Teachers. Many of the characteristics of the teachers' unions discussed above are also true of these lecturers' unions with a few important differences. These unions are also large though not always as large as the teachers' union, but like the teacher's unions are influential, operate as trade unions and professional organisations, and are highly organised. The National Tertiary Education Union of Australia for example is a democratic organization, with structures and processes designed to maximize membership participation and control. Members are organized through workplace branches, each of which is part of a State or Territory Division, and in turn, part of the National Union.[105]

Because of the high level of specialization, institutional autonomy and academic independence at the higher education sector in most states, the lecturers' unions do not play as central a role as do the teachers' unions in curriculum development but are nonetheless a good starting point for strengthening general human rights based education the world over. In a number of states, particularly Commonwealth states, other professional organizations play a significant role in shaping particular courses in higher education. An example of this are the various professional associations made up of practicing professionals. This is further exemplified by the quasi professional organizations, which are usually creations of statutes, created to regulate the profession and in particular, academic training and qualification. These organizations are generally autonomous and usually consist, in part, of members appointed or elected from the professional associations.

The said associations are usually involved in the training and development of future professionals. Examples of the former are associations of engineers, doctors, architects, nurses and lawyers, while examples of the latter are the various councils and institutes created in some cases by statutes in consultation with the professionals to regulate the professions. Examples include the Institute of Chattered Accountants of Nigeria, the Medical and Dental Council of Pakistan and the Council of Legal Education, New Zealand. An Example from the medical profession in Nigeria may be helpful. The training of medical doctors and dentists in Nigeria is the sole responsibility of lecturers and consultants in the various medical colleges and faculties. These lecturers are members of the Academic Staff Union of Universities, Nigeria as well as members of the Nigerian Medical Association or the Nigerian Dental Association along with other medical doctors and dentists in Nigeria. The Medical and Dental Council of Nigeria, created by the Medical and Dental Practitioners' Act, in turn regulates the medical profession in Nigeria and the curricula of the medical schools.[106] Of the twenty-two members of the council,

[105] National Tertiary Education Union 'NTEU Organisation' available from www.nteu.org.au/about/organisation, [accessed 3 November 2004].
[106] CAP 221 Laws of the Federation of Nigeria (1990).

eleven are to be nominated by the association.[107] This example represents generally the intricate relationship between professional organizations that play a role in higher education in most parts of the world. For human rights education in the higher institutions to be effective, all major players must be mobilized and all definitely have a role to play.

3.2.4. The Role of the Professional Associations and Regulatory Organisations

Starting with the professional regulatory councils and institutes, where they are creations of statutes, they are usually empowered to make rules of professional conduct where applicable and in some states, empowered to develop the educational curricula of the schools. Accordingly, there is a well defined role for these bodies. Rules of professional conduct could be revised and brought to parity with human rights standards where this is not already so. Additionally, in those states where such bodies determine educational curricula, they have the possibility of introducing minimum human rights standards in each profession, both in the areas particularly applicable to the profession and the incorporation of general respect for human rights. The Medical and Dental Council of Nigeria has recently made continuing professional development mandatory for all doctors for the purposes of license renewal. The council could actually have made related human rights standards part of this mandatory continuing medical education.

The professional associations, aside from the lecturers also have a very important role to play regarding human rights; they are well placed to introduce profession-specific human rights norms into the profession as a whole as well as to advocate for them to be made part of the training of future professionals. They are also well placed to consult with governments and where necessary campaign for the implementation of human rights treaties especially those directly linked to their profession. The advantageous position of these professional associations or the potential thereof *vis-à-vis* the government is depicted by the Nigerian Medical Association, which has stated that

> "Although the Association is involved in many of the government's activities, it is consulted formally by the government only on an 'ad-hoc' basis. It is not consulted as 'of right' on health issues and has to press for its participation . . . The NMA is at present involved in influencing health policy formulation in an ad hoc manner. This is done by making unsolicited recommendations to government on various health issues and also by making inputs, whenever invited, to some of the national committee meetings on policy formulations."[108]

It becomes immediately apparent that the Association already has the necessary capacity to canvass for the implementation of international human rights in Nigeria.

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[107] *See generally* Nigerian Medical Association 'About NMA' available from www.nigeriannma.org/ aboutus.htm, [accessed 1 November 2004]; Medical and Dental Council of Nigeria 'Composition of MDCN' available from www.mdcn.org/composition.htm, [accessed 3 November 2004]

[108] Nigerian Medical Association *ibid.*

3.2.5. The Role of Lecturers' Unions

The need for the lecturers' unions to contribute to human rights education and as a result to the implementation of the treaties cannot be overstated. In today's world, legislators, members of the executive and the judiciary are university graduates. Accordingly, today's lecturers have the opportunity of shaping the minds of tomorrow's policy makers, legislators and members of the bench in their various countries, making them more human rights oriented. If this task is handled with deserving vigour, in some years, it is foreseeable that those states that are still struggling with the ratification, incorporation and implementation of human rights treaties will progress in these areas and those that are presently doing well would do even better.

The first step towards achieving this goal is for these unions to acquaint themselves with the extant human rights standards beyond the promotion of labour rights and other rights that form part of the usual workings of a trade union, which is where many unions have distinguished themselves. The aim at all times should be to build into the students a pervasive culture and world-view based on human rights as a social paradigm anchored on international and municipal legal instruments. This aim can then be disseminated to the academia through seminars, conferences and the other channels of outreach between the union and the members.

As a minimum, the lecturers' union should encourage the introduction of human rights as a general studies course or equivalent courses or programmes for freshmen in each university. This of course should be in addition to other specialised human rights programmes that exist in many universities at undergraduate and postgraduate levels. General Studies courses are compulsory for all students in Nigerian universities as well as in some universities in other commonwealth countries. At Moi University, Kenya, they are called National Development courses, under which English language and Social Change are taught. At University of Buea, Cameroon, French, English, Athletics, and Civics are taught under a similar arrangement. Progressively, the human rights dimension of all disciplines in higher education can in the same way be vigorously researched and emphasised at the continued insistence of the unions.

3.2.6. Who will Teach the Teachers?

Understandably, the constitutions and other terms of reference of the organisations and unions may not clearly include the above objectives. However, because of the treaties, declarations and other instruments discussed in chapter two above, the organisations should amend their constitutions where necessary to reflect the duties placed on them by contemporary international human rights standards. For this to happen and for the organisations to play the envisaged role willingly and effectively, they must first be sufficiently apprised of the extant standards.

Such knowledge must aim to motivate the teaching of human rights with a commitment for action and the determination that all those who 'graduate' from any house of learning ought to move into the world with knowledge of human rights as a

prevailing social concept underpinned by legal instruments.[109] Lawyers and law teachers have a role to play regarding bringing other lecturers up to date with human rights standards. Are the lawyers always ready to undertake the task?

3.3. Legal Education

Lawyers are involved in the development of human rights, the implementation and enforcement of the treaties as incorporated into domestic law and indeed in facilitating access to international procedures. At one level, legal practitioners are the custodians of justice, human rights and fundamental freedoms. At another level, they have an unstated moral obligation to teach the principles of justice, human rights and fundamental freedoms to civil society. At yet a different level, qualified legal practitioners increasingly participate in the political workings of states as legislators and members of the executive arm. Traditional legal training should therefore include not only the human rights safeguards in national laws but also more importantly the comparative and international aspects along with the decisions and views of international monitoring bodies and regional courts.[110]

3.3.1. The Role of Professional Organisations in Legal Education

Three different types of professional organisations are usually involved in legal education in most countries, including law teachers' associations, regulatory bodies and bar associations/law societies. Examples of the first include the Irish Law Teachers Association, Australasian Law Teachers Association, Association of Law Teachers, UK and the Canadian Association of Law teachers. Examples of the second would be the Council of Legal education (Nigeria), Council of Legal Education (New Zealand); and the Caribbean Council of Legal Education. Examples of the third are the bar associations, bar councils and law societies that are invariably part of the legal profession in most countries.

Basic legal education in most countries starts with a university degree, followed by either a period of pupillage or by attendance in a bar school like the Nigerian law school, the Law Development Centre (Uganda) and the Japanese Legal Research and Training Institute. At the different levels of legal training, the roles of the different kinds of professional organisations are interrelated. The law faculties and lecturers draw up the curricula as sometimes approved by the councils of legal education. In most countries, the law teachers and members of the regulatory bodies are all qualified legal practitioners and members of the law societies or bar associations. As the umbrella organisations, these professional lawyers' associations and societies are influential and can easily serve as the focal points for any move for

[109] *See* Koenig, S., 'Human Rights Culture and NGOs', in Åkermark, S. (ed.), *Human Rights Education Achievements and Challenges*, Turku/Åbo: Institute for Human Rights Åbo Akademi University, 1998, p. 120.

[110] *See generally* Foreword by the International Bar Association 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' p. xxix.

improving human rights education in each country. Indeed, the role of the professional lawyers associations and law faculties are clearly spelt out in the *Basic Principles on the Role of Lawyers.*[111] Article 9 exhorts for appropriate legal education that includes human rights and fundamental freedoms.

As a minimum, human rights law should be a compulsory part of every law faculty's curriculum including the international aspects of it. Where this is not so, both the law teachers associations and the professional lawyers associations can play a role in seeing that it becomes so. Furthermore, the various bar schools and other pupillage programmes should endeavour to include the procedural rules of international human rights monitoring bodies and regional courts as compulsory parts of their curriculum. Although international human rights law increasingly forms part of the curricula of law schools and faculties around the world, it is only in some countries that it is a compulsory part of the basic law degree.[112] In many other countries, human rights law courses are elective and this should change if there would be hope for pervasive and effective implementation of human rights treaties. The regulatory bodies and accreditation boards should in all cases, where a list of courses are required from university law graduates before admission to either bar schools or call to bar or articles, ensure that international human rights law is part of that list of courses.

4. CIVIL SOCIETY/NON-GOVERNMENTAL ORGANISATIONS

The term 'civil society' can be given a broad or narrow meaning. It has been defined as "a sphere of social interaction between economy and state, composed above all of the intimate (especially the family), the sphere of associations (especially voluntary associations), social movements, and forms of public communication."[113] Civil society is hence often categorised as a third sector placed between the state and market economy to which much of the development of democratic society is attributed.[114] The term describes a broad range of non-governmental actors including labour unions, consumer unions, religious, gender and issue oriented groups, public interest groups and associations of citizens and non-state institutions. Of all the groups that make up civil society a dominant subset, often used as a synonym for civil society, has emerged: non-governmental organisations − sometimes also referred to as voluntary organisations. Although all groups that make up civil society are within the purview of this thesis and can indeed play the role described below, I

[111] *See* Section 2.2.2 above.
[112] Examples include the Czech Republic, Egypt, India, Romania and South Africa. *See* C. Heyns and F. Viljoen, *supra* footnote 4, pp. 489−490.
[113] Steiner and Alston, s*upra* footnote 35, p. 938, quoting Cohen and Arato, *Civil Society and Political Theory* (1992), ix.
[114] *See e.g.*, Kjaerum, M., 'The Contributions of Voluntary Organisations to the Development of Democtratic Governance', in Micou, A. and Lindsnaes, B. (eds.), *The Role of Voluntary Organisations in Emerging Democracies . . . (A Workshop Report)* (Danish Centre for Human Rights/institute for International Education 1993) p. 13.

have chosen to conveniently limit analysis and recommendations to human rights NGOs.

4.1. A Tribute to Civil Society Organisations

Animal wan dash me human rights
Animal can't dash me human rights

The words of late Fela Anikulapo Kuti, a renowned Nigerian musician, in one of his songs means: an animal wants to make a gift of human rights to me. An animal cannot make a gift of human rights to me. He was referring to the then Nigerian military government as the animal, which according to him has no moral standing to proclaim human rights for Nigerians. For one thing, human rights cannot be given; they are inalienable, for another thing, the government came to power in violation of the people's right to representative government. At least that is how I understood Fela at the time. Incidentally, this line in Fela's song provided me with one of my early instructions on the inalienability of human rights. At the time Fela and his fans represented a sector of civil society. Other civil society organisations like the Civil liberties Organisation of Nigeria kept issues of democracy and human rights before the Nigerian public and indeed continually invited the scrutiny of the international community over the dictatorships that characterised the Nigerian politics for several years. As a result, they contributed to the overthrow of the different Nigerian dictatorships and the attendant human rights violations.

This Nigerian example illustrates perhaps the greatest contribution of civil society organisations to human rights, the generation and maintenance of public opinion on human rights issues. In individual states, domestic NGOs act as checks on governments and urge the reconsideration of policies and programmes designed in disregard or in violation of human rights norms. They provide information and exert pressures that have sometimes led to foreign economic policies that consider human rights violations in other states.[115] They have provided early warnings, acted as political watchdogs, played essential roles as educators and lobbyists, participated in human rights standard setting and today have become an indispensable part of the human rights system. At the international level, NGOs have been depended upon as independent sources of information particularly in the United Nations context; their 'shadow reporting' has enhanced the quality and reliability of the treaty monitoring system. A considerable proportion of initiatives to draft new international instruments, establish new procedures and identify particular states as violators are direct results of concerted NGO campaigns.[116]

[115] *See generally* Steiner and Alston, *supra* footnote 35, p. 940.
[116] *Ibid.*

4.2. Selected Highlights on the Role of NGOs

Since NGO's have been the subject of much research and analysis, this section will only highlight specific roles that NGOs have played in different countries, which are worthy of emulation by NGOs from other states.

4.2.1. Participation in the Political Process

The corollary of the international law guarantees discussed in section 3.3.2 above, i.e. Articles 19, 21, 22 and 25 of the ICCPR read together with the relevant declarations, particularly the Declaration on Human Rights Defenders, is the active participation of NGOs and related institutions in the political process of their various countries. In harnessing these guarantees, a key role of NGOs would be to develop expertise in articulating the views and desires of the citizens. These can in turn be transformed into political demands.[117] Continuity in this would result in earning a place in the political process whether officially acknowledged or not. Success in this role depends on the NGO's ability to analyse and monitor human rights policies and compare them with international standards. The traditional response to adverse policies or inaction is opposition and protest. While this response is highly fitting under dictatorial or other forms of repressive governments, there is a need for NGOs to forge new and different relationships with governments[118] probably in addition to opposition and protests. When all else fails, the need to give effect to the treaties can be kept before the citizenry and where possible transformed into electoral issues until respect for human rights is achieved

4.2.2. Litigation, Public Interest Litigation and other Legal Processes

The right to sue and be sued is one of the important attributes of legal personality, the status accorded most professional and civil society organisations in their countries. Litigation has therefore been a feature of civil society organisations. To date, litigation takes the form of reactive application for redress of human rights violations and the principal role NGOs have played is that of providing legal support and assistance. A good number of the cases are brought forward on a *pro bono* basis and in this regard the NGOs have frequently been the last hope of the powerless in the face of violations. Effective and all-encompassing treaty implementation would however call for more than reactive litigation. For one thing, until the root-cause of violations is addressed and an adequate domestic climate created, continued violations would end up wearing out even the most committed organisations. For another, the agents of human rights violations are usually better funded and equipped in the litigation arena. Examples from different jurisdictions indicate that

[117] *See also* Kjaerum, *supra* footnote 114, p. 15.

[118] *See also* Carmichael, W., 'The Particular Missions and Roles of VOs in Periods of Transition from Authoritarian to Democratic Policies', in Micou, A. and Lindsnaes, B. (eds.), '*The Role of Voluntary Organisations in Emerging Democracies . . . (A Workshop Report)* (Danish Centre for Human Rights/institute for International Education 1993) p. 19.

fresh initiatives that are worth trying include public interest litigations, class actions, test cases (for common law countries), petitions and general innovative advocacy.

Class action suits involve the combination of similar claims and causes of action of many victims of human rights violations. Such actions make for economy of scale and attract nationwide attention via the media, ensuring that the courts would not make a short shrift of a worthy case. Class actions have been extensively used by both NGOs and other public initiatives in the United States. In *Leisner* v. *New York Tel. Co*.[119] 2,235 plaintiffs, all women employed in management level positions with the defendant, New York Telephone Company, brought a class action pursuant to Title VII of the Civil Rights Act of 1964, as amended[120] for injunctive relief and damages. They alleged that the defendant, in violation of the statute, discriminated against women it employed in management level positions in its traffic departments throughout the state. The defendant's motion to dismiss the complaint on numerous grounds was denied and the court granted the plaintiffs' motions for a preliminary injunction and for class action certification even though only one plaintiff had received the notice of her right to sue at the date of commencement of the suit. Class actions are not permissible in every jurisdiction but where it is allowed civil society organisations should use it to facilitate the implementation of the treaties.

Public interest litigation involves court petitions for the protection of "public interests" like fundamental human rights, the environment and terrorism.[121] They are initiated via petitions, bypass actions in law, and are thereby cheaper and faster. Public interest litigation has been put to use in some countries including India, Uganda and Bangladesh. According to the report on the WHO Tobacco Free Initiative "Consultation on litigation and Public Inquiries as Public Health Tools", 2001, Amman, Jordan, advocates in Bangladesh have fashioned creative "Public Interest Writ Litigation" in equity to advance tobacco control.[122] Although the case was under review in the Bangladeshi highest court at the time of the Amman Consultation, the ruling sped up the formation of a national coalition of NGOs committed to tobacco control and the development of comprehensive national legislation.[123] According to the same report, the Indian case of *Shri Murli S. Deora, et al.* v. *Union of India, et al*. brought out the almost unlimited power of public interest litigation. Commenced by writ petitions, the case took advantage of the right of citizens to petition the Supreme Court of India to enforce constitutionally guaranteed fundamental rights or to compel the government to do so. The case was brought by the President of Mumbai Regional Congress Committee, Murli Deora against the Union of India and the major tobacco companies based on the

[119] 358 F. Supp. 359 D.C.N.Y., 1973.
[120] 42 USC §2000e.
[121] *See also* Helplinelaw 'Public Interest Litigation' available from www.helplinelaw.com/ docs/ pub-i-litigation/index.php, 23 November 2004.
[122] Blanke, D., 'Towards Health with Justice Litigations and Public Inquiries as Tools of Tobacco Control' World Health Organisation 2002, p. 36; available from www.who.int/tobacco/media/en/final_jordan_report.pdf, 23 November 2004.
[123] *Ibid.*

fundamental rights of citizens to life, health and a clean environment. The petition requested that the Ministry of Health and Family Welfare be directed to develop a comprehensive national tobacco control policy. The court granted the sweeping demands; it ordered the states of India to immediately order the banning of smoking in public places: hospitals, educational institutions, railways, public transport, courts, public offices, libraries and auditoriums. "At one stroke, the Court accomplished measures that had long been proposed and that were, at the time, under consideration before the Indian Parliament."[124] The foundation for public interest litigation in India was perhaps laid in *PUDR [People's Union for Democratic Rights]* v. *Union of India*[125] where the Indian supreme court conceded that unusual measures were warranted to enable people the full realization of not merely their civil and political rights, but the enjoyment of economic, social, and cultural rights.[126]

Public interest litigation have also been used by NGOs in Uganda in *The Environmental Action Network, Ltd.* v. *Attorney General and National Environment Management Authority*.[127] Like the Indian and Bangladeshi cases, this case petitioned the Ugandan courts to protect the rights to life and a clean and healthy environment pursuant to Articles 21 and 39 of the Constitution of Uganda. Although the foregoing cases were prosecuted under the constitutions of the respective countries, their treaty implementation potentials cannot be mistaken. Recently revised constitutions reflect treaty guarantees particularly the ICCPR and in some countries, ratified treaties form part of the constitution. Starting with these petitions based on the constitutions, it is foreseeable that as the courts increasingly give heed to human rights pleas, incorporated and even non-incorporated treaties would soon become the subjects of successful petitions. NGOs are therefore encouraged to continue employing these tools in their treaty implementation role.

4.2.3. Public Education and Information Provision

The public is generally reliant on NGOs for information on human rights. In many states, governmental information is taken with a pinch of salt. Understandably, state sponsored information is bound to reflect the state's perspective on policies in question whether right or wrong. Accordingly, independent NGO information has become highly priced in both national and international processes. Human rights treaty bodies, foreign governments, international NGOs and intergovernmental organisations all routinely seek out NGO information and expertise in all human rights reporting in particular countries. Information made available to international

[124] *Ibid.*
[125] [1982 (2) S.C.C. 253].
[126] MANAS (UCLA) 'Public Interest Litigation' available from www.sscnet.ucla.edu/southasia/History/SocialPol/spmove.html 23 November 2004 (site created by Vinay Lal Associate Professor of History, UCLA).
[127] Misc. Application No. 39 of 2001, High Court of Uganda. Taken from Blanke, *supra* footnote 122, p. 42.

organisations have resulted in international pressures of different kinds and is likely to continue to do so.

Public education by NGOs takes different forms including advocacy campaigns, which might be thematic or concentrated on specific human rights problems, mobilising citizens and institutions to pressure relevant authorities to address the issues by giving effect to the treaties. Officials in positions to effect human rights implementation can also be educated through lobbying. Specific public educational campaigns and programmes take diverse forms including exhibitions, billboard messages, concerts, street performances, public debates, conferences, seminars, symposia and creative use of the media. Formal human rights training and education programmes have also been utilised particularly for members of the security forces, prisons and other government officials, the business community and even educators. Amnesty International through its country organisations and affiliates is a prime example of an NGO that has used all these methods.[128]

4.2.4. Human Rights Training for Judges

With the exception of initiatives from willing governments or intergovernmental organisations and projects sponsored by foreign agencies like the U4 Project in Ethiopia, sponsored by NORAD (Norway),[129] NGOs are the other major facilitators of human rights training for judges. Traditional legal professional organisations like bar associations may not always be suited for this task mainly because the judges are of the bench while the lawyers are of the bar and deference flows from the bar to the bench.

In Nigeria for example, in the wake of the infamous Sharia legislation and trials in the Nigerian states of Kano, Katsina, Bauchi and Jigawa states, it was an NGO, the Legal Defence and Assistance Project (LEDAP) that became involved in a pilot training project for newly appointed sharia judges. Incidentally, private companies funded the initial project and the request for funding from the state (provincial) governments is yet to yield any results.[130] Training in Human rights for judges is quite central to treaty implementation at the domestic level, hence while international, intergovernmental and foreign organisations have led the way, domestic initiatives must be added and NGOs have played a role in this respect and should continue doing so with increased vigour.

4.2.5. Research and Generation of Policy Alternatives

In States that have not displayed proficiency in adapting human rights policies to suit local conditions and in states engaged in the transition to democracy, NGOs and

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[128] *See* Spanga, C., 'Amnesty International's Human Rights Promotional and Educational Work', in Åkermark, S. (ed.), *Human Rights Education Achievements and Challenges*, Turku/Åbo: Institute for Human Rights Åbo Akademi University, 1998, pp. 105–109.

[129] *See* U4 Project Information available from www.u4.no/projects/project.cfm?id=619, [accessed 1 December 2004].

[130] *See* Human Rights Watch 'VII Training of Judges' available from www.hrw.org/reports/2004/nigeria 0904/7.htm, [accessed 1 December 2004].

other civil society organisations can play a role in generating policy options. The first step would be to engage in policy oriented research and bring the findings to bear on the political and governmental processes. Another way is by developing pilot projects and urging their adoption or funding by governments on a lager scale.[131] The Human Rights Training Project for Judges by the Legal Defence and Assistance Project cited above is an example. Most of the judges in question were transferred to the Sharia Courts from the Area Courts, which have limited jurisdiction as compared to the Sharia courts that are invested with jurisdiction over capital offences. Most of them had no prior legal training (being judges of inferior courts of record) and no training in the new Sharia legislation and definitely none in human rights.[132] The policy option of human rights training for the said judges that the government has been asked to fund, exemplifies this role.

5. REALISATION OF THE ROLE: CONCLUSION

Largely, the preceding chapters have been recommending in form. Consequently, this concluding chapter will only touch on some of the problems that could hinder the adoption of the identified roles.

5.1. Professional Organisations

Regarding professional organisations and their role in human rights education, the first obstacle that comes to mind is the absence of awareness of the duty to participate in defending human rights. Consequently, most of the organisations surveyed do not mention human rights nor its advocacy and promotion in their constitutions and articles of association. It would be correct to assume that these professionals feel quite removed from the problems of human rights and its implementation. Sadly, this apathy extends to even lawyers' associations. Indeed some teachers' unions seem to be more concerned with human rights than do some bar associations. Connected to the foregoing is the problem of knowledge of the relevant human rights standards.

Besides the obvious expectation of motivation from the state governments, one solution would be to extend the reach of international human rights through international and regional professional organisations to which the national ones are affiliated. Examples would include Education International (EI), to which most teachers' and lecturers' unions are affiliated and the International Bar Association (IBA), to which most national bar associations and law societies are affiliated. Incidentally, the IBA runs a human rights institute and EI by its constitution is committed to the promotion of human rights through education. However, not all international professional organisations are already involved and one principal agency of motivation that should be able to contribute is the UN Technical Cooperation and Advisory Services in the Field of Human Rights.

[131] *See generally* Carmichael, *supra* footnote 118, p. 20.
[132] Human Rights Watch, *supra* footnote 130.

5.2. Civil Society Organisations

NGOs and other civil society organisations generally face some noted problems. These include the problem of credibility, since there are no standardised accreditation procedures for these organisations; the problem of fragmentation of efforts, where many NGOs pursue the same goals individually even when concerted efforts will be more effective; and the problem of funding. Beyond these however, the problem I have chosen to address in this section is that of human rights education and advocacy training. Effectiveness in this important role entails a clear understanding of human rights in theory and practice; the ability to *inter alia*, take a claim, assess its value, collect evidence and present them in a way that brings redress to the aggrieved. For this level of expertise and professionalism, training needs to be sought even when professionals such as lawyers are involved.

National coalitions of NGOs may provide a solution to these problems as they will not only solve the problem of fragmentation of effort but will ensure economy of scale for training programmes. Another possible solution would be using the international NGO network for materials and training programmes. T. Orlin has also suggested affiliation to an international human rights federation. Suggested advantages of this move include, better credibility as a result of affiliation. "The benefit to the local group is it gains legitimacy of the parent body or federation and its proclamations now carry the force of an international group and not just the sentiments of a local organisation."[133] Additionally, national NGOs can receive training and technical support from the parent organisation or federation.[134] Admittedly, not all NGOs can or should belong to a federation of NGOs and not all have the skill to tap into the existing network of NGOs worldwide. There is therefore a need for other forms of assistance. Once again one of the agencies that may have the resources, facilities and potential to achieving this is the UN Technical Cooperation and Advisory Services in the Field of Human Rights.

5.3. Concluding Remarks

The notion that treaty implementation is exclusively the responsibility of states is no longer entirely defensible in the field of human rights. The crux of this thesis has been that professional and civil society organisations also have a role to play. The term 'role' implies responsibility. Using duty as a synonym for the word, the Cambridge Advanced Learners Dictionary defines it as "the position or purpose that someone or something has in a situation, organization, society or relationship".[135] Borrowing the language of this definition, I am persuaded that this thesis has

[133] Orlin, T., 'The Local Non-Governmental Organisation', in Åkermark, S., (ed.), *Human Rights Education Achievements and Challenges*, Turku/Åbo: Institute for Human Rights Åbo Akademi University, 1998, p. 133.
[134] Carmichael, *supra* footnote 118.
[135] Cambridge Advanced Learners Dictionary available from http://dictionary.cambridge.org/define.asp?key=68410&dict=CALD, [accessed 15 December 2004].

demonstrated that professional and civil society organisations occupy an important position in the entire scheme of human rights implementation in both law and fact.

Some of the identified roles could directly result in treaty implementation; an example would be municipal litigation and other legal processes by civil society organisations. Other roles bear indirectly on the treaty implementation aim, examples would include lobbying and the influencing of public opinion by civil society organisations. Yet other roles could result in a hybrid of direct and indirect implementation of human rights treaties; human rights education efforts of professional organisations exemplify this hybrid role since education in human rights leads to a culture that will end up facilitating treaty implementation. At the same time, taking human rights into the classroom directly implements some of the provisions of the CESCR and CRC in relation to the objectives and content of education. Nevertheless, all the identified roles are equally important and I am looking forward to the day when the activities that constitute the roles become uniformly commonplace in all countries.

As indicated, several problems affect these organisations and in some states civil society is undeveloped. However, these problems are all surmountable and do not detract from the fact that while some national courts are blowing muted trumpets on account of non-incorporation of the human rights treaties, civil society organisations can and have taken governments to task by bringing them before the court of public opinion and by so doing, eliciting positive response. While respect for the sovereignty of states parties constrain treaty-monitoring bodies in their assessments or pronouncements, these organisations could charge ahead and demand implementation because they are operating in their own countries where no one will accuse them of violating state sovereignty. Again, while political and other considerations result in subdued rhetoric instead of inter-state complaints, these organisations, through the facilities of global networks, access to intergovernmental organisations and the help of international NGOs, could present the same complaints to the world and elicit the possible responses that the 'shame factor' can give. Accordingly, my recommendation is that all bodies that render technical or financial aid to such organisations should direct research to these roles and point the organisations they sponsor to the same direction. As a final caveat, I would like to clarify that the position taken by the thesis does not detract from the fact that primary responsibility for human rights treaties implementation continues to rest on state parties.

TRADITIONAL KNOWLEDGE: AN ANALYSIS OF THE CURRENT INTERNATIONAL DEBATE APPLIED TO THE ECUADORIAN AMAZON CONTEXT

Esther Almeida[*]

1. INTRODUCTION

Traditional knowledge (TK), understood as "the information that people in a given community, based on experience and adaptation to a local culture and environment, have developed over time, and continue to develop"[1], has reached a high economic value. With the advance of technology, traditional knowledge is attracting the attention of modern industries, for they have discovered its valuable information and its ability to develop and give riches to a country from its natural and cultural resources.

Ecuador is one such country, well known for having some of the richest biodiversity in the world as well as for its multicultural population. The Ecuadorian indigenous people of the Amazon have lived in the rainforest for centuries and have developed valuable knowledge which is useful for future improvements in the fields of medicine, agriculture and environmental management, amongst others. This information is considered a 'gold mine' for universities, research institutes, laboratories, pharmaceutical companies and other entities that seek innovative ways of managing natural resources by taking advantage of the knowledge of indigenous people on this issue. However, traditional knowledge has been snatched from these people without asking their permission or at least providing them with fair economic compensation. For this reason, access to traditional knowledge, instead of benefiting both parties, has become an issue filled with conflict of interests between the intellectual owners of TK and abusive invaders.

For indigenous people, traditional knowledge is not only a potential source of income but also a valuable cultural heritage and a survival tool that must be

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[1] American Association for the Advancement of Science, *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity*, p. 13, available from shr.aaas.org/tek/handbook/handbook.pdf, [accessed 26 August 2005].

respected and protected. Many international forums support this position, and the current debate is focused on finding appropriate ways to protect traditional knowledge and the rights of indigenous people. However, a global TK protection agreement has not been reached until recently.

In Ecuador, as a result of claims presented by well-organized indigenous groups from the Amazon Jungle, some national institutions -especially those related to environmental protection- are discussing the issue of traditional knowledge. At international level, Ecuador has obligations with regard to the protection of traditional knowledge by having ratified the Convention on Biological Diversity, the Andean Decisions 391 and 486 and the ILO Convention and, at national level, the country has developed a plan aiming to ensure the protection of biodiversity and traditional knowledge. As mentioned above, some steps are been taken in order to fulfill these commitments but more efforts are required to fully implement them, since cases of misappropriation still occur, evidencing a need to establish an international enforceable mechanism to ensure proper protection.

Up to now, the main debate has focused on the creation of a *sui generis* system which includes the unique characteristics of traditional knowledge and that guarantees both the protection and the preservation of TK.

1.1. Purpose and Methodology

The primary objective of this research is to analyze the current international debate on traditional knowledge protection and the possible future trends on this issue. Special attention will be given to the Amazon indigenous groups of Ecuador as well as to the conventions ratified by this country and the steps taken to implement them.

The research is based on the analysis of the policies developed by international organizations dealing with traditional knowledge as well as indigenous perceptions. This study does not claim to provide a final solution to this issue; rather, it aims to study the current settings regarding traditional knowledge and the possible development of a *sui generis* system based on the different approaches provided herein.

An extensive literature review was required to reach an overall and deep understanding of the topic herein. This process included reviewing primary documentation as well as secondary bibliographical sources. An extensive review of Internet-based sources was also necessary since many relevant organizations (WIPO, ILO, WTO, UNESCO, CBD, CONAIE, etc.) have their own publications and data is available mainly online. Additionally, a number of interviews were performed to assess the current situation of traditional knowledge in Ecuador.

2. RELEVANT FEATURES OF TRADITIONAL KNOWLEDGE

2.1. What is Traditional Knowledge?

It is a difficult task to define traditional knowledge, due to the diverse aspects of this concept. Most definitions are merely a description of the characteristics of

traditional knowledge which differ from one another. One of the most accepted and widely used definitions is provided by Article 8(j) of the Convention on Biological Diversity (CBD), according to which, traditional knowledge involves "innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity".[2]

Most definitions highlight the relationship between traditional knowledge and environment protection; however, traditional knowledge also involves traditional technical know-how, traditional ecological, medical or agricultural knowledge; traditional cultural or folklore expressions; and traditional tools, amongst other things.

Whichever definition one chooses to use, there are certain characteristics that must be considered: usually, TK is held collectively, it tends to be transmitted orally, it is not static and it is 'traditional'.[3] The first characteristic will be further analyzed in a separate section related to the holders of traditional knowledge. Oral transmission of the knowledge takes place from generation to generation, and this is why it remains undocumented. It is not static means that it is continuously evolves over time according to the needs of the communities. Thus, TK becomes a source of creation and innovation. The 'traditional' aspect of knowledge is stated by Barsh as follows:

> "What is 'traditional' about traditional knowledge is not its antiquity, but the way it is acquired and used. In other words, the social process of learning and sharing knowledge, which is unique to each indigenous culture, lies at the very heart of its 'traditionality.' Much of this knowledge is actually quite new, but it has a social meaning, and legal character, entirely unlike the knowledge indigenous peoples acquire from settlers and industrialized societies." [4]

In other words, traditional knowledge does not have to be old or antiquated; it is in the way in which a traditional attribute is acquired and used that reflects the traditions of specific groups.

In conclusion, the simplest way to define traditional knowledge is by referring to it as useful information developed by local communities related to different aspects of life such as health, food, education, and biodiversity management which are mainly used to maintain the culture and to preserve the genetic resources and environment.

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[2] Convention on Biological Diversity, Article 8 (j).

[3] United Nations Conference on Trade and Development, *Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices*, TD/B/COM.1/EM.13/2, para. 9.

[4] Barsh, R., 'Indigenous Knowledge and Diversity', in Dutfield, G. (ed.), *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, United Kingdom: Earthscan, 2004) p. 95.

2.2. Why protect traditional knowledge?

Just the fact that different international forums have made large efforts to protect traditional knowledge (i.e., WIPO, WTO, UNCTAD, ILO, UNESCO, etc.), shows that the importance of TK is increasing. About a decade ago, this discussion only mattered to the holders of traditional knowledge, but today this scenario has changed and involves a variety of players ranging from multinational pharmaceuticals to NGOs.

According to Dutfield, there are a variety of moral and legal reasons to protect traditional knowledge. These reasons include: improving the life of the communities where traditional knowledge is created and used, generating a new source of income for national economies, conserving the environment and preventing the misappropriation of traditional knowledge.[5]

For the holders of traditional knowledge, the importance of preserving TK is a matter of survival, as one can understand from the words of one community leader:

> "[w]e maintain a vital linkage between the ancestral wisdom, collective knowledge, the land and our existence as communities. This knowledge is fundamental for the integrity of the environment in which we live and not only a retrieval of the socio economic rights, it is about a condition without which we cannot exist as such. Thus, we have affirmed that the collective knowledge, the ancestral wisdom and the biodiversity conservation are linked to the right of self determination".[6]

Traditional knowledge is created and used by its holders and communities in their daily life, in essential areas like nourishment, health, spirituality, etc. In other words, it is a vital tool for the well-being of community members.

Concerning the benefit received by national economies, many products used worldwide, such as plant-based medicines, cosmetics, handicrafts, agricultural and non-wood forest products, originate from traditional knowledge and have been successfully traded. This constitutes a valuable input to national economies. As an example, according to surveys conducted by Kate and Laird, the annual income derived from the trading of genetic resources is around USD 500 to USD 800 billion.[7]

One of the most compelling reasons to protect traditional knowledge is to prevent the loss of valuable skills to preserve the environment and biodiversity. As an example, in the highlands of Ecuador, land deterioration has resulted from replacing the traditional way of managing soil (i.e. terraces, channels, etc.) with intensive forms of monoculture (i.e. flower plantations).[8] In contrast, the maintenance of traditional knowledge generates evident environmental conservation, as shown by the Wola people from Papua, New Guinea, where the fertility of the

[5] Dutfield, *ibid.*, p. 97.
[6] Coordinator of the Indigenous Organizations of the Amazon Basin (COICA), *Going back to Maloca* (original title: *Volviendo a la Maloca*), p. 59.
[7] Laird, S., 'Contracts for Biodiversity Prospecting', in Dutfield, G., *supra* footnote 4, p. 18.
[8] Author's observations of the rural area of Cayambe, Ecuador.

soil has been maintained thanks to the use of terraces, decomposing vegetation applied as fertilizer and the strategic selection of crops.[9] This demonstrates that traditional knowledge has the potential to provide useful skills and techniques to preserve biodiversity.

In regards to misappropriation of traditional knowledge, it is evident that in the last decades science and technology have progressed rapidly while natural resources are increasingly depleted. This situation draws the attention to developing countries, where natural resources are usually found in those places where indigenous people live, being them the ones that better understand the use of these resources. As a result, the time and money required to investigate potentially beneficial natural products for the Western world is considerably reduced thanks to traditional knowledge.

Traditional knowledge provides valuable information such as the genetic and biochemical sources for generating pharmaceutical products, natural medicines and other products. In fact, according to statistics provided by Pascual Trillo, only one in ten-thousand potentially-valuable biological products proves to be useful; however, this rate changes significantly to one in two when the research is based on information provided by indigenous cultures.[10] In front of this scenario, 'bio-piracy', understood as the unauthorized extraction of biological resources and/or associated traditional knowledge from developing countries,[11] has become more common than ever and big industries from developed countries have gained intellectual property rights over traditional knowledge without the consent of their holders, who are often perturbed by the fact that their information is spread and used without their permission Consequently, the demand for a regulation in favor of traditional knowledge protection is increasing.

2.3. Who are the Holders of Traditional Knowledge?

The debate about who are the holders of traditional knowledge – meaning the people that hold and/or use it – is extensive among the different forums dealing with the issue. Unfortunately, the available literature provides a wide variety of approaches which are sometimes contradictory and contain generalizations that lead to confusion instead of clarifying the matter.

For instance, the CBD considers that traditional knowledge is held by indigenous or local communities, implying that the holders of TK are not necessarily indigenous groups and could be a community people of any sort, as long as they lead

[9] Gómez, M. (ed.), *Protección de los conocimientos tradicionales en las negociaciones TLC* (Protection of traditional knowledge in the TLC negotiations) Colombia: Universidad Externado de, 2004, p. 66.

[10] Pascual, J., 'El Arca de la Biodiversidad' (The ark of biodiversity), in Gómez, M. (ed.), *Protección de los conocimientos tradicionales en las negociaciones TLC* (Protection of traditional knowledge in the TLC negotiations), Universidad Externado de Colombia, 2004, p.70.

[11] Dutfield, *supra* footnote 4, p. 52.

traditional lifestyles, despite the fact that indigenous groups are the ones that usually seek protection.[12]

The difference between traditional communities and indigenous peoples, as well as the knowledge they hold, is clearly explained by Mugabe, who affirms that "traditional people are not necessarily indigenous, but indigenous people are traditional".[13] According to him:

> "traditional people are described as those who hold an unwritten corpus of long-standing customs, beliefs, rituals and practices that have been handed down from previous generations. They do not necessarily have claim of prior territorial occupancy to the current habitat; that is, they could be recent immigrants."[14]

While the definition he adopts regarding indigenous peoples is the one provided by the International Labour Organization (ILO), the Convention Concerning Indigenous and Tribal Peoples in Independent Countries refers to indigenous groups as:

> "peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."[15]

Therefore, according to Mugabe, the difference is that the concept of indigenous groups has wider political implications, such as the prior territorial occupancy to the current habitat. Regarding traditional knowledge, indigenous knowledge is a subset of traditional knowledge held by communities that still live in a traditional style (not necessarily indigenous). It is argued that the knowledge held by traditional communities has not gained momentum in the international debate while indigenous traditional knowledge has been recognized as vital for the existence of these communities.

In conclusion, it can be stated that traditional knowledge is being created and used by traditional communities, indigenous or not. However, for the purpose of this study, special importance is given to the indigenous communities as holders of traditional knowledge. In South America, reference to the holders of traditional knowledge usually means the indigenous communities that have inhabited the American territory before European conquest. A detailed study regarding the indigenous groups from the Ecuadorian Amazon will be provided in Chapter 3.

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[12] Meyer, A., 'Towards the Explicit Recognition of Traditional Knowledge', 2001, 10(1) *Review of European Community and International Environmental Law* p. 38.

[13] Mugabe, J., *Intellectual Property Protection And Traditional Knowledge: An Exploration in International Policy Discourse*, p. 2, available from www.wipo.int/tk/en/hr/panel discussion/papers/pdf/mugabe.pdf, [accessed 15 July 2005].

[14] *Ibid.*

[15] Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Article 1(1)(b).

2.4. Current Challenges to Traditional Knowledge

As mentioned above, traditional knowledge has been created and continues evolving thanks to the innumerable arts, abilities and intelligence of the indigenous communities that live closely with the environment. These people have learned by a process of trial and error. But now, due to the globalization process and the increased exploitation of the resources of the Amazon rainforest, these tribes are being absorbed by the modern world, and so is their traditional knowledge.

There are many factors that endanger the survival of traditional knowledge, ranging from internal reasons − such as the loss of native languages and the lack of interest from new indigenous generations − to external factors − like the industrial exploitation of the rainforest, the contamination of the environment and the misappropriation of traditional knowledge.

The majority of native languages are vanishing; most are only spoken by elders. Disappearance of indigenous languages goes along with the loss of traditional knowledge. A recent study, made by the linguist Ken Hale, shows that of the 6,000 languages around the world, 3,000 are in the process of disappearing since new generations do not speak them.[16] The acculturation process that these groups are experiencing is influencing their education and culture. In general, there are no efforts from governments to preserve them. However, even if there is a general trend to follow Western models of living, there is also a movement to keep the essential components of culture alive (i.e. language, traditions, etc.). For example, UNESCO has funding programs aimed to recover and maintain indigenous languages. Also, private NGOs are advocating the inclusion of native languages in the curriculum of primary schools of the Amazon Region, which are taught by the elders of the native communities.

Regarding external factors, these follow a trend that starts with the arrival of Western influences. Usually, this occurs under the modality of religious missions or military posts, which open a path for industries like crude oil, tourism or logging companies, amongst others. It would be unfair to generalize all of them as detrimental to traditional knowledge; however, experience has shown that in many instances this is the case. For example, the Huaorani people have been acculturated and fragmented. Today, an oil company is operating in their territory and strongly influencing these communities (there are cases of prostitution, introduced health diseases, etc.) without making any effort to preserve the cultural identity and integrity of these native groups. These incursions are quite common all over the Amazon, leaving the native cultures in danger of loosing their traditional history and jeopardizing their future as well.

[16] E. Linden, *Lost Tribes, Lost Knowledge*, available from www.ee.ryerson.ca:8080/~elf/abacus/lost-tribes-lost-knowledge.html, [accessed 9 June 2005].

3. THE ECUADORIAN CONTEXT

3.1. Geographical and Socio-Political Context

Ecuador is located on the Pacific Coast, bordering Colombia and Peru. With an area of 256,370 square kilometers, this country has an ethnically diverse population of about 13 million people − 65 per cent mestizos, 25 per cent indigenous, ten per cent Caucasian and ten per cent African-American. Geographically, Ecuador is divided into four regions (the Amazon Jungle, the Andean Mountains, the Coast and the Galapagos Islands), and politically into 22 provinces.

Ecuador is primarily an exporter of raw material. The major sources of international trade are crude oil (the most active wells are located in the Amazon Region), bananas, flowers and shrimp.

The Ecuadorian Government consists of a representative democracy. Administratively, it is divided into three branches: Executive, Legislative and Judicial. In the past decade, the political and economic situation has been unstable and menaced by poverty, bureaucratic ineptitude, political fragmentation and a high corruption level in the country.[17] This long-running political instability goes along with a deepening economic crisis. Forty eight per cent of the Ecuadorian population is below the poverty line (USD 2 per day),[18] and an additional 17 per cent may fall below. Most of them are located in rural areas.

Despite the difficulties described above, Ecuador is considered a rich country due to its natural resources, exemplified by its position as one of the top ten mega-diverse countries worldwide in relation to biodiversity. Remarkably, the region that holds most of Ecuador's riches is the Ecuadorian Amazon Region, which will be analyzed in the following section.

3.2. The Amazon Region and Its People: Setting the Scenario

The Amazon Region constitutes almost half of the Ecuadorian territory with an area of 130,035 square kilometers. It is divided into the provinces of Sucumbios, Napo, Pastaza, Morona-Santiago and Zamora-Chinchipe. Continuous, heavy rainfall and high humidity characterize the Amazon Rainforest, which is said to be one of the 25 hot spots that must be preserved for the Earth's survival (i.e. Rainforest Concern, Rain Forest Alliance, etc.) because it has one of the highest biodiversities in the world and holds unique and exuberant fauna and flora.

The Amazon Jungle is scarcely inhabited in relation to its overall size. Only around 500,000 indigenous people live in this area.[19] Its population is divided into

[17] According to Transparency International, after Paraguay, Ecuador is the second most corrupt nation in Latin America with a level of corruption compared to Congo, Uganda, Iraq, amongst others.

[18] *Human Development Report*, 2003, available from hdr.undp.org/statistics/data/indicators.cfm?x=24&y=1&z=1, [accessed 15 July 2005].

[19] National Institute of Statistics and Census of Ecuador, 2002.

various nationalities, understood as the historic and political entities that share a common identity, history, language and culture, living in a determined territory with their own social, economic, political and legal organization.[20] The nationalities are Cofán, Secoya, Siona, Huaorani, lowland Quichua, Shuar, Achuar, Shiwiar and Zápara.

The location of these groups has allowed them to have their own social and political life and to develop a unique and strong culture. The ownership of land is communal and families are given pieces of land to use, which are usually located along the river. In these areas, they practice small-scale agriculture, mainly for the family's maintenance and subsistence. The rest of the community land is typically set aside as a reserve for future development, hunting and gathering.

Regarding the political system, there are local, national and international organizations. Locally, indigenous groups from the Ecuadorian Amazon Region are organized in community-level structures, which in turn are organized into higher-tier associations or local and regional federations, which then constitute the national federation.

At the national level, the Confederation of Indigenous Nationalities of Ecuador (CONAIE) is the largest and most representative organization constituted by regional indigenous organizations throughout Ecuador. This organization fosters self-reliant development by establishing and implementing indigenous policies.

Internationally, the main representative of the Amazonian indigenous people is the Coordinator of the Indigenous Organizations of the Amazon Basin (COICA), created in 1984 in the city of Lima, Peru. COICA integrates nine organizations from the nine countries that share the Amazon Region.[21] In Ecuador, the organization that represents the country in COICA is the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFENIAE). This is an umbrella organization, composed of 13 ethnic federations from the Amazon basin, to promote the cultural and economic development of the indigenous communities of the Ecuadorian Amazon as well as the preservation of the Amazon environment. CONFENIAE constitutes the major component of the CONAIE. [22]

An example of the typical structure of the Amazon organizations is in the Shuar nationality, which is organized as follows:

- They have centers established in each community.
- The second-tier organizations are called associations.
- The associations constitute the Shuar Federation.
- This federation, along with other ethnic federations from the Amazon basin, compose the CONFENIAE.

[20] Council for Development of Nationalities and Peoples of Ecuador (CODENPE), available from www.codenpe.gov.ec/npe.htm>, [accessed 15 July 2005.
[21] Perú, Guiana, Bolivia, Brazil, Ecuador, Venezuela, French Guiana, Surinam, Colombia.
[22] The Advocacy Projects, *Defending the Amazon*, available from www.advocacynet.org/ cpage_view/ amazonoil_conaie_17_70.html, [accessed 15 July 2005].

- This organization, together with other highland and coastal federations, constitute the CONAIE.[23]

These organizations have helped indigenous Amazon groups make a stand in national and international arenas.

3.3. Traditional Knowledge and Biodiversity Conservation of the Amazon Region

3.3.1. Biodiversity of the Area

The Ecuadorian Amazon lowlands are considered among the richest ecosystems on Earth, enhanced by the cultural diversity and forms of social organization that indigenous groups have adapted in harmony with the environment in which they have evolved over the centuries.

The Ecuadorian rainforest is extraordinarily rich in species. It is estimated that only ten per cent of the flora has been catalogued, leaving an enormous potential for future surveys. Preliminary studies show that there are probably 1,000 to 1,500 different tree species in this area. Recent investigations made by the Missouri Botanical Garden have found that ten per cent of tree species inventoried were new to science. Furthermore, it is estimated that around 15 per cent of all plant species from this region are endemic to it – that is, found growing nowhere else on Earth.[24]

The variety of bird species in this area is amazing; the Ecuadorian Amazon holds 18 per cent of the avian diversity worldwide. Rainforest mammal populations are abundant in this area, including the Brazilian Tapir (*Tapirus terrestris*), Jaguar (*Panthera onca*), Ocelot (*Felis pardalis*), Jaguarundi (*Felis yarouaroundi*), Oncilla (*Felis tigrina*), Margay (*Felis wiedii*), Capybara (*Hydrochaeris hydrochaeris*), two species of river dolphins (*Inia geoffrensis and Sotalia fluviatilis*), etc.

Such biological diversity constitutes a strategic resource for the future, both for the applications that certain tropical species have for human well-being (medicine, raw materials, cosmetics, etc.) as well as for the large contribution they have lent to the development of improved agricultural varieties. However, access to these resources is greatly increased, and the time it takes to make them available to society is drastically reduced when traditional knowledge is utilized.

3.3.2. Traditional Knowledge of the Amazon Indigenous Groups

For the purpose of this study, Amazonian traditional knowledge will be classified in two main pillars: land use (agriculture, hunting and gathering, etc.) and unique

[23] The World Bank, *Social Capital as a Factor in Indigenous Peoples Development in Ecuador*, August 2003, available from lnweb18.worldbank.org/ESSD/sdvext.nsf/60ByDocName/SocialCapitalasaFactorinIndigenousPeoplesDevelopmentinEcuadorLatinAmericaandCaribbeanRegionSustainableDevelopmentWorkingPaper15/$FILE/Social+Capital+and+Indigenous+Development.pdf, [accessed 17 July 2005].

[24] The Pachamama Alliance, *Achuar Climate and Rain Forest Protection Project*, Ecuador, June 2001, p. 14.

management of flora and fauna (medicinal uses, spiritual/ritual applications, construction and handicraft materials).

Traditional Knowledge Applied to Land Use

The Amazon native groups have for centuries successfully managed the tropical forest where they live. This fact constitutes the strongest argument for traditional knowledge as an example to follow for achieving sustainable use of the environment. For instance, agricultural practices are based on shifting cultivation, where the indigenous groups take advantage of the natural forest structure and small human-made clearings to plant mixed crops, such as edible roots, fruits, medicinal plants and plants used for construction material. These 'garden plots' are usually cultivated for three to ten years and then abandoned to allow the soil to regenerate and become part of the forest once again. Occasionally, after that period of time has elapsed, the cultivation plots may be used once again, despite the fact that there is not an explicit strategy to rotate them due to the amount of land available for a relatively small and scattered population. In addition to revealing great knowledge of the dynamics and functioning of tropical ecosystems, traditional agricultural systems make self-subsistence viable and keep an ecological equilibrium. .[25]

There are many examples of hunting and gathering practices across the Amazon; however, the practices of the Achuar people is particularly illustrative. The Achuars base their hunting and gathering activities on the movement of two constellations: Pleiades (*musach*), which is visible to them between July and April, and Scorpion (*ankuam*), which appears in mid- January and indicates the beginning of the rainy season. The position of these constellations marks twenty-seven specific seasons for hunting and gathering activities. For instance, in the month of January, six seasons take place which indicate the time for fishing for small species since the water level in rivers and lakes decreases, the fruit of the Chonta palm is ready to gather, and the hunting season of fruit eating animals is over for their famine time starts. This type of applied traditional knowledge avoids over-hunting and allows ecosystems to maintain a healthy equilibrium. It goes without saying that these types of practices are unique to the Amazonian indigenous groups and provide empirical evidence of the functional management of natural resources, which could be of value for other fragile areas around the world. [26]

Traditional Knowledge Related to Fauna and Flora Species

Kricher considers that the rainforest is a "neotropical pharmacy", [27] meaning that most of the well-known poisons and stimulants come from plants that live there.

[25] Espinosa, M., *Retos de la Amazonia* (Challenges of the Amazon), ILDIS, ABYA-YALA, 1993, p. 31.

[26] KAPAWI Ecolodge and Reserve, *Understanding of the Cosmos*, available from www.kapawi.com/ html/en/reserve/achuar/cosmos/january.htm, [accessed 27 July 2005].

[27] Kricher, J. (ed.), *A Neotropical Companion*, United States of America: Princeton University Press, 1997, p. 145.

Today, modern societies are very familiar with compounds coming from rainforests and use them for a variety of purposes ranging from medicine to pesticides.

Given the great amount of plants and animals that live in the rainforest, the knowledge of the native people of the region plays an important role since they have been dealing with them for generations. Therefore, it is not surprising that they have found multiple uses for various chemical substances contained within the species of native flora and fauna. For instance, groups from the Amazon rainforest extract these compounds to use them in arrow poisons, hallucinogens, fish poisons, drugs for medical and similar uses, stimulants and spices, and essential oils and pigments. [28]

The pharmaceutical, biotechnology, and agricultural industries have shown interest in the Amazon people's knowledge. Some of these industries have performed studies related to species of the forest, relying on the guidance of local communities and the familiarity they have with native species. [29]

While it is claimed that indigenous groups are compensated for the use of their traditional knowledge and that permission is granted before accessing such knowledge, traditional knowledge has been repeatedly taken to benefit many people other than its original holders.

3.3.3. Cases of Misappropriation of Traditional Knowledge from the Amazon Region

As pointed out above, there have been many cases of unauthorized use and misappropriation of traditional knowledge and biological resources in this region, neither with the consent of the holders nor with compensation. The rules regarding the use of knowledge by third persons will be a matter for the next chapter; in this subsection, some cases of misappropriation will be provided.

The Ayahuasca Case

Banisteriopsis caapi is the name assigned to the variety of plant used for generations by shamans from the Amazon and considered to be sacred. The bark of this plant is processed along with other rainforest plants to produce a ceremonial drink called *ayahuasca*. This concoction is used for spiritual and healing ceremonies.

The traditional knowledge regarding this plant is not based on the mere use of a single plant species; in fact, the *Banisteriopsis caapi* itself does not contain the necessary enzyme for the human body to assimilate its compounds, in order for it to have an effect it needs to be combined with a different plant to catalyze the necessary reaction. This begs the questions: how did the indigenous communities from the Amazon find out which two plants to mix from the thousands of different

[28] Gotlieb, O., *The Chemical Uses and Chemical Geography of Amazon Plants*, in G.T. Prance, and T.E. Lovejoy (eds.), *Amazonia*, Pergamon Press, Key Environments Series, 1985, pp. 218–238.

[29] Posey, A. and Dutfield, G., *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, Canada: International Development Research Centre, 1996, pp. 5–12.

varieties available in the rainforest? And, how long did it take for them to realize this combination?

Although this plant has been used in the Amazon for generations, in 1986, an American citizen, Loren Miller obtained -for a period of twenty years- the US Plant Patent number 5,751 that granted him rights over an alleged variety of B. caapi, which he had called "*Da Vine*". To obtain the patent, he **argued** that this species is a new variety of *Banisteriopsis caapi* because of its uniquely colored flower and that he found it in a domestic garden of the Amazon Region.[30] After ten years that the patent was granted, the indigenous communities from the Amazon became aware of **this fact** and declared Mr. Loren as persona *non-grata* among the indigenous peoples, thus preventing him from entering their territories. Indigenous environmental and human rights organizations soon expressed their solidarity with these indigenous communities **and filed** a demand **requesting the US Patent and Trademark Office (USPTO)** to reexamine and suspend the patent. The demand was presented under the auspice of the Center for International Environmental Law (CIEL) on behalf of the Coordinating Body of Indigenous Organizations of the Amazon Basin (COICA) and the Coalition for Amazonian Peoples and Their Environment (Amazon Coalition).

In November 1999, the USPTO revoked the patent arguing that the plant was not distinguishable and not because it was considered sacred and held as intrinsic traditional knowledge of the Amazonian indigenous groups.

According to international guidelines, such as the Convention on Biological Diversity that advocates protection of traditional knowledge, the patent should have never been granted. It is important to mention that the United States is one of the few countries that have not ratified the CBD. After the patent was cancelled, Mr. Miller issued an appeal affirming that he fulfilled the requirements to be granted the patent (novelty, non obviousness and utility) and submitted many botanical studies arguing that the plant constituted a new variety. After three years of reexaminations, in 2001, the patent was re-issued, despite the overwhelming arguments showing that the *ayahuasca* patent was not valid. These arguments included the common use and documentation of the plant, the spiritual importance for Amazonian indigenous groups, the lack of novelty, amongst others.[31] This situation fueled once again protests from indigenous groups and organizations that helped them to get the patent rejected a few years prior.

Eventually, on 17 June 2003, the patent reached its 20th year and therefore expired. This case clearly shows that traditional knowledge does not possess a strong enforceable mechanism to protect it and that intellectual property rights do not include indigenous peoples' perspectives and rights, because, if a plant is already known and used by an indigenous community, according to the intellectual property regime the plant may be registered by another individual that proves the novelty of the plant.

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[30] COICA, *Situation of the Patent for Ayahuasca,* available from www.coica.org/en/ ma_documents/ patent_ayahuasca.html, [accessed 26 July 2005].

[31] Posey and Dutfield, *supra* footnote 29, p.5.

Despite this case having gained a lot of international attention, it did not set a legal precedent for possible future conflicts. This situation drove the indigenous organizations to a state of alertness when it comes to sharing their knowledge and woke them from a naive position of having to accept the raping of their knowledge without necessary acknowledgement and proper economic compensation.

The Epipedobates Tricolor Case

Another case of biopiracy which occurred in the Ecuadorian Amazon lowlands concerned *Epipedobates Tricolor*. This species is a poisonous neo-tropical frog that has been used by indigenous communities of the area since ancient times. The frog's skin secretes a chemical compound that the native people use to hunt by putting this poison onto a spear. This substance causes the death of the animal once it reaches the blood system. A scientist from the US National Institute of Health (NIH) learned about this species and its effects from the Amazonian communities. Then, he illegally took 750 samples of the animal to investigate, without having a license to take them in the first place. This license is required since this animal is an endangered species in Ecuador, as stated in the annex to the Convention on International Trade in Endangered Species (CITES), ratified by Ecuador in 1975. Subsequently, after many investigations about the chemical compound and its effects, Abbot Laboratories obtained the patent through the creation of ABT-594, which is a non-toxic painkiller in the category of opium derivates. It has no side effects and promotes alertness. Again, in this case, the traditional knowledge from which this product derives has not been recognized, according to the Convention on Biological Diversity and regional legislation, such as the Andean Pact Decision regarding access to genetic resources.[32]

These two cases demonstrate the current scenario regarding the use of biological resources and related traditional knowledge. The interest of big companies (i.e. in the field of pharmaceuticals) to acquire traditional knowledge related to resources is growing**,** thus, protection must be granted to the holders in order to ensure a fair outcome for both parties Traditional knowledge is not separable from the indigenous communities. They do not see it only as a possible tool to obtain an economic benefit, but it is also part of their daily lives and has a cultural and social dimension that has to be recognized when dealing with this topic. There are many international forums where this topic is being discussed to foster an equitable distribution of benefits derived from the access to traditional knowledge. However, this is not only a debate regarding the sharing of benefits. It involves more complex issues such as full participation of indigenous groups, mechanisms of consultation and prior informed consent for activities that take place in their territories, autonomy and self-determination in the exercise of their own decision-making, and the customary laws regarding the use of traditional knowledge.[33] It is

[32] *Acción Ecológica*, *Biopiracy of Epipedobates Tricolor*, available from www.grain.org/bioipr/?id=55, [accessed 4 August 2005].

[33] Working Group On Article 8(J) And Related Provisions Of The Convention On Biological Diversity, *Composite Report on the Status and Trends Regarding the Knowledge, Innovations*

relevant to explore the instruments that might influence the future of traditional knowledge, with special attention to those that have played an important role in the Ecuadorian setting.

4. POLICY FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

In the previous chapters, the importance of traditional knowledge and its current challenges were addressed. In this chapter, the discussion will move forward into the relevant international forums and conventions that have fueled the debate regarding the protection of traditional knowledge, biodiversity and indigenous peoples' rights.

Despite the fact that different forums (CBD, WTO, WIPO, UNCTAD, FAO, UNESCO, UNEP, UN Permanent Forum for Indigenous Issues, amongst others) are currently addressing the concerns of traditional knowledge, there is not yet a consensus on the kind of protection that is needed. This may be due to the fact that there are many sorts of traditional knowledge and that each forum is trying to assess the one that best fits into its scope and objectives. However, even if each forum provides significant input into the debate, it will be an important task to agree on a general system of protection and preservation of traditional knowledge. This is because, at the end, the providers of traditional knowledge are indigenous peoples that need a unique system of protection when their rights are being infringed and there is a need to provide measures to preserve traditional knowledge, which is being lost at an alarming rate.[34]

For the purpose of this study, special attention will be given to two international conventions: the Indigenous and Tribal Peoples Convention No. 169 and the Convention on Biological Diversity. Meanwhile, at the regional level, the Andean Decisions 486 and 391 will be analyzed. Those conventions were chosen because they are applicable to the Ecuadorian context and significant to the traditional knowledge debate. Both the international framework and the national legislation will be considered further on.

4.1. ILO 169

The International Labour Organization is the specialized agency of the United Nations charged with promoting social justice, international recognition and implementation of labour rights standards.

Back in 1921, the ILO first addressed indigenous situations when dealing with the miserable situation of 'native workers' in the overseas colonies of Europe. Then, after the creation of the United Nations in 1945 the ILO broadened its objectives and started dealing with indigenous peoples in general.

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and Practices of Indigenous and Local Communities, available from www.indigenas.bioetica.org/wg8j-03-inf-10-en.pdf, [accessed 12 July 2005].

[34] For example, it is estimated that 90 per cent of the world's languages will become extinct in the next 100 years, which are carriers of culture and traditional knowledge.

In developing norms, the ILO gave life to Convention 169 which is an updated version of Convention No. 107, since the latter had an integrationist approach of indigenous peoples to western societies, while Convention No. 169 promotes the survival and development of indigenous and tribal peoples with their own structures, culture and traditions. This document constitutes the platform for national and international discussions concerning these peoples and, to date, 17 countries have ratified it, including Ecuador, on 15 May 1998.

Although this Convention does not directly address traditional knowledge, it is relevant for traditional knowledge since it recognizes the importance of indigenous and tribal peoples' participation in the decision making process of their countries. It also attaches importance to the consultation process that has to be done regarding any decision that may affect these groups. In this line, Article 7.1 states:

> "[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."[35]

However, this consultation process is not an absolute obligation of the State since it is obligatory only "whenever appropriate", leaving to the discretion of the State the use of this tool. This Convention also enshrines the importance of the culture and the spiritual values of indigenous groups as well as the rights of indigenous peoples to use and manage the natural resources of their lands.[36] Furthermore, Mugabe highlights the importance of the Convention in recognizing collective rights of indigenous groups. According to him, "[t]his provision provides a basis for arguing for the enlargement of intellectual property regimes to accommodate collective rights of indigenous peoples".[37]

Although critics qualified this Convention as a weak instrument, especially due to its few members, it does recognize indispensable rights for indigenous peoples, such as rights to lands, territory and natural resources, and provides valuable measures, such as consultation with these groups in order to respect their social, economic and cultural rights.

4.2. The Convention on Biological Diversity

The Convention on Biological Diversity (CBD) was adopted on 5 June 1992 at the Earth Summit Conference held in Rio de Janeiro under the auspices of the United Nations Conference on Environment and Development and came into force on 29

[35] Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, Article 7(1).
[36] Meyer, *supra* footnote 12, pp. 42, 43.
[37] Mugabe, *supra* footnote 13, p. 19.

December 1993. To date, it has 188 parties, including Ecuador, which ratified it on 23 February 1993.

The governing body of the Convention is the Conference of the Parties (COP), which meets every two years in order to assess the implementation of the Convention and keep developing the issues involved in the agreement.

Besides the COP, two other bodies deal with aspects related to traditional knowledge: the Working Group on Article 8(j) and Related Provisions and the Working Group on Access and Benefit Sharing. The former was created in 1999, at the suggestion of the COP to assist them by addressing issues involved in the protection of traditional knowledge, and to focus on the implementation of Article 8 (j). The Working Group on Access and Benefit Sharing was established to develop the implementation of the obligation assumed by States to promote equitable sharing of benefits derived from the access and commercial use of genetic resources.[38]

Given the importance of traditional knowledge to the conservation of biological resources and the preservation of the environment, this Convention is the first legally binding instrument that explicitly addresses traditional knowledge. However, it is important to mention that CBD does not offer protection to all kinds of traditional knowledge. Rather, it focuses only on practices and innovations associated with the conservation and sustainable use of natural resources, leaving outside its scope all traditional knowledge that does not fall into this category, such as expressions of folklore.[39] Most traditional knowledge of the groups from the Ecuadorian Amazon is related to biodiversity and large interest from outsiders lies in this kind of knowledge as well.

In the CBD, traditional knowledge aspects are dealt with in the preamble as well as in four of its articles. The pivotal article regarding traditional knowledge is Article 8(j):

> "Article 8. In-situ Conservation
>
> Each Contracting Party shall, as far as possible and as appropriate:
>
> (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;" [40]

This Article establishes three main State obligations :

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[38] Ministry of Economic Development of New Zealand, *Fact Sheets on International Bodies Considering Traditional Knowledge*, available from www.med.govt.nz/buslt/int_prop/traditional-knowledge/fact-sheets/index.html, [accessed 13 July 2005].
[39] Meyer, *supra* footnote 12, pp. 37, 38.
[40] CBD, Article 8(j).

- To respect, preserve and maintain the indigenous knowledge.
- To promote the wider application of this knowledge with the authorization and participation of the holders.
- To encourage equitable sharing of the benefits derived from the use of the knowledge.[41]

This Convention constitutes the first attempt to regulate traditional knowledge. Its importance is based on the fact that it recognizes the pivotal role of indigenous and local communities in the conservation and sustainable use of biological resources since these communities have been using the biodiversity and preserving the environment for generations. It also recognizes the significance of traditional knowledge as a starting point to develop valuable agricultural, medicinal and industrial information and practices.

Although the CBD is considered an important step for the arguments mentioned above, it has also been strongly criticized. For instance, in regard to the language of the Convention, Mugabe argues that "[l]anguage such as 'subject to national legislation' and 'as far as possible and as appropriate' was promoted during the negotiations for the CBD by governments that did not want to commit themselves to protection of indigenous peoples and their rights", [42] meaning that the implementation of articles such as Article 8(j) depends on the willingness of national governments, which leaves the protection of traditional knowledge in a weak position and to the discretion of States.

The Convention on Biological Diversity includes two more aspects regarding traditional knowledge that need to be addressed further: access to genetic resources and the benefit sharing mechanism. Regarding access to genetic resources, when these resources and the traditional knowledge associated with them are exploited by outsiders, Article 15 of the CBD (access to genetic resources) needs to be read in conjunction with Article 8 (j) because the former establishes that the governments of State Parties are the ones that will make decisions regarding access to genetic resources, and it does not mention local or indigenous communities.

According to emerging practice and the evolution of concepts such as traditional knowledge and sovereignty of indigenous groups, it is internationally recognized that when exchange of genetic resources and related traditional knowledge takes place in indigenous or local communities, all the arrangements must involve these groups.[43] It is argued that the CBD is "an important re-assertion of the sovereign rights of states over their biological resources (Articles 3 and 15)", [44] but as mentioned before, current international law recognizes that 'state

[41] Gundling, L., *Implementing Article 8(j) and Other Provisions of the Convention on Biological Diversity*, Ecuador: COICA, 2000, pp. 9–14.
[42] Mugabe, *supra* footnote 13, p. 23.
[43] Gundling, *supra* footnote 41, pp. 9–13.
[44] Gibson, J., *Traditional Knowledge and the International Context for Protection*, p. 13, available from www.law.ed.ac.uk/ahrb/script-ed/docs/TK.asp, [accessed 24 June 2005].

sovereignty' does not exclude respect for indigenous peoples' rights ensured by international treaties as well as by the constitutions of many countries, including the Ecuadorian.

Furthermore, Article 15 of the CBD requires prior informed consent (PIC) of the party that provides the resources. And again, reading this Article in conjunction with Article 8(j), the PIC of the holders of traditional knowledge related to these resources is also needed. Examples of national legislation in this respect are found in Costa Rica as well as in the Andean Community; both require PIC from native communities. However, it is important to assert that prior informed consent from local and indigenous communities must be given once they are completely aware of all the implications and applications that the transfer of knowledge and/or resources entails.[45]

Besides legislative measures to protect traditional knowledge, which are not yet fully developed, the creation of contractual agreements is taking place in the private sphere. If PIC is obtained, a contractual arrangement dealing with mutually agreed terms (MAT) and benefit sharing aspects might be discussed between the local or indigenous community and outsiders. The establishment of contracts on access to genetic resources and sharing of benefits is the current private law trend to accomplish the objectives of the CBD regarding these aspects. Fact finding missions, conducted by the World Intellectual Property Organization (WIPO), in order to assess the needs and expectations of the holders of traditional knowledge have found that these contractual arrangements are being created in different forms such as licenses, material transfer agreements, access agreements, information transfer agreements and so on.[46]

Even though these contracts seem to be a useful tool to procure fair access to genetic resources and related traditional knowledge, contractual arrangements in the private arena should not be considered the sole solution to accomplish the goals of protecting traditional knowledge and procuring a fair exchange: there is a need to implement an international enforceable mechanism. To this regard, during the seventh session of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), India argued that:

> "[h]owever carefully any model contract is drafted, however ardently such contracts try to correct the huge imbalance between the provider and the user, such an

[45] Zamudio, T., *Conocimiento Tradicional, Hacia un Marco Normativo de Protección,* (Traditional Knowledge: Towards a Normative Framework of Protection), Ecuador: Abya Yala, 2004, p. 253.

[46] World Intellectual Property Organization, *Draft Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge*, p. 20, available from www.wipo.int/tk/en/tk/ffm/report/interim/pdf/8.pdf, [accessed 17 June 2005].

> approach simply cannot lead to anything even remotely resembling a fair and equitable regime."[47]

Countries like Ecuador and Brazil adopted the same position, and the latter articulated that making the 'disclosure of origin' a requirement dependant on a contractual agreement will weaken the protection of traditional knowledge. There is a need to stipulate that every country requires the disclosure of origin prior to granting a patent based on genetic resources so as to protect the source of origin of those resources.[48]

A study made by COICA to this respect draws attention to possible problems arising from the conclusion of contracts: contracts are not binding upon third parties (i.e. weakening the protection of traditional knowledge if misappropriation occurs). This could generate high costs. Additionally, all the implications of concluding a contract are not always well known by indigenous groups and this situation place them in a less powerful position amongst the contractual parties.[49] It is argued, however, by the same organization, that all these inconveniences could be properly dealt with through strategies to support and train local and indigenous communities in order to prepare them to achieve fair terms when the disclosure of knowledge occurs.

During the process of implementing the CBD, the COP, through its specialized bodies, has produced two sets of guidelines, the so-called 'Akwe: Kon Guidelines' and the 'Bonn Guidelines'. Both are the result of many years of national and international experiences in the adaptation of the CBD. They clarify concepts and aspects of the Convention and promote the sustainable use of resources as well as the protection of traditional knowledge. Even if the guidelines are not legally binding instruments, they help in achieving the goals of the CBD since they are useful tools in guiding States to implement the Convention in a more detailed manner.

The CBD has made important advances in this respect by establishing standards and guidelines for the conclusion of contracts. However, these 'suggestions' should evolve into a more enforceable mechanism at the national level, i.e. through their incorporation in national legislation. However, this is only part of the required protection. There is also a need for a parallel mechanism to ensure the protection of other community interests such as the preservation of traditional knowledge, sanctions for misappropriation and the implementation and enforcement of contracts. To this effect, a legally binding system is required.

Although the CBD does not offer a binding dispute settlement mechanism, it is important to remark that the principles established by the CBD have created a

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[47] World Intellectual Property Organization, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Draft Report of the Seventh Session (2004)', in Berglund, M., *The Protection of Traditional Knowledge Related to Genetic Resources: The Case for a Modified Patent Application Procedure*, available from www.law.ed.ac.uk/ahrb/script-ed/vol2-2/TK.asp, [accessed 1 August 2005].
[48] *Ibid.*
[49] Gundling, *supra* footnote 41, pp. 9–13.

platform to develop and implement a new system of protection. Other forums have come out with possible solutions as well, though some of them are somewhat contradictory to the internationally recognized principles established by the CBD. An example of this is the position of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement, which according to critics weakens the status of traditional knowledge and leaves it unprotected.

4.3. Andean Community Decision 391 (Access to Genetic Resources) and Andean Community Decision 486 (Industrial Property)

The Andean Community of Nations is a regional organization dealing with social, political and economic aspects. Its members are Bolivia, Colombia, Ecuador, and Peru (Venezuela left the organization in April 2006). All its resolutions take the form of 'Decisions' that constitute legally binding instruments to be applied by each member State without the need of the Congress's approval.

To acknowledge the value of biological resources and related traditional knowledge and in order to establish an equitable benefit sharing mechanism system between the Andean Community countries, Decision 391 was adopted in July 1996. Basically, this Decision sets a legal framework for bio-prospecting in the region. The creation of this Decision was made in the very early stages of the international debate on traditional knowledge when the CBD was the only reference.[50] It is argued that this Decision is a big step in the implementation of CBD in the region, especially regarding the benefit sharing mechanism.

Amongst the main aspects of this Decision, it establishes that genetic resources are part of the patrimony of the State, and in order to access them with the purpose of investigation or economic interest, there has to be a contract between the party(ies)interested in bio-prospecting and the national authority of the state. It also establishes the need for a fair and equitable share of the benefits derived from access to the resources, and recognizes the value of traditional knowledge from the communities. To this respect, it is established in Article 7 of the Decision to "recognize and value the rights and decision making process of indigenous, Afro-American and local communities over their traditional knowledge, innovations and practices associated to genetic resources and derived products".[51] However, the Decision is only partially in agreement with the objectives of the CBD since consultation with indigenous communities is only necessary when traditional

[50] M. Ruiz, 'Regulating Bio Prospecting and Protecting Indigenous Knowledge in the Andean Community: Decision 391 and its Overall Impacts in the Region', in UNCTAD (ed.), *Recopilación de documentos relevantes para el Taller "Acceso a recursos genéticos, conocimientos y prácticas tradicionales y distribución de beneficios"* (Compilation of Relevant Documents for the Workshop "Access to Genetic Resources, Traditional Knowledge and Practices and Benefit Sharing"), available from www.comunidadandina.org/desarrollo/unctad_can_caf.PDF, pp. 89, 90, [accessed 14 August 2005].

[51] Decision 391 of the Andean Community on a Common Regimen on Access to Genetic Resources, Article 7.

knowledge is associated with the genetic resources to be exploited. Therefore, if the genetic resources in discussion do not involve traditional knowledge, it is not necessary to reach an agreement with communities. This leaves communities in a weak position because even if traditional knowledge is not directly linked to the natural resources being exploited, any process occurring in their lands will have a direct effect in their culture and environment.

In the same manner as the CBD, the Decision has made clear the awareness of the Andean Community that even if the conclusion of contracts is required in order to access genetic resources, it will not ensure the protection and preservation of traditional knowledge. Despite this awareness, to date there has not been a concrete proposal as to the creation of such a protection and preservation system.

In sum, even if Decision 391 sets standards for an equitable sharing of benefits, it restricts the collective rights of indigenous peoples since it is the State that has absolute sovereignty over its resources and the right to make decisions regarding access to genetic resources. Only when the intangible component is involved, will communities be consulted. This premise is contrary to the integral and indissoluble link local communities have with their resources and traditional knowledge.

Another relevant Decision from the Andean Community that contains provisions regarding traditional knowledge is Decision 486. It was adopted in September 2000 to develop a common regime between its members on intellectual property. This Decision, as well as Decision 391, is considered an innovative step since it contains provisions directly connected to the protection of indigenous communities and biological diversity. This creates a direct link between the industrial property regime and the CBD by subordinating the granting of patents involving TK to prior consultations and agreement with TK holders[52]. This link is developed in Article 3:

> "The Member Countries shall ensure that the protection granted to intellectual property elements shall be accorded while safeguarding and respecting their biological and genetic heritage, together with the traditional knowledge of their indigenous, African American, or local communities. As a result, the granting of patents on inventions that have been developed on the basis of material obtained from that heritage or that knowledge shall be subordinated to the acquisition of that material in accordance with international, Andean Community, and national law."[53]

Amongst its regulatory functions, this Decision establishes special obligations in the patent system to ensure the protection of traditional knowledge. For instance, article 26 requires a copy of the contract allowing access to genetic resources and/or a copy of the contract authorizing use of traditional knowledge from local, African-American or indigenous communities as a condition to obtain a patent. If the

[52] M. Ruiz, *The Andean Community's New Industrial Property Regime: Creating Synergies Between the CBD and Intellectual Property Rights*, available from www.iprsonline.org/ictsd/docs/RuizBridgesYear4N9NovDec2000.pdf, [accessed 26 July 2005].

[53] Decision 486 of the Andean Community on a Common Regime on Industrial Property, Article 3.

applicant does not comply with the requirements of the article, the patent application could be denied.[54] It is argued that this provision is not as protective of traditional knowledge as it could be since the norm stipulates "if applicable . . .". This means that national governments will, at the end, have to decide in which cases a contract of access/authorization concluded with local communities is required. Nonetheless, when contracts are required, this constitutes an innovative approach to ensure that the applicant of a patent is not setting aside indigenous peoples' rights to their traditional knowledge and that the benefit sharing mechanism has been agreed upon. But again, this article is only applicable to members of the Andean Community. In the current debate, developing countries are requesting industrialized countries to adopt such measures in their intellectual property rights regimes in order to ensure a worldwide protection.

The mechanism set out by this Decision on the patent system, is completely aligned with the CBD. It is also a viable way to ensure that the principles regarding access to genetic resources, benefit sharing and protection of traditional knowledge are respected. However, two remarks must be made. First, as stated above this mechanism is only compulsory for members of the Andean Community and most bio-prospecting activities come from other countries. Second, besides this regional limitation, the members of the Andean Community must implement Decisions in their respective national legal orders in order to make them functional. In the case of Ecuador, this has not been done.

5. ECUADOR: IMPLEMENTATION OF INTERNATIONAL STANDARDS AND THE DEVELOPMENT OF A *SUI GENERIS SYSTEM* FOR PROTECTION

As pointed out in the previous chapter, currently the protection of traditional knowledge is somewhat addressed in the CBD and Andean Decisions 391 and 486. But all these instruments need to be implemented at the national level in order to make them functional. When a State adopts a treaty, it binds itself to implement it nationally through legislative or administrative mechanisms. However, almost ten years have passed since the adoption of the CBD by Ecuador and traditional knowledge in the country remains unprotected. In this chapter, the steps that have been taken to protect traditional knowledge will be discussed as well as the national norms that address this issue.

5.1. The Ecuadorian Constitution

The Ecuadorian Constitution recognizes the multi-cultural and multi-ethnic character of the country. This fact is highlighted in the reformed Constitution of 1998, where the establishment of collective rights of indigenous and African-American groups is stated. Amongst collective rights, one can mention the right to preserve identity and tradition in terms of spiritual, cultural, linguistic, social,

[54] *Ibid.*, Articles 26, 75.

political and economic aspects; the right to maintain ancestral and non-transferable ownership of community lands which shall be inalienable and indivisible, excepting the State's right to declare their public usefulness and including the exemption from payment of real-estate taxes; the right to share in the use, usufruct, administration and conservation of renewable natural resources on their lands; the right to be consulted on projects of exploitation of these or any other resources which may affect them environmentally or culturally; the right to preserve their knowledge and practice of traditional medicine; etc.

The rights enshrined in the Constitution are aligned with the principles enshrined in the ILO Convention No. 169, the Convention on Biological Diversity and Andean Decisions 391 and 486. At first glance, the Ecuadorian Constitution appears to be forward looking regarding the legal framework for indigenous groups. However, the rights established in the Constitution are not self-executing; they need further action and secondary laws to support them. In this respect, action is needed in the country to find the proper mechanisms to implement these right-bearing provisions.

5.2. Intellectual Property Law

The Ecuadorian Intellectual Property Law is aligned with Andean Decision 486. It requires that for granting a patent, genetic resources have to be accessed in accordance with the Constitution, international treaties and the Andean Decisions (e.g. obtaining PIC, MAT, etc). Additionally, this law establishes the need of implementing a *sui generis* system regarding collective intellectual rights of indigenous communities through a special law that must be provided for this effect.

Regarding the protection of traditional knowledge through the intellectual property system, there is a general consensus between Ecuadorian indigenous groups and other forums (i.e. NGOs, government agencies, etc that the intellectual property system is not adequate to protect traditional knowledge. The idea behind this argument is that the current intellectual property system even with the incorporation of new elements does not guarantee the protection and preservation of traditional knowledge. It is seen as a Western system that does not understand the nature of collective rights of indigenous groups and their concept of communal property.[55] This position has gained the support of most stakeholders of traditional knowledge.

Indigenous groups advocate the creation of a *sui generis* systemsince patents, copyrights, certificates of origin, industrial designs, etc. were created to protect individual rights and have only a commercial purpose while traditional knowledge has a collective character and not an exclusive commercial purpose.[56] Even though

[55] R. de la Cruz, *Protección a los Conocimientos Tradicionales* (Protection of Traditional Knowledge), available from www.comunidadandina.org/desarrollo/t4_ponencia2.htm, [accessed 10 September 2005].
[56] *Ibid.*

some countries have succeeded in applying the intellectual property system, the tendency in the Amazon region is the creation of a new system.

5.3. Environmental Norms

The Ministry of Environment is currently the main national forum where traditional knowledge is being discussed. By taking some administrative measures to protect natural resources, the Ministry has shown a proactive role in developing protection for traditional knowledge as well. For example, an authorization from the Ministry must be obtained in order to carry out activities such as recollection, investigation and exportation of flora and fauna. This measure is important for traditional knowledge since it protects natural resources, which are a vital source for its creation. As mentioned before, in the *Epipedobates* case, the frog samples were taken without permission from the national authorities. This illustrates that the provision does exist but is not properly enforced. This may be due to the budgetary constraints of the Ministry of Environment.

The main action that has been taken by the Ministry of Environment is the elaboration of a national plan, which will be explained below.

5.4. National Biodiversity Strategy and Action Plan

Besides norms, the Ecuadorian Government has elaborated a national plan to preserve biodiversity that includes the protection of traditional knowledge. The institution in charge of implementing the plan is the Environmental Management Sub-Secretary of the Ministry of Environment, which includes amongst it members representatives from the CONAIE (the main national indigenous organization of Ecuador). The plan is expected to be implemented between the years 2000 and 2010.

Traditional knowledge and practices are part of four strategic components of the plan. The objective of this plan is to guarantee respect for collective rights when accessing genetic resources and/or related knowledge, ensuring the participation of local communities in decisions regarding access and control of resources, and promoting an equitable sharing of benefits. [57]

This plan includes the needs and expectations of the source communities of traditional knowledge, and it is expected to produce the following results:

- The development of legal framework concerning intellectual collective rights to traditional knowledge, based on the already established guarantees in the Constitution.
- The establishment and facilitation of procedures in order to register traditional knowledge.

[57] Andean Community, *Documentation of the IV Regional Workshop about Access to Genetic Resources, Traditional Knowledge and Benefit Sharing*, Venezuela, 2001, available from www.comunidadandina.org/desarrollo/dct4.PDF, [accessed 19 August 2005].

- The development of capacities for contract negotiation for access to the intangible component (as established in Andean Decision 391).
- Information systems on the forms of traditional management of biodiversity.
- Participation forums for indigenous groups in the implementation of Article 8(j) of the CBD through consultation processes.
- The recognition of the right to veto of the indigenous communities when access may have a negative impact on the community.[58]

The national plan also mentions that when an indigenous community provides natural resources and/or related knowledge, the legal framework to regulate the contract containing the benefit sharing mechanism will be the one established in Andean Decision 391. However, the provisions included in the Decision are not self-executing; therefore, there is the need to develop an appropriate framework to be implemented in Ecuador.

It is important to highlight the role of indigenous groups from the Ecuadorian Amazon. Their contribution to the debate has led to the development of the national movement towards the implementation of international and regional standards. The contribution of COICA is valuable as well since it has collected in its publication "Returning to the Maloca" the expectations of Amazon indigenous groups regarding the creation of a *sui generis* system. These indigenous groups advocate that a *sui generis* system must be based on the following principles in order to guarantee the protection of traditional knowledge:[59]

[58] De la Cruz, R., *Necesidades y expectativas de protección legal de los titulares del conocimiento tradicional en el Ecuador* (Needs and expectations of traditional knowledge holders regarding their legal protection in Ecuador), Ecuador, 2002.
[59] COICA, *supra* footnote 6, pp. 62, 63.

-Acknowledgment of our self-determination rights, including our right to decide on the use of our knowledge.
-Acknowledgment of the collective character of our knowledge, innovations and traditional practices.
-Acknowledgment that within us, the innovation is a cumulative process that includes all the manifestations of our creativity.
-Guarantying the legal security of our lands and territories.
-Respect and guarantee our own institutions and organizations, including our original languages.
-The right to foster the exchange of our knowledge, innovations and traditional practices between ourselves.
-The veto right, that is, to oppose to any research that is against the respect and recognition of our rights.
-The declaration of nullity of any transaction that has the objective of destroying or discredits the integrity of our knowledge, innovations and practices.
-Inclusion of impact prevention strategies against our knowledge, innovations and practical traditions, especially for the execution of mega-projects within our territories.
-The custody and management of our collective knowledge belongs to us. In this sense, a system that protects collective property rights must not disable the common use of biological resources and of those corresponding to traditional knowledge.
-To guarantee that we are the ones who make the decisions on the previous based consent principle. A *sui generis* way must regulate that this consent be granted in a collective way by a community according to their own common practices.
-An access contract to genetic resources does not necessarily imply a permit to use traditional knowledge, without taking into consideration a previous based consent granted by affected peoples.

Elements proposed by COICA to be taken into consideration in the creation of a collective rights protection system

As one can see, Ecuador is aware of the importance and value of traditional knowledge. Good initiatives have been taken in both public and private sectors. Even if the creation of a *sui generis* system is still pending, the progressive implementation of the National Biodiversity Strategy and Action Plan is a positive step since it includes more achievable measures to ensure compliance with the principles established in the CBD. However, more support is expected from the central government, especially regarding financial aspects, to develop initiatives.

5.5 Towards the Creation of a Sui Generis System

The legal protection of traditional knowledge has triggered different forums to screen current instruments and to develop new approaches to achieve this goal. Basically, there are two approaches: the positive route and the defensive protection system.[60]

Positive protection is based on the assumption that "protection of indigenous knowledge is important to safeguard the rights of knowledge holders in view of commercial exploitation and benefit".[61] Examples of possible positive protection that are being discussed include: the current intellectual property system, contracts and ABS systems, liability regimes and the creation of a *sui generis* system. On the other hand, the defensive protection system aims at "the protection of indigenous knowledge, mainly in an effort to protect these assets against acquisition and exploitation by third parties".[62] As for defensive protection, the documenting of knowledge is considered a possible solution in order to preserve traditional knowledge and to prevent unauthorized acquisition by third parties.

The alternatives provided above are analyzed as possible solutions to protect traditional knowledge. Most of them have a limited potential in offering strong protection of TK. However, ABS regimes and contracts offer a valuable alternative in establishing the rules for access, as mentioned in earlier chapters, but they depend on the willingness of states to involve indigenous groups when dealing with access to genetic resources. Databases are also considered as a solution for protection, and this system has an added value because it will help to preserve traditional knowledge as well. However, the use of databases needs further study since it is argued that they could turn into a *dangerous* tool if access to them is not regulated.

As studies continue to develop, some tools are falling out of favor while others are being considered as preferential tools. However, it is important to mention that they could be used together since they are not mutually exclusive.[63] A fully effective regime involves the use of different tools in order to achieve the protection and preservation of traditional knowledge. To date, none of these tools have offered full protection of TK. This is why the holders of traditional knowledge are pressuring governments to develop a *sui generis* system that includes their perspectives and could be internationally enforceable.

The development of a *sui generis* system is the focal point of discussions regarding traditional knowledge and its unique features. At COP 7, the Conference of the Parties recognized that "a *sui generis* system for the protection of traditional knowledge at the international level, may enable indigenous and the local communities to effectively protect their knowledge against misuse and

[60] Van Overwalle, G., 'Protecting and Sharing Biodiversity and Traditional Knowledge: Holders and User Tools', 2005, 53 *Ecological Economics*, pp. 585–607.
[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.*

misappropriation".[64] This shows the concern of the COP of finding a protection system and, more important, how to articulate, in practical terms, the provisions of the CBD regarding PIC and the benefit sharing mechanism. In this respect, the Working Group on Article 8(j) is in charge of identifying the main elements to be considered during the development of this system. The outcomes of this study will be discussed in the eight meeting of this group to be held in March 2006. It is expected that this meeting will move forward the debate of the *sui generis* system, since the CBD is carrying out important research with the collaboration of organizations like WIPO and the Permanent Forum on Indigenous Issues, and this will bring many different perspectives together.

In the document "Legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity",[65] the Secretariat of the CBD stated that a *sui generis* system must have the following features:

- Be not only consistent with but supportive of the provisions of the CBD on indigenous and local communities, and conservation and sustainable use of biodiversity;
- Be based on an integrated-rights approach guided by human-rights principles and concern for the environment;
- Have among their basic objectives:
  - The encouragement of conservation and sustainable use of biodiversity;
  - The promotion of social justice and equity;
  - The effective protection of traditional biodiversity-related knowledge and resources against unauthorized collection, use, documentation and exploitation – including PIC; and
  - The recognition and reinforcement of customary laws and practices, and traditional resource-management systems that are effective in conserving biological diversity; and
- Be developed in close collaboration with indigenous and local communities through a broad-based consultative process that reflects a country's cultural diversity.[66]

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[64] Permanent Forum on Indigenous Issues, *Contribution of the Convention on Biological Diversity and the Principle of Prior and Informed Consent*, PFII/2005/WS.2/3, New York, 2005.

[65] Secretariat of the Convention on Biological Diversity, *Legal and Other Appropriate Forms of Protection for the Knowledge, Innovations and Practices of Indigenous and Local Communities Embodying Traditional Lifestyles Relevant for the Conservation and Sustainable Use of Biological Diversity, Note by the Executive Secretary*, UNEP/CBD/WG8J/1/2, (2000).

[66] Dutfield, G., 'Can the TRIPs Agreement Protect Biological and Cultural Diversity?', 1997, 19 *Biopolicy International Series*.

All these aspects are a good departure in the development of a new system. Many countries are already applying measures in order to protect traditional knowledge such as PIC, contracts, databases, amongst others, but there still persists the need to implement an internationally enforceable mechanism. However, such a mechanism will take a long time to implement since developed and developing countries must agree on a single system of protection.

Currently, at the national level, it is expected that Ecuador will continue implementing the plan mentioned above. At the regional level, it is expected that the Andean Community will develop a common system of protection and preservation of traditional knowledge, and continue supporting local communities in pursuing an internationally enforceable mechanism for protection. At the international level, it is expected that forums dealing with this issue will act in an orchestrated manner in order to find a balance between the concerns of industrialized countries and developing ones.

6. CONCLUSIONS AND RECOMMENDATIONS

The aim of this study was to assess the current status of TK protection, with special focus on the indigenous groups of the Ecuadorian Amazon. From this work it was found that TK has different values, such as economic, cultural, linguistic, spiritual and environmental, which makes TK an invaluable asset for humanity that must be preserved and protected.

This study also found that the debate on traditional knowledge concerns the definition of terms and is currently focused on the development of a *sui generis* system. It is now time to move forward and to find a way to use these findings.

Whatever the form the new system takes**,** besides generating income for indigenous and local communities and contributing to their development, it has to respect and aim to preserve cultural diversity. Additionally, the system should consider including the following elements: a) the collective character of the rights of TK holders, b) records of knowledge, c) clear rules that facilitate access to such rights and benefit-sharing, d) clarification of land resource rights, e) the inclusion of participation and consultation mechanisms, and f) the creation of incentives for research.

At the international level, it is important to promote the exchange of experiences between countries where progress has been made in the protection and preservation of TK. This will help to develop standards for an international *sui generis* system in order to prevent the misappropriation of knowledge by foreign countries. Even if many international forums are now addressing the protection of traditional knowledge, the question of how to achieve this goal remains blurred. Currently, the Convention on Biological Diversity is the only international convention that acknowledges traditional knowledge and its value, and it has become the main platform to support the current debate.

Apart from the work that needs to be done by governments, the private sector must involve itself in the process of achieving the protection of traditional

knowledge. For example, besides complying with norms regulating access to genetic resources and related knowledge, they should go further by developing industry-specific codes of conduct to serve as a guide to achieve the aforementioned goal.

In Ecuador, the national debate on traditional knowledge is similar to the international debate. The creation of a *sui generis* system is part of the national plan, and currently, it remains only on paper and in discussions; however, the steps of the national plan are being taken slowly but at the same time steadfastly. Indigenous organizations are playing an active role in this process, which is ensuring a multi-stakeholder perspective when addressing the protection of TK.

At the local level, Amazonian indigenous groups are reluctant to share their knowledge, not only because of the lack of mechanisms for economic compensation but because of the extractive nature that the approaches have taken so far. It is recommended here to include more holistic ways of compensation, such as training courses for local people about scientific methods, scholarships, student exchanges, sustainable technology (solar power, water pumps, sanitation, etc.), which will allow indigenous communities to take advantage of the Western knowledge while the Western world can learn from the traditional knowledge of these communities.

TRIPS AND AGRICULTURAL BIOTECHNOLOGY: IMPLICATIONS FOR THE RIGHT TO FOOD IN AFRICA

Jeannette Mwangi[*]

Abstract. This paper highlights the implications of the World Trade Organisation's (WTO) Agreement on Trade Related Aspects on Intellectual Property Rights (TRIPS) on the right to food in Africa. The paper highlights that modern agricultural biotechnology research and development is dominated by multinationals with distinct commercial interests while this industry is driven by intellectual property rights (IPRs). Due to the distinct and different needs of this industry and African countries, the right to food of African rural communities (and indeed other developing countries) is threatened. It shows that with a strengthened intellectual property rights regime under TRIPS, the individual's right to food (and food security) is in jeopardy. The paper thus analyses the implications of TRIPS on the right to food, and in this regard, a study of other relevant international and regional agreements is made to assess the impact of TRIPS. Finally, Africa's compliance with its international obligations under TRIPS is reviewed and assessed in light of the aforementioned implications.

1. HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS

1.1. Concept of Intellectual Property

Intellectual property refers to creations of the human mind, the human 'intellect'. Therefore, intellectual property rights are those rights derived from human intellectual creativity. These rights protect the interests of the inventors by giving them property rights over their creativity or inventions. IP law is today divided into two branches: industrial property law and copyrights law. There are different forms of industrial property rights, e.g. plant breeder's rights, patents, petty patents/utility models, geographical indications, trademarks, undisclosed information/trade secrets, industrial designs. Each industrial property right has different requirements and grants different rights.

Industrial property rights were originally developed as a way to reward creativity and promote innovation in the 19th century during the Industrial

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Revolution and were thus limited to industrial or mechanical inventions. The form and scope of industrial property rights has since expanded, especially in the recent past with the substantial developments in science and technology, to now include 'inventions' over life forms.

The expression 'copyright' refers to the act of making copies of the creator's work. Copies may only be made by the author or with his authorisation. The intent of copyright law is to protect a creator's work from being copied without his express permission. Copyright protection extends to the 'form' of the art and not the 'ideas' expressed, i.e. it protects only the form of expression of ideas, not the ideas themselves.

In general, property rights by their very nature vest exclusive legal rights to their owners; i.e. the owner has the right to use his property as he wishes while others can only lawfully use his property with his authorisation. In the same way, intellectual property rights grant the creator or inventor exclusive legal rights over his creation or invention.

Intellectual property rights are granted in order to stimulate human intellectual creativity for the benefit of the public. They also promote international trade in goods and services.

1.2. Historical Analysis of Intellectual Property Protection

The different subject areas of intellectual property rights originate in different places and at different times. Some researchers state that the origins of intellectual property date back to Aristotle in the fourth century BC or to ninth century China.[1] However, the Venetians are credited with the first properly developed patent law in 1474 and their model spread to other European states.[2] Modern copyright law began in England with the 1709 Statute of Anne.[3]

At inception, intellectual property protection was dominated by the principle of territoriality; i.e. intellectual property rights did not extend beyond the territory of the sovereign or state, which had granted the rights in the first place.[4] This meant that an intellectual property law passed by country A did not apply in country B. This principle showed the interrelationship between state sovereignty, property rights and territory. As a result, intellectual property rights owners faced problems due to the free copying of their creations in other countries. This inevitably led to the expansion of intellectual property protection to two distinct periods, i.e. the international period and the global period.

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[1] Dr. A. R. Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1) (C) of the International Covenant on Economic, Social and Cultural Rights*, Committee of Economic, Social and Cultural Rights, 24th Session in Geneva held the 13 November–1 December 2000, E/C.12/2000/12, 27 November 2000, p. 4.

[2] P. Drahos, *Intellectual Property and Human Rights* (Sweet & Maxwell, 1999) p. 350.

[3] Chapman, *supra* note 1.

[4] Drahos, *supra* note 2, p. 352.

The international period, which was principally during the 19th century, was marked by the possibility of international co-operation in intellectual property. The development of national intellectual property systems and international trade raised awareness of the need for international protection. This led to the adoption of various bilateral agreements in intellectual property and later in 1883 to the adoption of the Paris Convention for the Protection of Industrial Property and in 1886 the Berne Convention for the Protection of Literary and Artistic Works. These conventions ushered in an era of international co-operation in international intellectual property regimes. Over the years, these conventions have also gone through a series of amendments to keep up with technological advancements.

As more international intellectual property agreements were adopted, in 1967, an international agreement established the World Intellectual Property Organisation (WIPO) to administer them.[5]

However, with the increasing interdependence of national economies, a need for an effective international legal system to regulate intellectual property matters was identified, particularly one that ensured harmonisation of intellectual property standards among states. Up to this time, despite the existence of international intellectual property agreements administered by WIPO, there was still a lot of free riding or copying of works and inventions that was tolerated.

For the USA, however, the lack of effective enforcement machinery for intellectual property rights under WIPO was detrimental to key industries of its national economy, such as film and pharmaceuticals.[6] For US pharmaceutical companies, for instance, intellectual property was an investment issue. They wanted to locate their production anywhere in the world safe in the knowledge that their intellectual property would be protected. With intensive lobbying these industries succeeded in linking intellectual property to trade.

Beginning in 1984, the USA amended its 1974 Trade Act several times to provide for a bilateral enforcement mechanism against countries that did not have adequate and effective levels of intellectual property rights enforcement.[7] It included intellectual property in Section 301 (III. Section 301 Action: *Discretionary Retaliatory Action*), such that if countries failed to act on intellectual property, they could face trade sanctions from the USA.[8]

In addition, under the initiative of the USA (particularly its business community), intellectual property rights were included as a negotiating issue at the

[5] International secretariats were established for both the Paris and Berne Conventions. These then merged to form a "United International Bureau for the Protection of Intellectual Property". WIPO superseded this institution and is now responsible for the promotion of intellectual property worldwide. It administers several intellectual property treaties and also acts as a secretariat for the negotiation of treaties that establish new norms in intellectual property. It also conducts extensive training and technical assistance programs for developing countries (*ibid.,* p. 354).

[6] *Ibid.,* p. 355.

[7] *Ibid.*

[8] *Ibid.*

Ministerial Meeting at Punta del Este during the launch of the Uruguay Round of Multilateral Trade Negotiations held under the General Agreement on Tariffs and Trade (GATT).[9]

On April 15 1994, the Uruguay Round of Multilateral Trade Negotiations concluded with the signing in Marrakesh, Morocco of the Final Act Embodying the Results of the Multilateral Trade Negotiations. This Final Act contains the Agreement Establishing the World Trade Organisation and several annexed agreements. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is found in Annex 1C of the WTO Agreement.[10] TRIPS came into force on 1 January 1995, although it gives its members transitional periods to bring themselves into compliance with its rules, which differ according to their stage of development.[11]

After TRIPS was adopted, other international intellectual property treaties have since been concluded under the aegis of the WIPO. In 1996, the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty were concluded to deal with new technological developments in the digital area.

The economic importance of intellectual property has grown with the increasing role of information and knowledge-based industries. A causal link has been created between intellectual property and investment.[12] There is a progressive re-conceptualisation of intellectual property as an investor's right rather than a creator's right.

A historical analysis on the emergence of intellectual property reveals that they have always been used by states to secure market place objectives, both domestic and international. Intellectual property rights are still viewed as an economic tool facilitating trade and investment. The linkage between intellectual property and trade is made even clearer by the adoption of the World Trade Agreement on Trade Related Aspects of Intellectual Property Rights.

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[9] *Ibid.*

[10] TRIPS is the most comprehensive multilateral agreement that sets out detailed minimum standards for the protection and enforcement of intellectual property. It is known either as a Paris-plus or Berne-plus agreement because its standards incorporate those of the Paris and Berne Conventions in their most recent form and also includes standards on certain matters where the pre-existing conventions are silent or are seen as being inadequate. However, Article 6*bis* of the Berne Convention on the author's moral rights was not incorporated into TRIPS (*ibid.*)

[11] Developed countries had until 1 January 1996 to implement TRIPS and developing countries including countries with economies-in-transition had until 1 January 2000. Least Developed Countries had until I January 2006 and the period now extended for these countries to 1 January 2016 for pharmaceutical patents.

[12] Under the Organization on Economic Co-operation and Development (OECD Multilateral Agreement on Investment (MAI) Negotiating Text, investment is defined to include every kind of asset including intellectual property rights (Drahos, *supra* note 2, p. 357).

1.3. The Concept and History of Human Rights

Some basic ideas critical to the development of what we define as human rights today can be traced to various world religions and philosophies.

A cornerstone in human rights law is the principle of the equal dignity and worth of every human being.[13] It is a principle primarily derived from religion.[14] These religious, moral or ethical basic notions of human value from natural law were later transformed into positive law, at the national and international levels. Human rights are also inherent in all human beings by virtue of their humanity alone and universal, i.e. equally applicable to all and are inalienable.

1.3.1. The United Nations

A Conference on International Organisation saw the birth of the United Nations on 26 June 1945 in San Francisco, USA. The signing of the Charter of the UN was a significant step in bringing human rights more firmly within the sphere of international law. The UN Charter establishes the promotion and protection of human rights as one of the main objectives of the organisation.[15]

The atrocities committed during the Second World War – where the Nazi regime in Germany founded a power-base on terror and gross violations of human rights – spurred the creation of the UN and also emphasised the need for the international protection of human rights. There was a need for violations of human rights by persons representing state power (e.g. Hitler in Nazi Germany) to be seen as a breach of international law, a breach of a duty towards the international community. Only then would the international community step into the state's sphere (the domestic jurisdiction of a state) and suggest measures to ensure conformity with international law obligations.

In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR).[16] The UDHR formed the basis for the development of international human rights treaties covering civil, economic, cultural, political and social rights.

Human rights norms differ from other rights in international law in several key aspects. Human rights originate from a perceived need to protect the individual against the abuse of power by the state, and therefore the primary purpose of human

[13] The preamble of the Universal Declaration of Human Rights (UDHR) recognises the "inherent dignity and equal and inalienable rights of all members of the human family" and "in the dignity and worth of the human person and in the equal rights of men and women".

[14] This is derived from, for example, Christianity where it is recorded that "[t]hen God said, 'Let us make man in our own image, in our likeness… ' So God created man in his own image, in the image of God he created him; male and female he created them". Thus, God created man in his *own* image. If man is then created in the image of God he has dignity and worth. Therefore, every man (and woman) has equal dignity and worth (*see New International Version* (NIV), Holy Bible: Genesis Chapter 1 verses 26 & 27).

[15] *See* Article 1 and also Articles 55 and 56 of the UN Charter. Human rights are also mentioned in the preamble and Articles 8, 13, 62, 67, 68, 73 and 76 of the Charter.

[16] Adopted by the UN General Assembly by Resolution 217 (III) of 10 December 1948.

rights is to govern the relationship between the individual and the state whereas other areas of international law govern the relationship between states. As part of international law, they create state obligations which are to be implemented in a national context.

The concept of human rights is broad. Therefore, for ease of reference several schemes have been used to classify this broad spectrum of what we know as human rights today. Human rights have been classified as either first, second, and third generation rights; individual or collective rights; civil and political rights as opposed to economic, social and cultural rights; or as subjects in need of protection i.e. children, women, minorities, indigenous peoples, refugees, migrant workers; or according to the elimination of specific forms of discrimination i.e. race, religion; or an elaboration on certain rights e.g. genocide, torture, treatment of prisoners; or on a geographical context i.e. African, American, Asian or European.

Whatever the classification, "all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".[17]

1.4. The Link between Human Rights and Intellectual Property Rights

The historical link between human rights and intellectual property rights is thin. Nevertheless, the relevant provisions are Article 27 of the Universal Declaration of Human Rights[18] and Article 15 of the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR).[19]

An analysis of Article 27(2) of the Universal Declaration of Human Rights and Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights reveals an individual human right in intellectual property, although not

[17] Paragraph 5 of the Vienna Declaration and Program of Action, which was adopted at the 1993 World Conference on Human Rights held in Vienna, Austria, A/CONF.157/24.

[18] It states: "1. Every one has the right freely to participate in the 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."

[19] Article 15 of the ICESCR builds on and closely resembles Article 27 of the UDHR and states: "1. The State Parties to the present Covenant recognize 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 is the author…".

explicitly worded as such.[20] To this extent, one can say that the drafters recognised intellectual property rights as human rights.[21]

The above cited international human rights instruments attempt to strike a balance between the rights of the authors/inventors/creators and the rights of the public. Four components are identified: the right to culture, the right to benefit from scientific advancement, intellectual property and freedom of scientific and creative activity.[22] The right of the author or creator (private interest) and the rights of the wider society (public interest) are seen as complimentary.

These provisions recognise that the rights of authors and creators are not just good in themselves but are understood as essential preconditions for cultural freedom and participation and scientific progress. In order to avoid conflicts between the human rights guaranteed by these provisions, e.g. intellectual property rights and cultural rights, there is a need to strike the right balance in their promotion and protection.[23]

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[20]It was felt by the drafters that there was no need to include a specific reference to property in Article 27 Universal Declaration of Human Rights due to the existence of the right to property in Article 17 Universal Declaration of Human Rights. However, the right to property was omitted in the International Covenant on Economic, Social and Cultural Rights (*see* Chapman, *supra* note 1, pp. 8, 9 and Drahos, *supra* note 2, pp. 358−371).

[21] Very little attention has been paid to analyse intellectual property as a human right. A notable exception are indigenous peoples who have called for the recognition of their knowledge as a human right (*see* Article 29 of the UN Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1993/29). More effort has been made to adopt a human rights approach to intellectual property than to recognise intellectual property as a human right. Whether, intellectual property rights are viewed as human rights today is also problematic because of the fact that they are: first, granted by the state rather than recognised by the state; second, intellectual property rights exist for a limited period of time and are territorial as opposed to human rights that are perpetual, inalienable and universal; and third, intellectual property rights have differing characteristics, and hence not all fit into the category of protecting the human dignity and worth of its creators (*see* Chapman, *supra* note 1, p. 9 and Drahos, *supra* note 2, pp. 365−367).

[22] R. Adalsteinsson and P. Thorhallson, '*Article 27'* in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights* (Kluwer Law International, The Hague, 1999) pp. 591−595.

[23] *Ibid.*, p. 593. When judging a state's fulfilment of these rights, it is relevant to consider the following: (a) measures taken to ensure the application of scientific progress for the benefit of everyone; (b) measures taken to promote the diffusion of information on scientific progress; and (c) measures taken to prevent the use of scientific and technical progress for purposes which are contrary to the enjoyment of all human rights. It is observed that the 1993 World Conference on Human Rights held in Vienna, Austria reaffirmed the right of everyone to enjoy the benefits of scientific progress and its applications but noted that certain advances, notably in the biomedical and life sciences as well as information technology, may have potentially adverse consequences on human rights and called for international co-operation to ensure that human rights are fully respected in light of these scientific advances (*see* the Vienna Declaration and Programme of Action, *supra* note 17).

The balance between private and public interests as identified by the international human rights treaties is also familiar to intellectual property law. States grant limited rights over creations or inventions as a means of providing incentive for innovation, eventually ensuring that the public has access to those creations or inventions. Thus, for example, under patent law, a state grants an inventor a patent for a limited period of time in return for the inventor's disclosure of the invention in his patent application.

During the period of protection, the inventor (now patent holder) has classic property rights; e.g. he can exclude others from making, using or selling his patented product. He can also use this time to recoup research and investment costs incurred in the development of his invention and/or otherwise commercially exploit his invention. After the time of protection expires, the invention falls into the public domain and is now freely accessible to all.

During the period of protection, there is potential for conflict between the rights of the patent holder and the public because patents are exclusive rights. The public would not have access to the protected works or inventions, except with the authorisation of the patent holder. But, in the long term, there is no conflict but instead a mutually supportive relationship between the interests of promoting creativity and innovation (private interest) and maximising access of the new invention to the wider society (public interest).

Therefore, the challenge is for national and international intellectual property laws to strike the right balance between the human rights of authors, creators and inventors (private interest) and the promotion of access to protected works or inventions for the public good (public interest). An emphasis placed on either one of the interests would tilt the optimal balance that is to be achieved.

In the TRIPS regime, the required balance between the private and public interests is proving difficult to attain.

2. THE TRIPS REGIME

2.1. Origins of TRIPS

In the Eighth Round of the Multilateral Trade Negotiations under GATT, which began in 1986 at Punta del Este, Uruguay, industrialised countries pressed and succeeded in incorporating intellectual property rights, *inter alia*, in the package of new rules and procedures to conduct international trade.[24]

[24] The General Agreement on Tariffs and Trade (GATT) was established in 1947 and provided the basic rules on multilateral trade from 1 January 1948 until the WTO Agreement entered into force on 1 January 1995. The GATT contracting state parties met in negotiating sessions known as 'rounds'. The main aim of the GATT rounds was to reduce tariffs and other barriers or obstacles to international trade so as to enable free trade among contracting state parties. The Uruguay round, which was the last GATT round, led to the establishment of the WTO and included new issues in international trade negotiations other than the reduction of tariffs and other barriers to trade, such as TRIPS Agreement (*see* Drahos, *supra* note 2, p. 355).

The conclusion of these negotiations introduced the most comprehensive multilateral agreement setting out minimum world-wide standards for the protection and enforcement of intellectual property rights, i.e. TRIPS. TRIPS is one of the agreements annexed to the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations under GATT; it is contained in Annex 1C of the Agreement establishing the WTO. It was adopted in April 1994 and came into force on 1 January 1995.

The introduction of intellectual property issues in the agenda of the Uruguay Round of Multilateral Trade Negotiations was principally an initiative of the USA. The USA first raised intellectual property protection under GATT to clamp down on trade in counterfeit goods and parallel imports.[25] The need to discuss intellectual property rights in these negotiations arose so as to reduce distortions in international trade and the increase in trade in counterfeit goods.[26]

This issue first emerged in the 1970s and early 1980s when the world went into a severe recession and the USA experienced a dramatic shift in its balance of trade.[27] A worsening balance of trade led the USA to examine structural changes to boost its competitiveness in world trade, and the examination revealed that the USA was losing its technological lead over other industrialised countries, notably Japan, and also newly industrialising countries (NICs), notably East Asian countries, mostly due to liberal technology transfer and generally lax import policies.[28]

At this time, US industries mainly in computer software and microelectronics, entertainment, pharmaceuticals, chemicals, and agro-chemical sectors claimed they were suffering heavy losses from the absence of adequate protection of their intellectual property rights abroad.[29] They were concerned about the loss of commercial opportunities abroad – brought about by the failure of foreign countries to recognise their intellectual property rights based on US intellectual property law which was different from or non-existent in those countries – and thus a loss to the US economy.[30] In 1987, a survey by the US International Trade Commission (ITC) confirmed, on the basis of public hearings and questionnaires, that firms in the US were losing some USD 43 to 61 billion annually due to lack of intellectual property protection abroad.[31]

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[25] R. Acharya, *Intellectual Property, Biotechnology and Trade: The Impact of the Uruguay Round on Biodiversity*, African Centre for Technology Studies (ACTS), *Biopolicy International Series No. 4*, Nairobi, Kenya, 1992, p. 7.
[26] *Ibid.*, p. 7, 8.
[27] *Ibid.* It is estimated that in the 1980s the US trade deficit was USD 150 billion (V. Shiva, *Protect or Plunder? Understanding Intellectual Property Rights* (Zed Books, London and New York, 2001) p. 19.
[28] Acharya, *supra* note 25 and Shiva, *supra* note 27.
[29] A. O. Adede, *The Political Economy of the TRIPS Agreement: Origins and History of Negotiations*, African Centre for Technology Studies (ACTS), *Biopolicy International Series No. 24*, Nairobi, Kenya, 2001, p. 2.
[30] Shiva, *supra* note 27 and Acharya, *supra* note 25, p. 8.
[31] Adede, *supra* note 29, p. 2 and Shiva, supra note 27.

The non-recognition of intellectual property rights granted in the USA meant that NICs would be in a position to imitate new technologies.[32] The result was the production and export of 'counterfeit' goods from NICs, which are cheaper than the intellectual property protected copies or counterparts from industrialised countries.[33] Thus, while at the same time closing their markets to exports from the US, the NICs would gain access to the US market as a result of liberal trade practices in the US.[34] The increasing competitiveness of the NICs, which was a result of increasing imitation of intellectual property protected goods, threatened the supremacy of US business.[35] To reverse this trend, a need to counter such unfair trade practices by NICs was identified.[36]

At the multilateral level, the enforcement of intellectual property protection under WIPO was very weak or non-existent. During the Uruguay Multilateral Trade Negotiations, the USA pointed out the failure of conferences in 1980–1984 to revise the Paris Convention to address these issues, and therefore preferred the GATT forum for negotiating effective enforcement of intellectual property rights at the international level.[37] The USA stated that the GATT forum provided for effective enforcement of agreements and for dispute settlement mechanisms, which were practically lacking in the WIPO administered conventions. The USA continued with its efforts to introduce, in the GATT forum, the protection of intellectual property rights to address the problem of counterfeit products and later of copyright piracy, which had been increasing in developing countries in the 1980s.[38]

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[32] In the 1980s, counterfeiting (and copyrights piracy) increased in developing countries because of the desire of these countries to catch up in the industrialisation process and also to have access to printed educational material, which they needed. The situation was accelerated by various factors, namely: the advent of copy-prone electronic-based technologies and products, the growing competitiveness of NICs in the manufacturing sector; the increasing globalisation of the market place and the growing perception of intellectual property by the enterprises of the developed countries as a strategic asset. There was thus a tension between the quest for tighter protection of intellectual property rights for the promotion of creativity being pursued by the industrialised owners of property and the policy of maximisation of social welfare arising from an impeded diffusion of that creativity and being pursued by developing countries through more relaxed intellectual property rights protection (*see* Adede, *supra* note 29, p. 4).

[33] Acharya, *supra* note 25, p. 8.

[34] *Ibid.*

[35] *Ibid.* and Shiva, *supra* note 27

[36] The US began to use its domestic law, i.e**.** US Trade Act Section 301, unilaterally to enforce trade sanctions against states that deny adequate and effective protection of intellectual property rights. Under this law, the US Trade Representative is authorised to identify foreign countries that deny adequate and effective protection of intellectual property rights. "A priority watch list" of specific countries whose action exhibited this unfair trade practice, mostly developing countries, was made for further investigation (Acharya, *supra* note 25, p. 9).

[37] *See* Adede, *supra* note 29, p. 3 and Acharya, *supra* note 25, p. 10.

[38] It is observed that US business was the main driving force behind the US government's insistence to include intellectual property rights in the GATT forum, notably through the US

At the Uruguay Negotiations, the debate on inclusion of intellectual property rights under GATT pitted developed and developing countries against each other mainly due to different priorities faced by these two groups of countries.[39] Developed countries favoured the intellectual property rights debate under GATT so as to clamp down on trade in counterfeit goods which was undermining their own industrial production while developing countries were concerned about the implications of this for technology transfer and technological development in their countries.[40]

It is evident that TRIPS in its adopted form was a result of intense negotiations and compromise between different sets of interests. TRIPS covers: copyright and related rights; trademarks; geographical indications; industrial designs; patents; plant variety protection (PVP); layout-designs (topographies) of integrated circuits; protection of undisclosed information/trade secrets; and control of anti-competitive practices in contractual licences.[41]

For notable reasons, TRIPS has revolutionised the intellectual property protection system:

1. It imposes a minimum intellectual property rights standard for all WTO members.[42] This standard is derived from the laws of industrialised countries, applying the form and level of protection of the industrialised world to all WTO members. Although TRIPS has attempted to harmonise national intellectual property standards, these standards are far too high for many developing countries, including those in Africa.[43] WTO members *must* ensure that their laws meet the minimum standards laid down, but

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Intellectual Property Committee (IPC) and also industry associations of Japan (Keidanren) and Europe (The Confederation of European Business (UNICE)). IPC is a coalition of 13 major US corporations, i.e. Bristol Myers, Dupont, General Electric, General Motors, Hewlett Packard, IBM, Johnson and Johnson, Merck, Monsanto, Pfizer, Rockwell and Warner (Shiva, *supra* note 27, pp. 94–98).

[39] Acharya, *supra* note 25, p. 10.

[40] *Ibid.* Developing countries saw the establishment of an international intellectual property rights system under GATT as likely to be detrimental to their economic growth and development. Since developed countries are largely the ones who develop new technologies, developing countries saw the introduction of intellectual property rights under a trade forum such as GATT as a barrier for them to gain access to new technologies or to be able to develop imitations of their own (*see* Acharya, *supra* note 25, p. 10).

[41] *See* Part II of TRIPS, which deals with "Standards concerning the Availability, Scope and Use of IPRs".

[42] *See* Article 1 of TRIPS.

[43] The intellectual property standard laid down in TRIPS is higher than existing laws in most developing countries, including those in Africa. Although developing and least-developed countries have flexible schedules to implement TRIPS at the national level, the intellectual property standard TRIPS imposes often conflicts with these countries national interests and needs (Adede, *supra* note 29, p.14).

they can introduce stringer laws if they so wish.[44] However, not all members comply with the provisions of the Agreement at the same time.[45]

2. TRIPS provides for an effective intellectual property protection enforcement mechanism through the integrated dispute settlement system. [46]A serious threat in this system is that if a country does not fulfil its intellectual property rights obligations under it, trade sanctions can be imposed against it. TRIPS also includes for the first time in any area of international law "rules on domestic enforcement procedures and remedies".[47]
3. TRIPS has expanded the scope of intellectual property by extending the scope of protectable subject matter.[48] Also, TRIPS allows for the first time, the patenting of life forms and processes, e.g. micro-organisms, microbiological processes and plant varieties under Article 27(3)(b).
4. TRIPS has also strengthened the level of intellectual property protection and hereby strengthened the legal position of intellectual property rights holders. The strengthening of intellectual property rights under TRIPS, as an exclusive property right, raises the price of technology transfer or access to new technologies[49] and further increases the risk of blocking developing countries, including Africa, out of the technology sector. This is because as an exclusive property right and the resultant economic power of an

[44] *See* Article 1 of TRIPS.

[45] *See* Article 65 of TRIPS. As mentioned earlier, TRIPS came into force on 1 January 1995 and developed countries had to implement the Agreement by 1 January 1996, Developing countries including countries with economies-in-transition had until 1 January 2000 while Least Developed Countries had until 1 January 2006 and the period now extended for these countries up to 1 January 2016 for pharmaceutical patents. WTO members do not benefit from transitional arrangements and thus have to comply with TRIPS immediately upon joining the WTO.

[46] *See* Part V of TRIPS and Article 68 of TRIPS. The Council for TRIPS is required to monitor members' compliance with their obligations under TRIPS. Intellectual property rights disputes are subject to WTO's dispute settlement procedures. In the case of a dispute, a panel of specially appointed trade experts hears the dispute. The decision of the panel may be subject to appeal to the WTO's Appellate Body. If a party to a dispute fails to abide by such a decision, the other party can impose trade sanctions on the member in breach upon authorisation by the Dispute Settlement Body (*see* Chapman, *supra* note 1, p. 6 and the Report of the UN High Commissioner for Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, E/CN.4/Sub.2/2001/13, pp. 3, 4).

[47] G. Tansey, *Trade, Intellectual Property, Food and Biodiversity: Key issues and Options for the 1999 review of Article 27.3(b) of the TRIPS Agreement,* Discussion Paper prepared for Quaker Peace & Service, 1999, p. 6.

[48] Article 27(1) of TRIPS provides, *inter alia,* that patents shall be available for any inventions, whether products or processes, in all fields of technology.

[49] Chapman, *supra* note 1, pp. 22 - 23 and L. Westerlund, *Biotech Patents: Equivalency and Exclusions under European and US Patent Law.* Kluwer Law International, The Hague, 2002. pp. 9 - 13.

exclusive right, intellectual property rights holders can dictate the terms on which third parties can access their technologies, e.g. through the payment of royalties, and therefore the highest bidder gets the license to the technology. This is particularly true with respect to modern technologies that have been developed by multinational companies where heavy investments have been put into their research and development, and therefore by obtaining intellectual property rights, such multinational companies would like to get a return for their investment plus a profit.

2.1. TRIPS and Human Rights

There are potential links between TRIPS and human rights. Article 7 of TRIPS, which spells out the objectives, recognises a need for a balance between "mutual advantage of producers and users of technological knowledge" and "a balance of rights and obligations". This also corresponds to the attempted balance of rights and tensions inherent in international human rights treaties as analysed above.

TRIPS has attempted to achieve this balance in a number of ways: by determining the definition of protectable subject matter, the scope of rights, permissible limitations and the term of protection.[50]

As TRIPS is a minimum rights agreement, it leaves a fair amount of leeway to member states to implement its provisions within their own legal system and practise and fine-tune the balance in light of domestic public policy considerations.[51]

TRIPS can also be seen to give effect to IPRs, as a human right, at the international level as indicated in its preamble that IPRs are private rights.

TRIPS also seems to promote values deemed essential for the realisation of human rights, such as the prohibition of discrimination on the basis of nationality in intellectual property rights, a prohibition which resonates throughout international human rights law.[52]

TRIPS could also be seen to promote the rule of law at the national and international levels by the observance of due process and the peaceful settlement of disputes through its dispute resolution mechanism.[53]

TRIPS also encourages international co-operation by requiring developed member countries to facilitate technology transfer to least developed member countries and to provide, on request, technical and financial co-operation to both developing and least developed member countries.[54] International co-operation is

[50] *See* the Report of the Secretary General, *Intellectual Property Rights and Human Rights*, E/CN.4/Sub.2/2001/12, pp. 7–9 and also Secretariat of the WTO. *Protection of Intellectual Property under the TRIPS Agreement,* Committee on Economic, Social and Cultural Rights, 24th Session, November 2000, pp. 4–7.
[51] *See* Articles 1(1) and 8 of TRIPS.
[52] *See* Articles 3–5 of TRIPS on "National Treatment" and "Most-Favoured-Nation Treatment" clauses.
[53] *See* Part III of TRIPS
[54] *See* Articles 66(2), 67, 69 of TRIPS.

also encouraged in international human rights law, especially as pertaining to the implementation of economic, social and cultural rights.[55]

TRIPS affects other human rights either positively or negatively. In particular, TRIPS has created tensions with the human rights regime. This tension principally revolves around balancing the intellectual property rights of inventors or creators with that of the public.

Finding a link between the standards of TRIPS and human rights is not the same as saying that TRIPS takes a human rights approach to intellectual property protection; the primary question is whether TRIPS strikes a balance that is consistent with a human rights approach.[56]

There are actual or potential conflicts inherent in the implementation of TRIPS that have been identified.

On 17 August 2000, the UN Sub-Commission for the Protection and Promotion of Human Rights adopted a resolution unanimously on "Intellectual Property Rights and Human Rights", noting, *inter alia,* that:

> "There are actual or potential conflicts that exist between the implementation of TRIPS and the realization of economic, social and cultural rights in relation to inter alia:
>
> 1. Impediments to the transfer of technology to developing countries,
> 2. The consequences for the enjoyment of the right to food of plant variety rights and the patenting of genetically modified organisms,
> 3. 'Biopiracy' and the reduction of communities' (especially indigenous communities') control over their own genetic and natural resources and cultural values and,
> 4. Restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health."[57]

The resolution "*[a]ffirms* that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is author is, in accordance with Article 27, paragraph 2, of the Universal Declaration of Human Rights and Article 15, paragraph 1(c), of the International Covenant on Economic, Social and Cultural Rights, *a human right, subject to limitations in the public interest*".[58]

It further "[d]eclares, however, that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to

[55] *See* Article 2 of the ICESCR.
[56] *See* Report of the High Commissioner for Human Rights, *supra* note 46, pp. 7–11.
[57] Sub-Commission on Human Rights Resolution 2000/7 on *Intellectual Property Rights and Human Rights*, E/CN.4/SUB.2/RES/2000/7, 17 August 2000.
[58] *Ibid.*, para. 1.

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".[59]

There exists a conflict between the 'private' interests of intellectual property rights holders, championed by TRIPS and the 'social' or 'public' concerns found in international human rights law.

TRIPS is seen to tilt the balance inherent in intellectual property law away from the public interest and in favour of intellectual property rights holders.

The resolution further "reminds all governments of the primacy of human rights obligations over economic policies and agreements; and requests them to take international human rights obligations and principles fully into account in national, regional and international economic policy formulation and also further requests governments and intergovernmental organizations to integrate in their national laws and policies provisions that are in accordance with international human rights obligations and principles that protect the social function of intellectual property".[60]

In TRIPS, the various links with human rights, e.g. the promotion of health, nutrition, environment and development, are generally expressed in terms of exceptions to the rule rather than the guiding principles themselves, and are also made subject to the provisions of the agreement. A human rights approach would place the promotion and protection of all human rights at the heart of the aims of IP protection rather than as only exceptions.[61]

A human rights approach would establish a different standard for the evaluation or grant of IP by including human rights safeguards. IP should be consistent with the realisation of other human rights. For instance, such an IP regime would facilitate and promote cultural participation and scientific progress and also do so in a manner that will broadly benefit members of society both on an individual and collective level.

TRIPS only recognises individual rights by stating in its preamble that IPRs are private rights. By emphasising IPRs as private rights, TRIPS ignores the creativity and innovation of groups and communities. A human rights approach would recognise that, although not in all cases, an author, artist, inventor or creator could be a group or a community as well as an individual.

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[59] *Ibid.*, para. 2.

[60] *Ibid.*, paras. 4−6.

[61] *See* Report of the High Commissioner for Human Rights, *supra* note 46, p. 8. Human rights are promoted by commercial aims, e.g. the right to development. On the other hand, IPRs are an incentive for creativity and innovation and are human rights. Thus, the balance is struck when IPRs are not overemphasised, as TRIPS does, at the expense of other guaranteed human rights. As observed earlier, ***all*** human rights are **"*universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis*"** (*World Conference on Human Rights.* 1993. Vienna. Vienna Declaration and Programme of Action. A/CONF.157/24.)

Strengthened IPRs under TRIPS and particularly patents could impede or block the creativity and innovation of other individuals or groups to the extent that they would not have access to products or processes under IP protection or such access would be under restrictive terms and conditions set by the patent holder. As a result, TRIPS is seen as impeding scientific and cultural progress. A human rights approach would recognise that IP products or processes with an intrinsic value are an expression of human dignity, creativity and cultural values and not just an economic commodity, and therefore the public good would ultimately outweigh private rights.

Also, TRIPS focuses on forms and levels of protection that have developed in industrialised countries. For instance, patents on modern biotechnological inventions are most relevant to inventors in these countries. A human rights approach would recognise the need to protect traditional knowledge (TK) and technology of local communities and indigenous peoples. The emphasis on modern technology or the 'formal' sector and not other forms of technology or the 'informal' sector suggests an imbalance within TRIPS that would have an impact on the enjoyment of human rights.

A human rights approach to TRIPS would require that a private/public balance be struck with the primary purpose of promoting and protecting all human rights. A human rights approach is centrally based on protecting and nurturing human dignity and the common good. The rights of creators and inventors are therefore not absolute but conditional on contributing to the common good and welfare of the society. Therefore, vesting creators, authors and inventors with a full and unrestricted monopoly on IP rights is not consonant with a human rights approach.[62]

3. TRIPS AND THE RIGHT TO FOOD

The IPRs protected in TRIPS particularly relevant to the right to food are patents, plant variety protection/plant breeders' rights (PBRs) and trade secrets. These are studied below.

Patents

Section 5 of Part II of TRIPS on patents was the most politically and economically controversial in the entire TRIPS negotiations.[63]

[62] Report of the UN High Commissioner for Human Rights, *supra* note 46, pp. 7-11 and *supra* note 57.

[63] During negotiations, the USA and Japan pushed for patent law provisions that recognised very few restrictions on the scope of patentability while the EU had another point of view, which eventually prevailed. In this respect, the USA was following a long tradition of patent expansionism in biotechnology that had been part of its domestic law since the 19th century. For example, in 1873 the US Patent and Trademark Office (USPTO) granted a patent to Louis Pasteur for yeast. In 1930, the US passed the Plant Patent Act that provides for the patenting of asexually propagated varieties. In 1970, the US passed the Plant Variety Protection Act that provides for the protection of sexually propagated plants. In *ex parte Hibberd, 227 USPQ 443 (1985)*, the PTO Boards of Appeal reversed a decision of the USPTO that had precluded

It is observed that Articles 27(2) and 27(3)(b) of TRIPS draw from Article 52 and 53 of the 1973 European Patent Convention (EPC).[64] The key element is the *mandatory* requirement for WTO members to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination.[65] However, WTO members are allowed certain exceptions to the basic rule on patentability.

Article 27(2) of TRIPS provides that members *may*, exclude from patentability inventions, when they want to prevent the commercial exploitation of the invention to protect *ordre public*[66] or morality; including to protect human, animal or plant life or health or to avoid serious prejudice to the environment.

Article 27(3)(a) of TRIPS provides that members *may* exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals.

Article 30 of TRIPS provides members with limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Article 27(3)(b) of TRIPS is of special interest. It states:

> "Members *may* also exclude from patentability:
>
> (b) plants and animals *other than micro-organisms,* and essentially biological processes[67] for the production of plants or animals *other than non-biological and microbiological processes.* However, members *shall* provide for the protection of plant varieties either by *patents* or by an *effective sui generis system* or by *any*

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patent protection for plant-related inventions that were covered, at least in theory, by the Plant Patent Act. Therefore, under US IP law plants are patentable. In the landmark case of *Diamond, Commissioner of Patents and Trademarks vs. Chakrabarty, 447 US 303 (1980)*, the US Supreme Court maintained that it was the task of the courts to continue to adapt and expand the patent system unless otherwise directed by US Congress; hence, the Court declared that inventions are patentable in principle even if comprised of living matter (L. Westerlund, *supra* note 49, pp. 1, 2)

[64] The EPC is founded on the provisions of the 1963 Strasbourg Convention and also the International Covenant for the Protection of New Varieties of Plants (UPOV) (*ibid.,* pp. 4, 5).

[65] Article 27(1) of TRIPS. As a political matter in the negotiations, this was especially meant to cover pharmaceuticals, which had been excluded from product patent coverage in many developing countries (*see* J. H. Barton, *Biotechnology and Trips: Issues and Options for Developing Countries*, *PSIO Occasional Paper, WTO Series No. 03*, 2000, p. 12).

[66] *Ordre public* concerns the fundaments from which one cannot derogate without endangering the institutions of a given society. Morality is a *different* concept (*see* Tansey, *supra* note 47, p. 25).

[67] In plant biotechnology, these can include multi-step processes consisting of the genetic modification of plant cells, the subsequent regeneration of plants and the propagation of these plants. The EU takes a more restrictive approach: "any process which, taken as a whole, exists in nature or is not more than a natural breeding process" (*see* Tansey, *supra* note 47, p. 25).

> *combination thereof*. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

The key terms used in Article 27(3)(b) are not defined in TRIPS, i.e. plants, animals, micro-organisms, essentially biological processes, non-biological, microbiological, plant varieties,[68] effective and *sui generis*[69] system. It is noted that these words are defined differently in different national and international laws. This means that there is considerable scope for individual national interpretations and protracted legal wrangles are likely to determine which interpretation prevails.[70]

It is stated that in order to comply with Article 27(3)(b) of TRIPS, four options are available:

1. To allow patents on everything, and therefore not exclude plants, animals and essentially biological processes;
2. To exclude plants, animals and essentially biological processes from patenting but not to exclude plant varieties from patentability;
3. To exclude plants, animals and essentially biological processes from patenting and to introduce a *sui generis* system for the protection of plant varieties; and
4. To exclude plants, animals and essentially biological processes from patenting but not plant varieties and to provide, in addition, for a *sui generis* system ('combination thereof').[71]

The bottom line is that plant varieties, at the very least, have to be protected. Options 1 and 2 do not require members to establish a *sui generis* system to protect plant varieties.

The analysis of this paper will be limited to intellectual property protection of plant varieties under TRIPS either by patents or plant breeders' rights (or combination of both?). This is because an interpretation of TRIPS will reveal that, at the very least, intellectual property protection must be accorded to plant varieties even in situations where WTO member states exercise the exemption of patentability to plants, animals and non-biological processes. To be eligible for a

[68] The question arises how a 'plant variety' can be distinguished from a 'plant' and whether a transgenic/genetic engineered plant is a plant or a plant variety.

[69] *Sui generis* is a Latin term meaning 'its own kind/genus'. In this context, it could mean a system of rights providing an alternative unique form of IP protection designed to fit a country's particular context and needs. It can have a wider meaning to cover IP not covered under TRIPS or a system protecting community, farmers' and indigenous peoples' rights (*see* Tansey, *supra* note 47, p. 25).

[70] Tansey, *supra* note 47, p. 7. It has also been said that this provision provides sufficient flexibility for countries to design a system that best fits their circumstances and meet their goals and objectives (*see* International Plant Genetic Resources Institute, *Key Questions for Decision-Makers: Protection of Plant Varieties under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights*, October 1999, at <www.ipgri.org>.

[71] Tansey, *supra* note 47, pp. 7, 8.

patent, an invention must be new, involve an inventive step (non-obvious) and be capable of industrial application (useful).[72]

Traditionally, patent law has distinguished between 'inventions', which are patentable, and 'discoveries', which are not. Life forms as products of nature, laws of nature or scientific principles are not patentable as they are discoveries. Before TRIPS, most countries in their domestic laws excluded the patenting of life forms, such as plants or plant varieties, because as products of nature they are not new but actually discoveries. Article 27(3) (b) of TRIPS has changed all this as the distinction between 'discovery' and 'invention' has been blurred.

3.2. Plant Breeders' Rights

A *sui generis* system likely to be recognised (particularly by developed countries) as effective is the International Union for the Protection of New Varieties of Plants (UPOV) system of PBRs.[73] The UPOV Convention, known after its French acronym *Union internationale pour la protection des obtentions vegetales*,[74] was initially developed in Europe and has now been adopted by industrialised countries and an increasing number of developing countries. It ensures that its member states acknowledge the achievements of breeders of new plant varieties by making available to them an exclusive property right on the basis of a set of uniform and clearly defined standards. Most of the UPOV Convention's contracting states account for the largest part of the global seed trade.

PBRs were developed as an alternative to patents to grant plant varieties protection because plant breeders found it impossible to meet the conditions for patentability, i.e. inventiveness (non-obvious) and the disclosure requirement of how to make and use the invention. This was largely attributable to the fact that life forms were excluded in their purely natural state from patent protection.

PBRs are exclusive property rights for a limited period of time at the end of which the varieties protected by them pass to the public domain. The rights are also subject to controls, in the public interest, against any possible abuse.[75]

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[72] Article 27(1) of TRIPS. The concept of 'invention' as used in patent law means a technical solution to a problem. Novelty is "the state of the art comprising everything made available anywhere to the public by means of written or oral description, by use, or in any other way, before the date of filing of the patent application". Inventive step is "not obvious, having regard to the state of the art, to a person skilled in the art" (*see* Tansey, *supra* note 47, p. 25).

[73] Although not mentioned in TRIPS, African countries are being pressured or forced to join the UPOV Covenant so as to meet their obligations. The lack of definitions in TRIPS is thus leading to the manipulation of sovereign states (*see* Adede, *supra* note 29, p.17, 18).

[74] The UPOV Convention established the UPOV, which is an intergovernmental organisation with its headquarters in Geneva, Switzerland. The UPOV Convention was adopted in 1961, entered into force in 1968, and has subsequently been revised in 1972, 1978 and 1991. *See* <www.upov.int> for the role and functions of the UPOV and other particulars.

[75] Article 30 of the 1978 UPOV Act and Article 30 of the 1991 UPOV Act restrict the free exercise of exclusive rights "for reasons of public interest" and ensure that the breeder receives equitable remuneration.

PBRs also safeguard the interests of breeders by recognising their moral rights in innovation and their economic right to remuneration.

To be eligible for protection, a plant variety has to be:[76]

1. Distinct (clearly distinguishable from existing commonly known varieties);
2. Uniform (sufficiently uniform in its essential characteristics with variation as limited as necessary to permit accurate description and assessment of distinctness and to ensure stability);
3. Stable (in its essential characteristics over time which remain unchanged after repeated propagation); and
4. New (it must not have been offered for sale or marketed prior to certain dates established by reference to the date of the application for protection).

The 1978 and 1991 UPOV Acts set out a minimum scope of protection and offer member states the possibility of taking national circumstances into account. Under the 1978 Act, the minimum scope of protection of PBRs requires that the right holder's prior authorisation is necessary for production for purposes of commercial marketing, the offering for sale and the marketing of propagating material (e.g. seeds) of the protected variety.

The 1991 Act tilts PBRs more towards patents and is geared to institutional breeding that may not suit all countries.[77] This Act seeks to maintain the effectiveness of breeders' rights in the face of new biotechnologies such as genetic engineering. This led to its stronger terms.

A key addition in the 1991 Act prevents genetic engineers from adding single genes to existing varieties and exploiting the modified variety with no recognition of the contribution of the breeder of the existing variety. Such modified varieties are now seen as 'essentially derived' varieties and may not be exploited without the consent of the original breeder.

Other notable changes are:[78]

1. It extends the subject matter of protection from plant varieties of nationally defined species to all plant genera and species;

[76] Article 6 of the 1978 UPOV Act and Article 5 of the 1991 UPOV Act. The 1991 UPOV Act also states that a plant variety must have a denomination (i.e. scientific one) to enable it to be identified specifically.

[77] *See* Tansey, *supra* note 47, pp. 8–11, *e.g.* the concept of 'national treatment' and the provision of appropriate legal remedies for the enforcement of rights.

[78] *See* M. A. Girsberger, 'The Protection of Traditional Plant Genetic Resources for Food and Agriculture and the Related Know-How by Intellectual Property Rights in International Law – The Current Legal Environment', 1(6) *The Journal of World Intellectual Property* (November 1998) pp. 1029–1032. (Transnational Corporations and Management Division. Department of Economic and Social Development. *Intellectual Property Rights and Foreign Direct Investment.* United Nations. New York. 1993. pp. 18–19.)

2. It has extended the scope of breeders' rights by expanding the acts subject to the breeder's consent in respect to the propagating material of the protected variety. This not only includes production, marketing and final sale but also reproduction (multiplication), conditioning for the purpose of propagation, exporting, importing and stocking for those purposes;[79]

3. The 'farmers privilege' in the 1978 Act is further limited in the 1991 Act. It leaves member states to determine on an *optional* basis whether or not to exempt from breeders' rights any traditional form of saving seeds for use as seeds in subsequent planting seasons;

4. It provides that PBRs *may* be extended to the products made directly from harvested materials in cases where the breeder did not have reasonable opportunity to exercise his right on the propagating material of the variety;

5. The 1978 Act provides for the breeders' exemption allowing breeders to use a protected variety as an initial source to create their own variety and then market them. The 1991 Act also includes this exemption but adds that 'essentially derived' varieties can only be marketed with the consent of the original breeder;

6. It removes the restriction of the 1978 Act which prohibited the accumulation of patents and PBRs;[80]and

7. It extends the minimum period of protection from 15 years to 20 years and to 25 years for trees and vines.

3.3. The Combination Option

A mixed system of patents and a *sui generis* system is also envisaged under TRIPS, but it is unclear whether this provides for double protection, i.e. whether patents and a *sui generis* system can protect an object or that every object must be covered by either system. It is also of the most advantage to developed countries with modern biotechnological industries.

[79] Article 5 of the 1978 UPOV Act lists the acts that require the authorisation of the breeder: (1) the act of production for the purposes of commercial marketing; (2) the act of offering for sale; and (3) the act of marketing. In addition to these acts, Article 14 of the 1991 UPOV Act introduces: (1) the act of reproduction or multiplication; (2) the act of conditioning for the purpose of propagation; (3) the act of exporting; (4) the act of importing; and (5) the act of stocking for any of these purposes.

[80] Under the 1978 UPOV Act, a member state whose national law allows protection under both these forms may provide only one of form of protection (but not both) for one and the same species. It thus restricts the state to protect breeders' rights either by patents *or* PBRs.

3.4. Undisclosed Information/Trade Secrets

Trade secrets are protected against dishonest commercial practices, e.g. unfair competition. Article 39 of TRIPS provides the details of such protection.[81] The effective term of protection is as long as the secret is valuable and secret and thus not subject to a fixed amount of time. The person lawfully in control of the information must have taken reasonable steps under the circumstances to keep the information secret.

Trade secrets have been used to control inbred lines used as parents of a hybrid.[82] As the inbred lines are kept secret, this does not affect the marketing of the hybrid. The lines can be protected through a combination of efforts such as: the physical protection of the materials themselves and of the contracts with employees and those involved in producing seeds. However, this may not prevent a third party from attempting to reconstruct the parental lines from the marketed hybrid, so-called 'reverse engineering'. Seed companies (in order to supplement PBRs and patent protection) also use contractual provisions to prohibit reverse engineering of the material they sell to farmers.[83]

3.5. The Right to Food

Article 25 of the UDHR[84] and Article 11 of the ICESCR[85] are the more authoritative international human rights provisions on the right to food.[86] The right to food is a

[81] Paragraph 2 of Article 39 of TRIPS states that "[n]atural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."

[82] J. H. Barton, 'Acquiring Protection for Improved Germplasm and Inbred Lines' in F. H. Erbisch and K. M. Maredia, *Intellectual Property Rights in Agricultural Biotechnology* (CAB International, New York, 1998) p. 27. In the seed trade, the term hybrid refers to the first generation of a cross between inbred lines. *See also* R. Pistorius and J. van Wijk, *The Exploitation of Plant Genetic Information – Political Strategies in Crop Development* (CAB International, New York, 1999).

[83] Barton, *ibid.*, pp. 27, 28.

[84] It states in part that "[e]veryone 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 and necessary social services …".

[85] It states in part that "[t]he State Parties … recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food … The State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent …".

basic human right as well as a basic human need. It is a component of the right to an adequate standard of living. It is also closely linked to the right to life and is indivisibly linked to the inherent dignity of the human person.[87] The right to adequate food[88] is "realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. States have a core obligation to take the necessary action to mitigate and alleviate hunger".[89]

The core content of the right to adequate food "implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; (and also) the accessibility of such food in such ways that are sustainable and that do not interfere with the enjoyment of other human rights".[90]

All 189 members states of the UN attending the World Millennium Summit held at the UN headquarters in New York, USA in September 2000 adopted the UN Millennium Declaration of which the eradication of extreme poverty and hunger is the first goal to be achieved by reducing by half the number of people who live on less than one USD a day and those that suffer hunger by 2015.[91]

More specifically, the World Food Summit held in Rome, Italy in 1996 laid the foundations for diverse paths to achieve food security, at the individual, household,

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[86] The right to food is also found in Article 12 of the Convention on the Elimination of Discrimination Against Women, Article 24 of the Convention on the Rights of the Child, Article 2 of the Convention on the Prohibition and Punishment of the Crime of Genocide, Article 21 of the African Charter on Human and Peoples Rights, Article 12 of the San Salvador Protocol to the American Convention on Human Rights, and in the 1948 Geneva Conventions I, III, IV and the 1977 Additional Protocols, and Articles 6–8 of Part II of the Statute of the International Criminal Court.

[87] The Human Rights Committee, a treaty body established under the ICCPR, in its General Comment No. 6 (1982) (A/37/40) on the right to life stated that "the expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures … to reduce infant mortality, increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics".

[88] Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999) on the right to adequate food, E/2000/22.

[89] Freedom from hunger is fundamental. States have an obligation to ensure as a minimum that people do not starve.

[90] The term 'dietary needs' refers to those needs which are necessary for physical and mental growth and physical activity; 'free from adverse substances' requires certain measures such as food safety, hygiene and environmental protection, 'cultural or consumer acceptability' requires the need to take into account values attached to food and food consumption, e.g. religious beliefs, etc.; 'availability' implies either a possibility to feed oneself from productive land or the existence of a well-functioning food distribution system; and 'accessibility' consists of both economic and physical accessibility with regard to vulnerable groups such as indigenous peoples (who may not have access to their ancestral lands) and who need special attention or programmes (*see* General Comment No. 12, *supra* note 88, para. 8).

[91] *See* the text at <www.un.org/millenniumgoals/index.html>.

national, regional and international levels.[92] This Summit reaffirmed "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger".[93]

Food security exists when "all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life".[94]

Trade, *inter alia,* was seen as a key element in achieving food security. States made a commitment to strive to ensure that food, agricultural trade and overall trade policies are conducive to fostering food security for all through a fair and market-oriented world trade system. In this light, the 2002 World Food Summit noted the outcomes of the Fourth Ministerial Conference of the WTO held in November 2001 in Doha, Qatar.

The UN Food and Agricultural Organisation (FAO) together with the Consultative Group on International Agricultural Research (CGIAR) and other international research institutes were called upon to advance agricultural research and research in new technologies, including biotechnology; such research was to be conducted in a safe manner and adapted to local conditions so as to help improve agricultural productivity. A commitment was made to study, share and facilitate the responsible use of biotechnology so as to address development needs.

On state obligations, Article 2 of the International Covenant on Economic, Social and Cultural Rights is the key provision, according to which a state shall *take steps* "to the maximum of its available resources, with a view to achieving *progressively*" the full realisation of the right to food.[95]

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[92] The representatives of 185 nations and the EC pledged their political will and commitment to achieve food security for all and eradicate hunger in all countries, with an immediate view to reduce the number of undernourished people by half no later than 2015. The Summit adopted the 'Rome Declaration on World Food Security', which comprises a set of observations about food security and also an Action Plan, i.e. the 'World Food Summit Plan of Action'. The Action Plan is a set of seven commitments made by countries attending the Summit to ensure food security. The Rome Declaration is *not* a legally binding document (*see* <www.fao.org/worldfoodsummit> and the text at <www.fao.org/docrep/003/w3613e/w3613e00.htm>).

[93] UN Food and Agriculture Organisation (FAO), Rome Declaration on World Food Security (1996).

[94] Paragraph 1 of the World Food Summit Plan of Action. It should be noted that 'food security' and the 'right to food' are conceptually different. The right to food is an individual human right while food security is the condition through which this right can be realised. Food security is not, in itself, the right to food but rather a state, which if attained, that permits the individual to enjoy that right (*see* A. Eide and W. B. Eide, *Article 25*, in Alfredsson and Eide (eds.), *supra* note 22*,* pp. 540–541.

[95] *See* Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990) on the nature of state parties obligations under Article 2(1) of the Covenant, E/1991/23. Also, state obligations for economic, social and cultural rights have been elaborated by a group of experts, convened by the International Commission of Jurists, in Limburg, Netherlands in June 1986. The outcome of the meeting was the so-called 'Limburg Principles', which offer

States are thus obliged, regardless of their level of economic development, to ensure for everyone under their jurisdiction access to minimum essential food which is sufficient, nutritionally adequate and safe in order to ensure freedom from hunger.[96] The concept of progressive realisation recognises that full realisation of the right to food will generally not be able to be achieved in a short period of time and therefore imposes an obligation to move as expeditiously as possible towards the realisation of this right.

However, it should be noted that state obligations are intended to supplement personal efforts whenever needed.[97] The individual is expected whenever possible through his or her own efforts and by use of his own resources to find ways to ensure the satisfaction of his or her needs, individually or in association with others.[98]

The right to adequate food, like any other human right, imposes three types of state obligations: the obligation to *respect*, to *protect*, and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide.*[99]

In order to determine which state acts or omissions amount to violations of the right to food, it is important to distinguish the *inability* from the *unwillingness* of a state party to comply.[100]

Violations of the minimum core obligation of the right to food occur when a state fails to ensure the satisfaction, at the very least, of the minimum essential level

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guidelines on state obligations under the ICESCR (*see* the Limburg Principles on the Implementation of the ICESCR, E/CN.4/1987/17).

[96] *See* General Comment No. 12, *supra* note 87, para. 14.

[97] *See* A. Eide, 'The Right to an Adequate Standard of Living Including the Right to Food', in A. Eide *et al*. (eds.), *Economic, Social and Cultural Rights (second edition)* (Kluwer Law International, The Hague, 2001) pp. 138–140.

[98] Furthermore, the realisation of individual economic, social and cultural rights will usually take place within the context of a household as the smallest economic unit.

[99] *See* General Comment No. 12, *supra* note 87, pp. 23–25.

[100] A state cannot use the 'progressive realization' provision in Article 2 of the ICESCR as a pretext for non-compliance; nor can a state use its own differences with regard to social, religious and/or cultural background(s). If a state argues resource constraints that make it impossible to provide access to food for those who are unable by themselves to secure such access, the state has to show that every effort has been made to use all resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. If a state claims that it is unable to carry out its obligations for reasons beyond its control, it has to prove that this is the case and that it unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food. In addition, the choices made by a state would need to be assessed in order to determine a violation, e.g. what part of its resources are allocated to the realisation of the right to food vis-à-vis other purposes? (*see* General Comment No. 12, *supra* note 87, para. 17 and Eide, *supra* note 96, pp. 25–28).

required to be free from hunger.[101] This is irrespective of the availability of resources in the country concerned or other factors.

In addition, discrimination in access to food as well as to means and entitlements for its procurement on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of the right to food also constitutes a violation.[102]

Violations of the right to food can occur through the direct action of states or other entities insufficiently regulated by states. This can be done either through: the repeal of laws necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups; adoption of laws that are manifestly incompatible with pre-existing legal obligations relating to the right to food; failure to regulate the activities of individuals or groups so as to prevent them from violating the right to food of others; and failure of the state to take into account its international legal obligations regarding the right to food when entering into agreements with other states or with international organisations.[103]

It is observed that violations of the right to food of individuals and groups in Africa have occurred or may occur by the direct action of African states or other entities such as multi-national corporations (MNCs), which are insufficiently regulated by African states. The adoption of TRIPS, with many African countries being party to it, is to a large extent in direct tension and conflict with the right to food.

4. INTELLECTUAL PROPERTY RIGHTS IN AGRICULTURAL BIOTECHNOLOGY

Biotechnology is just one solution or set of tools (and indeed not a 'panacea' or 'silver bullet') to solve food insecurity in Africa. No technology by itself can make a country food-secure, but the appropriate use of biotechnology offers considerable potential to boost food productivity.

The work of Louis Pasteur on yeast fermentation and Gregor Mendel on genetics, in the late 19th to early 20th century, ushered in the current era of modern biotechnology. Modern biotechnology is characterised by a range of cutting-edge techniques or applications that use living organisms or substances from those organisms to make or modify a product, to change the characteristics of plants or animals or to develop micro-organisms for specific purposes. It includes cell fusion, tissue culture, in-vitro fertilisation, selection markers, gene transfer, cloning, and

[101] *See* General Comment No. 12, *supra* note 87, para. 17. In addition, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, though not legally binding, are relevant in determining violations of economic, social and cultural rights at the national, regional and international levels (*see* Eide and Eide, *supra* note 93, pp. 537−539).
[102] General Comment No. 12, *supra* note 87, para. 18.
[103] *Ibid.*, para. 19.

promoter technology.[104] It also includes genetic engineering – the process of recombining/altering DNA.[105] Genetic engineering involves the use of molecular techniques both to identify and move genes from one cell to another (even across species), as opposed to reproductive/sexual means, to produce genetically modified organisms (GMOs).

There have been substantial improvements in molecular science and reproductive biology, which have ushered in a new understanding of genetics. Modern science is now unravelling the structure of genomes and discovering the characteristics and functions of individual genes. Modern agricultural biotechnology is characterised by the ability to manipulate genes and has brought to the fore the importance of genetic resources. These new technologies have made a link between genes and new plant varieties while sparking many debates about the limits of science and the ethics of tampering with the essence of life.

The advent of modern biotechnology, particularly genetic engineering, is a major driving force in the expansion of protectable subject matter to now include life forms. Big and powerful corporate interests are behind this expansion of protectable subject matter to cover life forms.[106]

It is observed that modern biotech products are a result of substantial research, involving the inventive effort of and heavy investment by sophisticated university laboratories or MNCs in industrialised countries.[107] MNCs involved in biotechnological inventions have allocated huge funds for research in genomics; this

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[104] *Ibid.*, pp. 2−8.

[105] DNA is the molecule in chromosomes that is the repository of genetic information in all living organisms, with the exception of a small number of viruses in which the hereditary material is ribonucleic acid, RNA. As its coded information determines the structure and function of an organism, directly or indirectly, DNA controls the production and reproduction of the cell, organ and plant or animal (*see* Westerlund, *supra* note 61, pp. 7, 8).

[106] One of the economic reasons for patenting life is that living organisms can reproduce themselves after they have been sold. This limits the potential profitability of 'biological inventions', but patents on these inventions are an option for MNCs seeking to protect the profits that these inventions promise (*ibid,* pp. 9−13 and (F. Abbot, T. Cottier and F. Gurry, *International Intellectual Property Systems: Commentary and Materials,* Part One (Kluwer Law International, Hague, 1999) pp. 28−42).

[107] Developments in the seed industry in the USA give an indication of the recent interest in biotech patents. As a result of the energy crisis in 1973 and the increased price of petroleum products, US chemical companies were flush with funds and therefore looked for new investment opportunities promising high returns. Developments in modern biotechnology, particularly genetic engineering, were seen as a major opportunity for big business. Consequently, chemical, oil and pharmaceutical companies such as Ciba-Geigy, Monsanto, ITT, Shell, Sandoz, Rhone-Poulenc, Pfizer, ICI, Upjohn and others entered the seed business, and over time various mergers and acquisitions have taken place, creating a 'life-sciences' industry (*see* J. P. Mishra, 'Intellectual Property Rights and Food Security – The Efficacy of International Initiatives', 4(1) *Journal of World Intellectual* Property (January 2000), pp. 12−14 and Tansey, *supra* note 47, p. 6).

has changed the structure of the global seed industry and resulted in mergers and acquisitions among such actors.

It is observed that plant biotechnology patents represent about one per cent of the total number of patents granted annually worldwide.[108] Between 1990–1995, the USA, EU and Japan (combined) accounted for 93 per cent of biotechnology patents while the 'rest of the world', where all developing countries fall, accounted for the remainder.[109] Patents relating to agriculture represented only 11 per cent of the total for 1992–1995 while those specifically covering modified plants represented six per cent.[110]At least five US MNCs accounted for 44 per cent of the total plant patents during this period.[111]

Patents as exclusive property rights provide MNCs with the requisite incentive to innovate and invest because of the economic power of an exclusive right, even though it is only for a limited period of time.[112] Modern biotechnology industries invest considerable time and money in order to come up with a biotech product. Due to the complexity of biological phenomena, a biotech product may present risks not known until the later stages of research and development (R&D) or until the product has been launched into the market. Therefore, because of the considerable investment risk in biotech R&D, the possibility of an economic reward for biotech inventions is seen as vital.

Patents have served the biotechnology industry with effective incentives to promote innovation.[113] Patents also provide incentive for marketing new biotech inventions in which the inventor holds the patent rights and have thus promoted industrial competitiveness and continue to do so.[114] Thus, MNCs view patents as a tool to encourage or stimulate investment (also foreign direct investment (FDI)) and innovation. It is argued that if patent protection were not available, MNCs would invest less in R&D or there would be a serious disincentive to publicise the results of research.[115]

In plants, patents may apply to various biological materials and processes, including:

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[108] C. M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Zed Books Ltd., London and New York, 2000) p. 173.
[109] *Ibid.*, pp. 173, 174.
[110] *Ibid.*
[111] *Ibid.* In the order of those most active, they were: Pioneer Hi-Bred International, Monsanto, Calgene, Holden's Foundation Seeds and Dupont de Nemours.
[112] *See* Westerlund, *supra* note 61, pp. 9–13.
[113] *Ibid.*, p. 10.
[114] *Ibid.*
[115] The only remaining option would be for MNCs to keep the results of their research secret. Biotechnological products or processes can be kept secret, but as MNCs would have to commercialise them (without revealing the invention), once a product reaches the market, it is possible to work out how to copy it through, for example, 'reverse engineering' (Westerlund, *supra* note 61, p. 11)

- DNA sequences that code for a certain protein;
- Isolated or purified proteins;
- Seeds;
- Plant cells and plants;
- Plant varieties, including parent lines;
- Hybrids;
- Processes to genetically modify plants; and
- Processes to obtain hybrids.[116]

Patents on plant genes are often claimed together with a purified protein, plasmids and transforming vectors, plants or seeds.[117] It has been said that patenting of genes at the cell level extends the scope of protection to all plants which include a cell with a patented gene.[118] However, patenting principles and practices on biotechnological inventions are still in a state of flux, including those countries that have experience patenting of genes.[119] It is not clear the extent to which a patent on an isolated gene may extend to the same gene(s) existing in nature.

What is relatively clear is that biotech patents are aggressively enforced and used to establish a competitive advantage in the market place. The threat of enforcement/litigation of biotech patents may deter production, reproduction or research, and breeding activities using patented plant material or processes.

Nevertheless, IPRs in agricultural biotechnology are heatedly debated at international, regional and national levels. The main legal and policy issues that arise on the right to food relate to:

- *Ownership*: Who has patent rights, for example, in instances where a different person(s) than the one who has come up with the invention nurtured the raw material?
- *Access*: The grant of IPRs has implications on access as the right holder usually has exclusive property rights.
- *Benefit sharing*: How can the benefits arising from innovations be equitably shared?

4.1. Ownership

The rise of MNCs in the so-called life-sciences industry is worrying since they wield enormous power and control in the food and agricultural sector. Another

[116] Tansey, *supra* note 47, p. 8. For a more comprehensive analysis, *see* Correa, *supra* note 108, pp. 173–183.
[117] Correa, *supra* note 107, pp. 179, 180.
[118] *Ibid.*, p. 180.
[119] *Ibid.*, p. 182.

phenomenon of concern is biopiracy[120] of traditional knowledge (TK)[121] of local and indigenous communities in developing countries, including Africa.

The primary function of business like MNCs is to ensure maximum profits on investments for the benefit of their shareholders. Typically, businesses would only make investments in R&D if research could be legally protected so that in the final analysis they would recoup investment costs and also make a profit.

As in all other fields of technology, there is a need for the legal protection of biotechnological inventions. MNCs have sought the protection of their heavy investments in R&D and the resultant biotechnological inventions through IPRs, particularly patents.[122]

There has been an increase in privatisation of research as the rising costs of innovation go up.[123] The 1990's saw a significant rise and trend in the number and

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[120] Biopiracy refers to the process by which the rights of local and indigenous peoples with regard to TK and biodiversity is erased and replaced by IPRs by those who have exploited local/indigenous TK and biodiversity (RAFI. Bioprospecting/Biopiracy and Indigenous peoples. 2001. <www.kahea.org/gmo/pdf/bioprospecting_people.pdf> p. 1; Shiva, *supra* note 27, pp. 49–57 and *UNDP Civil Society Organizations and Participation Programme: Conserving Indigenous Knowledge.* <www.undp.org/csopp/CSO/NewFiles/doci knowledge.html>).

[121] In this context, TK means knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of agro-biodiversity. WIPO uses the term to refer to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. There are many categories of traditional knowledge, e.g. agricultural knowledge, ecological knowledge, technical knowledge, scientific knowledge or biodiversity-related knowledge (For a more comprehensive analysis, *see* <www.wipo.int/eng/meetings/2002/igc/pdf/grtkfic3 _9.pdf>).

[122] However, inventors of biotechnological inventions are faced with several obstacles in seeking patents for their inventions, e.g. whether their invention is not just a discovery and the fact that few national IP laws recognise or allow biotechnological inventions. Inventions on micro-organisms (either the process for obtaining a micro-organism or the micro-organism itself or the particular use of a micro-organism) are governed by the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purpose of Patent Procedure. As it is difficult, if not impossible, to sufficiently describe a new micro-organism, the Treaty provides a system for depositing micro-organisms. Therefore, applicants for those patents do not have to describe a new micro-organism but only have to refer to a deposit made with a recognised depositary authority (*see* Abbot, *supra* note 106, pp. 28–42).

[123] Due to a financial squeeze on national budgets, the proportion of public funding for research & development in science and technology has fallen around the world to be replaced by the private industry. There has also been a shift of these research efforts away from developing countries. Their share in the global total dropped from 6% in the mid-1980's to 4% in the mid-1990's. For example, in the USA, in the 1980's crop and seed development was under public research, patents were rarely sought and rarely enforced, saving and trading of seed was commonplace. The passing of the **Bayh-Dole Act** in 1980 changed this situation as it allows universities and other public funded institutions to license their technologies from

value of MNCs, a situation triggered by mergers and acquisitions of MNCs in the seed, chemicals, agro-chemicals and pharmaceuticals industries.[124] The concept of IPRs on life forms must be seen in this light. As a result of these mergers, a small number of MNCs dominate and control the so-called "life-sciences industry."[125]

MNCs from developed countries own most of the IPRs in agricultural biotechnology.[126] For example, in 1996, there were more than 400 patents granted or pending worldwide related to the gene of the soil bacterium *bacillus thuringiensis (Bt)*; 60 per cent of these patents originated from just ten companies based in developed countries.[127] Furthermore, a MNC called 'Agracetus' was awarded a very broad patent covering all transgenic soybeans; a MNC called 'Monsanto' subsequently acquired Agracetus and thus the ownership of the patent.[128]

The extension of very broad patents for specific plant varieties has resulted in a few MNCs in the life-sciences industry having virtual monopolies on the genome of important global crops.

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research projects that are directly funded from federal sources. The Act provides the legal platform for universities to commercialise the technologies they generate enabling private companies to profit from products developed largely with public funds. The Intellectual Property of public and university research has increasingly passed over to private industry through licensing or other agreements. The portion of public sector patents in biotechnology sold under exclusive licence to the private sector rose from just 6% in 1981 to more than 40% by 1990. See *UNDP Human Development Report 1999*. 1999. Oxford University Press. New York. p. 68.

[124] For example, Syngeta is a merger between AstraZeneca and Novartis to become the world's biggest agribusiness MNCs; Dupont de Nemours spent over USD 9.4 billion to acquire Pioneer Hi-Bred, the world's largest seed company (*UNDP Human Development Report 1999, ibid,* p. 68.

[125] In biotechnology, genetic engineering is the new direction of pharmaceuticals, food, chemicals, cosmetics, energy and seeds. This is blurring distinctions among the sectors and creating a large and powerful 'life-sciences' industry *(ibid.)*.

[126] "Developed countries hold 97% of all patents worldwide. In 1995 more than half of global royalties and licensing fees were paid to USA, mostly from Japan, UK, France, Germany and the Netherlands . . . by contrast, more than 80% of the patents that have been granted in developing countries belong to residents of developed countries" (*see UNDP Human Development Report 1999, supra* note 123.

[127] *Bt*-gene is a soil bacterium that has pesticidal properties. It has beeen known by farmers since the 1940s. When inserted in maise (*Bt*-maise) it produces corn resistant to the corn stem borer. It has also been inserted in cotton (*Bt*-cotton) and potatoes (*Bt*-potato). Few companies possess the technology in these specific or other crops (*see* C. Oh, *IPRs and Biological Resources: Implications for Developing Countries*, p. 9, <www.twnside.org.sg/title/iprharare.htm> and Electronic Forum on Biotechnology in Food and Agriculture, *The Impact of IPRs on Food and Agriculture in Developing Countries*, Background Document to Conference 6, p. 6, <www.fao.org/biotech/C6doc.htm>).

[128] Such broad species patents are also being applied to cotton and rice so as to secure the market for the patent holder and to prevent competition, with the effect of stifling research (*see* Oh, *ibid.*).

IPRs, particularly patents, are increasingly being used by MNCs to expand their market share, to prevent competitors from becoming active, or as a bargaining tool to negotiate favourable local agreements. The fundamental issue is power and control, and IPRs are being used as legal instruments to wield power and control. This IPRs regime has enabled a select group of companies to increase their market share of the global market.

In 1998, the top ten corporations: in the commercial seed industry controlled 32 per cent of a USD 23 billion industry; in pharmaceuticals held 35 per cent of a USD 297 billion industry; in veterinary medicine controlled 60 per cent of a USD 17 billion industry; and in pesticides held 85 per cent of a USD 31 billion industry.[129] Moreover, the top five biotechnology firms in the world are based in the United States and Europe and control more than 95 per cent of gene transfer patents.[130] Eighty per cent of patents on genetically modified foods are owned by just 13 MNCs, and the top five agro-chemical corporations control "almost the entire global seed market".[131]

Seeds are the first link in the food chain. The control of seeds through patents largely determines who controls the supply of food. MNCs have a monopoly on seeds and are thus able to control the supply of seeds. By controlling the supply of seeds, MNCs can control seed prices. To increase their profits, they can increase seed prices.

Besides price setting, patents are stifling not stimulating research. MNCs currently own multiple or overlapping patents required to develop biotech products. Patents have been obtained for enabling technologies – those technologies that are essential for the practical implementation of a wide range of biotech processes and products.[132] This has a direct impact on access to technologies by developing countries and on agricultural research in developed and developing countries.

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[129] UNDP, *supra* note 123.

[130] *Ibid.* Namely: Syngenta (AstraZeneca – UK/Sweden and Novartis (Sandoz and Ciba-Geigy – Switzerland)), E. I. du pont de Nemours (Pioneer Hi-Bred International – USA), Monsanto (a component of Pharmacia and Upjohn, it acquired Agracetus, Asgrow Seed, Cargill, Calgene, DeKalb Genetics, Holden's Foundation Seeds – USA), Aventis (Hoechst Schering AgrEvo, Plant Genetic Systems, Rhone-Poulenc – Germany/France), Dow Chemical (Mycogen Seeds). *See* J. H. Barton, 'The Impact of Contemporary Patent Law on Plant Biotechnology Research', in S. A. Eberhart *et al.* (eds.), *Intellectual Property Rights III, Global Genetic Resources: Access and Property Rights* (Crop Science Society of America, Madison, Wisconsin, 1998) p. 94.

[131] B. van Dillen and M. Leen, *Biopatenting and the Threat to Food Security: A Christian and Development Perspective*, CIDSE, February 2000, <www.cidse.org/pubs/tg1ppcon.htm>.

[132] Modern biotechnology requires the use of several products and processes, which are usually patented. For example, to produce a genetically modified food crop could entail the use of individual genes that are patented, DNA sequences that control the expression of the gene that are patented, and the two methods used to transfer foreign DNA and identify plant cells that are patented. MNCs have overcome this hurdle of access to patented products and processes to conduct R&D by cross-licensing their patents among each other. In the event that a competitor fails to license a technology, litigation usually ensues. This results in

With the advent of genetic engineering, seeds became the 'operating system' that MNCs use to deliver new technologies. MNCs are using genetically modified, patented seeds to dictate how farmers will farm and under what conditions, with the result that farmers, indigenous peoples and public sector researchers have lost the right to use and develop agro-biodiversity.[133] This has potentially devastating consequences for farmers, food security and the environment.

In order to maximise profits, MNCs are also preventing the use of second-generation seeds produced from transgenic crops by using legal contracts or other mechanisms.[134] This essentially constitutes a regulatory system that bypasses IPRs and government authority. For example, farmers who purchase transgenic plant seeds are often required to sign contracts that specifically prohibit the saving and replanting of second-generation seeds. These contracts also give MNCs, or their authorised agents, the right to inspect and test the farmer's field and monitor whether the farmer is reusing the patented seed(s) or is otherwise complying with the contract.[135]

Traditionally, farmers have had the right to save or replant seed from a harvest and/or sell the seed. One point four billion rural people, primarily rural poor farmers in developing countries, rely on farm-saved seed as their primary seed source. By requiring farmers to sign contracts every time they buy seed reduces farmers to renters of seed. This arrangement has also been described as a new kind of 'bioserfdom', where MNCs are the new feudal lords, who wield power and wealth by controlling new seed varieties instead of land.[136]

The latest development is the creation of biotechnologies known as Genetic Use Restriction Technologies (GURTs) and obtaining patents on them as a means of exerting control and ownership rights over agro-biodiversity.[137] GURTS are of two kinds: 'terminator technology', which is a set of new genetic engineering techniques used to create sterile plants with infertile seeds that cannot be replanted,[138] and

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acquisitions and mergers among MNCs as an out-of-court settlement. (Barton, *supra* note 131).

[133] MNCs such as Monsanto have sued farmers, for example, in Canada and the USA for saving and reusing genetically engineered seed patented by them (*see*, for other examples, Shiva, *supra* note 27. pp. 73-76).

[134] Royal Society of London, Report: *Intellectual Property. Transgenic Plants and World Agriculture*, National Academy Press, Washington, District of Columbia, USA, July 2000, p. 32. The validity of these contracts is an issue because TRIPS controls anti-competitive practices in contractual licenses (*see* Part VIII of TRIPS).

[135] Chapman, *supra* note 1, p. 23.

[136] *Ibid.*

[137] Monsanto has developed these technologies. Both AstraZeneca and Novartis have been researching GURTs also. (Chapman, *supra* note 1, pp. 23–24 and Shiva, *supra* note 27, pp. 80–85).

[138] Terminator technology involves the use of chemical treatments on seeds or plants that either inhibits or activates specific genes involved in germination. It would involve a complex three-gene system whereby one gene produces a protein that interferes with proper plant

'traitor technology', which control other plant characteristics or traits that can be switched on or off by the application of inputs only available from the MNCs.

The tight control of research in the hands of private interests in developed countries also ignores the research needs of millions in developing countries.[139] The best new biotechnologies are designed and priced for those who can pay and have a tendency of serving the needs of rich industrialised countries.[140]

This leads to developing countries having to rely on developed countries for the latest technologies since such technologies are owned by MNCs based in developed countries. Thus, there is an urgent need to consider the needs of the developing world and the impediments to technological development so as to derive maximum benefit from biotechnology.[141]

As mentioned earlier, MNCs (and their intermediaries) in the life-sciences industry based in developed countries engage in 'bioprospecting' and 'biopiracy'.[142]

Bioprospecting is the exploration, extraction and screening of biodiversity and indigenous knowledge for commercially viable genetic and biochemical resources while biopiracy involves the grant of patents to commercial interests, such as MNCs

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embryo development preventing seed germination. The US Department of Agriculture has recently announced its intention to commercialise this technology (*see ibid.)*

[139] Science and technology gives power to those who possess it, whatever the field involved, and such power tends to be wielded in the interests of those who command it. It takes a lot of time and money (an estimated ten years and USD 300 million) to create a new commercial product. MNCs have the money to protect their innovations and thus to ensure profits and recoup investment costs they have been increasingly applying for patent protection. Thus, in defining research agendas, money talks louder than need. This approach focuses on high-income markets only. (C. M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Zed Books, London & New York, 2000) p.171.)

[140] For example, research into tomatoes with a longer shelf-life, yellow maise to be used mainly for poultry feed, or seed varieties that are engineered to be suitable for mechanised mass production with labour-saving techniques are designed for industrial and intensive farming conditions. However, over the last several years, MNCs have also become interested in developing world markets, e.g. R&D in soybeans, maise, rice and wheat, all of which have large markets in developing countries and also major export potential. (Acharya, *supra* note 25, pp. 6,7)

[141] The challenge is for developing countries and its scientists and researchers to gain access to these biotechnologies on favourable terms and adapt them to suit the needs of their rural farmers. Most of the agricultural research in developing countries is carried out by the public sector. There is thus a need to foster public/private partnerships to effect transfer of biotechnology to developing countries. In this way, biotechnology can be developed in accordance with the needs and requirements of all humanity (this is my own analysis of the situation).

[142] There are numerous examples: the University of Wisconsin has obtained a patent on a plant that grows in Cameroon and produces Brazzein, which is a natural sweetener. The University has also engineered a bacterium to produce brazzein. This means that rural peoples of Cameroon, who have nurtured the sweetener for generations, will be excluded from commercialising it if they so wished (*see* Shiva, *supra* note 27, pp. 49−57).

based in developed countries, over biodiversity and indigenous knowledge used to develop biodiversity, such as traditional methods of breeding or domestication known by local and indigenous peoples in developing countries.

Local or indigenous peoples do not consent to the appropriation of these genetic resources or their knowledge. Appropriated biodiversity and indigenous knowledge is usually reduced to or isolated to specific genes, and this isolation is treated as an 'invention' warranting legal protection, i.e. IPRs such as patents. Once a product(s) is released to the market and becomes profitable, no compensation is given to the local or indigenous peoples where the product originated.

Bioprospecting and biopiracy usually go hand in hand.[143] As a result, one finds a growing number of MNCs in the life sciences industry (and their intermediaries, which are usually universities and other research institutions) in the developing world in search of biodiversity and TK.

Although bioprospecting does not always involve the use of TK, it is clear that valuable genetic resources derived from plants, animals and micro-organisms are more easily identified and of greater commercial value when collected with such knowledge and/or found in territories traditionally inhabited by indigenous peoples.[144]

The immediate impact of bioprospecting and biopiracy activities is that it reduces the ability of local and indigenous peoples to meet, *inter alia,* their food and health needs. Without their consent, it transfers their rights to their biodiversity and knowledge to IPRs holders. Thereafter, local communities end up paying high prices or royalties for products developed as a result of their own resources and knowledge. This in turn leads to the impoverishment of rural communities.

The patenting of life forms found in indigenous peoples' lands or ecosystems raises ethical, moral, religious and other concerns because indigenous peoples have a spiritual and cultural connection to their ecosystems. They are intimately linked to a particular socio-ecological context by various economic, cultural and religious activities. TK is therefore deeply entrenched in the lives of indigenous peoples. It is often difficult to isolate or distinguish TK indigenous peoples.

The use and improvement of farmers' plant varieties has been a major source of food security and vital to ensure food production for local and indigenous peoples. It is estimated that nearly two point five billion people rely on wild and traditionally

[143] RAFI, *Bioprospecting/Biopiracy and Indigenous Peoples*, *RAFI Communique*, 2001, p. 1, <www.kahea.org/lcr/pdf/bioprospecting_people.pdf >.

[144] Article 1(b) of the International Labour Organisation (ILO) Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries states that indigenous peoples are: "Peoples in independent countries who are regarded as indigenous on account of their descent from populations, which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".

cultivated plant species to meet their daily food needs.[145] Seed supply relies on this 'informal' system. TK, combined with continued access to and the availability of agro-biodiversity, is essential for the survival of many local and indigenous peoples. Biopiracy threatens the very survival of many of these people.

As a result of bioprospecting and biopiracy activities, there has been increased recognition of the need to protect TK of local and indigenous peoples. TRIPS does not specifically protect TK, which in my opinion and the opinions of others constitutes intellectual property worthy of protection. Furthermore, TRIPS ignores cultural diversity in creating and sharing innovations and on what can and should be owned.[146] Also, the extent that patents are obtained on TK reveals a system-weakness since such patents do not meet the criteria for patentability, particularly the novelty criterion. To this extent, TRIPS is therefore discriminatory. It is an absurd imposition of Western systems on other cultures and traditions.

The very nature of the current IPRs regime discriminates against developing countries as it unfairly places a greater value on biotechnology outputs, which are generally produced in developed countries, than on genetic resources (often used to create biotechnology outputs) and contributions from local/indigenous communities, which are found in developing countries.

4.2. Access

The sustainable development of agriculture is largely dependent on access to plant genetic resources (PGRs).[147] No country or region is self-sufficient in biological diversity. PGRs are unevenly distributed throughout the world. Even the most biologically diverse countries look to other regions for a crucial share of their genetic stock.[148] Humanity shares a common bowl containing only 20 cultivated

[145] P. Kameri-Mbote and P. Cullet, *Agro-biodiversity and International Law,* African Centre for Technology Studies (ACTS), Biopolicy International Series No. 22, (ACTS Press. Nairobi, Kenya, 1999) p. 4.

[146] UNDP, *supra* note 126, p. 68.

[147] PGR is a term generally used to refer to landraces, advanced cultivars, wild relatives of domesticated plants and wild (non-domesticated) species used by man but which have scientific and economic value. Conversely, the term 'genetic resources' is said to be "genetic material of actual or potential value while the term 'genetic material' includes "any material of plant, animal, microbial or other origin containing functional units of heredity". Thus, genetic resources are genetic material of actual or potential value of plant, animal, microbial, or other origin. A South/North argument is used as to whether to use the term 'plant genetic resources' or 'genetic resources' (*see* Pistorius and van Wijk, *supra* note 82 and Girsberger, *supra* note 78*,* p. 1020).

[148] For example, bananas and plantains are important cash crops in Central and South America and the highest per capita consumption as a staple food is in East Africa; however 'home' for bananas and plantains is Southeast Asia (*see* Crucible Group, *People, Plants and Patents: The impact of Intellectual Property on Biodiversity, Conservation, Trade, and Rural Society* (International Development Research Centre, Ottawa, 1994) pp. 4–7).

crops that sustain 90 per cent of our calorie requirements.[149] As far as the major crops are concerned, most regions depend on resources originating elsewhere. Hence, we need one another.

In light of our interdependence, access to PGRs and processes is extremely important as it directly affects food security. Access to, control over and ownership of PGRs and processes have increasingly become a major international issue as biological resources dwindle. This has led to increased competition for these resources and an emphasis on their economic value. Concern is also raised when equal partners have an unequal opportunity to benefit from these resources or where it appears that IPRs for PGRs are only available to a select few, such as MNCs, at the expense of farmers or other rural communities.

In principle, patents are negative rights to the extent that they exclude or prevent third parties from making, using or commercialising an invention without the authorisation of the patent holder. A patent on either a biotech product or process would exclude/prevent other parties from the production, reproduction (multiplication), research, breeding and commercialisation of the biotech product or process.

Patents have hindered the traditional flow of knowledge and genetic material among researchers. There is a lack of 'freedom to operate' to conduct biotech R&D activities because of the existence of numerous patents on biotech products and processes which are held by MNCs. This has slowed down research partnerships and the flow of knowledge between interested research parties and has led to a negative impact on the quality of research carried out.[150] The numerous patents owned by MNCs, especially broad patents on useful biotech information and technology or fundamental research processes, have stifled research and complicated or deterred useful and desirable follow-up research.[151]

Access to patented biotech products or processes through licensing agreements is subjected to terms and conditions set by the patent holder, e.g. the payment of royalties. This impedes and interferes with the exchange of plant materials and knowledge among researchers, countries, universities and other stakeholders. This could have dire consequences for public research in developing countries, which normally have scarce financial resources.

A patent holder may also prevent farmers from the traditional saving and reusing of seeds for use in subsequent planting seasons and/or commercially exploiting a harvest if the seeds used are patented. In addition, a patent holder may prevent farmers from breeding new varieties using patented seeds.

In sum, the patent holder has numerous means to block access to and distribution of a patented biotech product or process and to limit its use. Moreover,

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[149] *Ibid.*, p. 4. Of these, rice, wheat and maise account for 60 per cent of calories and 56 percent of protein that people derive from plants (*see* Kameri-Mbote, *supra* note 146, p. 3).
[150] J. H. Barton, *supra* note 129 and *UNDP Human Development Report 1999*, *supra* note 123.
[151] *Ibid.*

access to patented products or processes would be subjected to the patent holder's terms and conditions.

Similarly, as patents on isolated genes extend to GMOs into which genes are inserted, the entire organism is brought under patent protection. When such genes are inserted into plant varieties, the contribution of breeders of the original plant variety is not recognised, and this also affects access to any plant variety inserted with the patented gene.

Plant breeders' rights do not restrict access to plant varieties due to the availability of the breeders' exemption and farmers' privilege. However, the stronger levels of protection introduced under the 1991 UPOV Act restrict access.

The 1991 Act does not require countries to protect the rights of farmers to freely use their harvest as further planting material (the so-called farmers' privilege). It leaves it *optional* for member states to define a farmer's privilege – as an exemption from the breeders' right – which potentially restricts farmers' access to propagating materials, e.g. seeds in those member states that choose not to grant this privilege.[152]

Thus, under the 1991 Act, unless national law provides otherwise, a farmer who produces or reproduces a protected variety from farm-saved seed is guilty of infringement. This weakens the economic position of rural farmers because they traditionally rely on farm-saved seed for use as seed in subsequent planting seasons and also to sell in their local markets.

It would also be an infringement to produce or reproduce and perform related acts with respect to 'essentially derived' varieties. This may limit the diffusion of varieties improved by farmers, though (if the farmers' privilege is recognised) it would not prevent them from using essentially derived varieties in their own local and traditional innovations.

The 1991 Act also restricts breeding in that anyone using a protected variety in research has to make significant changes to the variety or else the 'new' variety will not be considered 'new' but an 'essentially derived' variety, which, as we have seen, cannot be exploited without the permission of the original breeder.

In addition, the 1991 Act is silent on double protection of plant varieties, i.e. under patents and PBRs; hence, it is for member states to decide whether or not to provide plant varieties double protection. In the event that a member state provides double protection, the position of the right holder is strengthened at the expense of the public, particularly researchers, breeders and farmers.

4.3. Access and Benefit Sharing

Access and benefit sharing have come about as a result of biopiracy. Benefit sharing constitutes a useful strategy to reduce the impact of patents on farmers and local

[152] It is observed that the 1991 UPOV Act expressly allows countries to permit seed saving by farmers, and in practice, virtually all countries make special provision for the right to reuse seed in their national laws; although this is usually restricted to small-scale or subsistence farmers (*see* Tansey, *supra* note 47, p.10).

communities and to eliminate biopiracy, which fails to acknowledge or compensate local or indigenous communities for the appropriation of their knowledge.

The IP system has contributed to biopiracy of TK, raising the issues of compensation and benefit sharing to local and indigenous peoples from where the knowledge originated and the need for protection against such activities in the future.

While the definition of benefit sharing is often broad, in practice, it is often limited to monetary compensation. In effect, such a limitation legalises and legitimises the dispossession of local and indigenous peoples' rights over PGRs and TK and in order to avoid biopiracy, it sacrifices their rights.[153]

In light of the above, efforts at both the international and regional levels have sought to address access and benefit sharing issues. The following instruments are a result of such efforts:

(A) The Convention on Biological Diversity (CBD);
(B) The FAO International Treaty on Plant Genetic Resources for Food and Agriculture; and
(C) The African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.

The hallmark of the CBD is "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the use of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding".[154]

The CBD recognises the sovereign rights of states over their biological and genetic resources.[155]

State sovereignty remains an important basis for regulating access to biological resources. The CBD states that the authority to determine access rests with national governments and is subject to national legislation.[156] States are to endeavour to

[153] P. Cullet, *Plant Variety Protection in Africa: Towards Compliance with the TRIPS Agreement*, African Centre for Technology Studies (ACTS), *Biopolicy International Series No. 3*, Nairobi, Kenya, 2001, p. 22.
[154] Article 1 of the CBD.
[155] Articles 3 and 15(1) of the CBD. State sovereignty over natural resources is reaffirmed in many international conventions. Permanent sovereignty over natural resources is a facet of state sovereignty and refers to the right to exploit and develop natural resources, including agro-biodiversity, according to a state's own policies. This right is also found in Article 1 of both the ICCPR and ICESCR and is a component of the right to self-determination. It states "*[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence*".
[156] Article 15(1) of the CBD.

facilitate access by other state parties for environmentally sound use.[157] Further, access to these resources can only occur on mutually agreed terms and with the "prior and informed consent" of states, unless states have otherwise determined.[158]

Furthermore, the CBD requires the equitable sharing of benefits – on mutually agreed terms – arising from the results of R&D and commercial use of genetic resources with the state providing the resources.[159] It specifically states that countries are to provide for the effective participation in biotech R&D, especially developing countries, which provide the genetic resources for such research, and also countries are to promote and advance priority access to developing countries – on mutually agreed, fair and equitable terms – to the results and benefits from biotechnologies based on genetic resources provided.[160]

The CBD recognises IPRs to biotechnological inventions and asserts that IPRs must be supportive of and not run counter to the objectives of the CBD.[161] The CBD recognises that access to and transfer of technology, including biotechnology, is essential for the attainment of its aims. It requires the transfer of technologies to developing countries who provide genetic resources (including those technologies protected by patents and IPRs) to be on mutually agreed, fair and most favourable terms and, where necessary, in accordance with the financial mechanism established by the Convention. In the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognise and are consistent with the adequate and effective protection of intellectual property rights.[162]

The CBD recognises the close, traditional dependence of many indigenous and local communities on biological resources and deals with TK in the context of conservation and sustainable use of biodiversity.[163] Although Articles 8(j) and 10 do not use the word 'protect', they create legal obligations for states to respect,

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[157] Article 15(2) of the CBD.

[158] Article 15(4) and 15(5) of CBD. 'Prior informed consent' from states and/or local communities means that agreement has been obtained by those taking genetic resources from the providers of the resources about the destination of those resources, what they may be used for and, usually, a commitment to share any benefits derived from the enhanced use of those resources (*see* Tansey, *supra* note 47, p. 25).

[159] Article 15(7) of the CBD.

[160] Article 19(1) and 19(2) of the CBD.

[161] Articles 15(6), 16, and 19 of the CBD.

[162] Article 16(2) and 16(3) of the CBD. It is said that the emphasis on acquiring new and patented biotechnologies designed for the needs of developed countries that will attract royalties denies the importance of biotechnological information that is already in the public domain and adapted to the environment and development needs of developing countries. Developing countries are therefore urged to concentrate their efforts on informing themselves about the existence of such knowledge rather than on gaining access to biotechnologies found in developed countries (*see* Acharya, *supra* note 25, pp. 17–22).

[163] John Mugabe, *Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse*, African Centre for Technology Studies (ACTS), Biopolicy International Series No. 21 (ACTS Press. Nairobi, Kenya. 1999) p. 21.

preserve, promote and maintain the knowledge, innovations and practices of indigenous peoples and local communities. Article 8(j) also provides for the equitable sharing of benefits arising from the use of TK, innovations and practices with indigenous peoples and local communities.

The aims of the International Treaty on Plant Genetic Resources for Food and Agriculture are "the conservation and sustainable use of PGRs for food and agriculture and the fair and equitable sharing of benefits derived from their use, in harmony with the CBD, for sustainable agriculture and food security".[164] Landmark is the Treaty's formal recognition of Farmers' rights and the enormous contribution that local and indigenous communities and farmers make in the conservation and development of plant genetic resources.

The Treaty further states "that the responsibility for realizing Farmers' rights … rests with national governments … and … should take measures to protect and promote Farmers' rights, including: *protection of TK relevant to PGRs for food and agriculture; the right to equitably participate in sharing benefits arising from the use of PGRs for food and agriculture; and the right to participate in decision-making, at the national level, on matters related to the conservation and sustainable use of PGRs for food and agriculture*". It also states that *"nothing ... should be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material,* subject to national law and as appropriate".

Another key element of the Treaty is the provision providing for a Multilateral System of Facilitated Access and Benefit-Sharing for PGRs.[165] The Treaty aims to provide facilitated access to an agreed list of over 60 plant genera, including 35 crops and 29 forages, established on the basis of interdependence and their importance for food security.[166] Recipient countries of these PGRs agree to provide facilitated access to other countries by, *inter alia,* not claiming any IPRs or other rights that limit the facilitated access to PGRs for food and agriculture, or their genetic components.[167]

The Treaty also provides that the benefits accrued from the use – including commercial – of the material accessed under the multilateral system should be shared fairly and equitably.[168] Its provision on the sharing of monetary benefits

[164] Article 1 of the Treaty.

[165] For example, access to information related to PGRs is a principle that is found throughout the Treaty, e.g. Article 13(2)(a) where non-confidential information regarding technologies, results of research, etc. on PGRs is to be made available to countries. This facilitates the exchange of information "on scientific, technical and environmental matters related to PGRs for food and agriculture", with a view to contributing to the sharing of benefits therefrom. (Article 13 of the Treaty).

[166] Article 11, Annex I of the Treaty.

[167] Article 12(3) of the Treaty.

[168] Article 13 of the Treaty: notably, the benefits do not return to the country of origin but are to be shared in a fair and equitable manner through multilateral mechanisms, e.g. partnerships and collaboration with the private and public sectors of countries in development and in transition. Such benefits should flow primarily to all farmers, especially farmers in developing countries and countries with economies in transition, who conserve and sustainably use PGRs

arising from commercial use is also landmark in that someone who obtains a commercial profit from the use of PGRs administered multilaterally will be obliged – by a standard material transfer agreement – to share such profits fairly and equitably and to pay a royalty to the multilateral mechanism, which is to be used by the Governing Body of the Treaty as part of its funding strategy for benefit-sharing.[169]

The African Model Law also aims "to ensure the conservation, evaluation and sustainable use of biological resources, including agricultural genetic resources, and knowledge and technologies in order to maintain and improve their diversity as a means of sustaining all life support systems". It focuses on the definition of the rights of local communities, farmers and breeders over biological resources and establishes them as *a priori* rights that take precedence over rights based on private interests.

Its core principles and provisions are state sovereignty and the inalienable rights of its people over biological resources,[170] food sovereignty and security, including the right and responsibility of all stakeholders to keep seed free from private rights.[171] It also provides for the full participation of all stakeholders in decisions over biological resources.[172] The Model Law provides for community rights and responsibilities over biological resources.[173] It recognises the importance of TK in the conservation and sustainable use of biological resources and provides for its protection.[174] It also provides for farmers' rights.[175]

Moreover, it provides for a mechanism to regulate access to biological resources and TK based on the prior informed consent of states and local communities, mutually agreed terms and the fair and equitable sharing of benefits arising from

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for food and agriculture. There will be increased opportunities for developing joint strategies for the conservation and sustainable use of PGRs, the facilitation of research partnerships and the pooling of resources to exploit PGRs, and access to relevant research and technologies (*see* A. Mekoaur, *A Global Instrument on Agro-biodiversity: The International Treaty on Plant Genetic Resources for Food and Agriculture,* January 2002, FAO Legal Papers Online #24 at <www.fao.org/Legal/pub-e.htm>, p. 7.)

[169] Article 13(2)(d) of the Treaty: the Treaty distinguishes between mandatory and voluntary payment. Payment is mandatory on the commercialisation of a product that is a PGR and that incorporates material accessed from the multilateral system, when this product is not available without restriction to others for further R&D. Payment is voluntary when this product is available (*see ibid.*).

[170] *See* para. 1 of the preamble, Part I(a), and Part IV – Article 21(1).

[171] *See* Part I(k) and Part VI – Articles 26(3) and 33(1)(b).

[172] *See* para. 6 of the preamble, Part I(e), and Part V – Article 26 (1)(c).

[173] *See* paras. 2 and 6 of the preamble, Part I(g), and Part IV – Article 16.

[174] *See* para. 3 of the preamble, Part I(e)(h), Part III – Article 5(1)(ii), Part IV – Articles 18 and 22, Part V – Article 24(1), and Part VII – Article 66(4).

[175] *See* Part V.

their use, and establishes a community fund for this purpose.[176] Access by the formal sector is subject to the conditions agreed to in the CBD while traditional access by local communities and indigenous peoples is maintained.

Nevertheless, the African Model Law has not been widely incorporated in the laws of African countries in spite of its noble objectives.

The global interdependency that prevails in respect of PGRs for sustainable agriculture explains why access to PGRs is essential to food security, an issue that has been addressed in the CBD, the FAO Treaty and the African Model Law. The introduction of IPRs in the management of biodiversity – through TRIPS – would have serious repercussions if it were not done with the aim of ensuring the realisation of basic food needs.

TRIPS has extended and emphasised private property rights over agro-biodiversity.

TRIPS favours corporate/commercial interests. IPRs as exclusive property rights are an incentive for private sector R&D in agriculture. TRIPS potentially conflicts with established agricultural management practices of small-scale rural farmers. This is due to the fact that the two systems rely on and promote different knowledge systems, identify innovations differently and reward inventors in different ways.

Furthermore, under TRIPS, TK is not recognised as knowledge worthy of IP protection. Consequently, it is assumed that TK is in the public domain and thus freely available. It gives the impression that TK is not valuable while scientific research work carried out in laboratories is (and also adds value to TK). With the current TRIPS regime, farmers and other local innovators contribute to the research efforts of others, principally those based in developed countries, without being attributed any right to their work.

As farmers TK is not recognised and also because the majority of farmers mainly operate on the basis of sharing of knowledge, the gap between countries – developed and developing – and individuals who can compete in international agricultural trade will eventually widen.

TRIPS, while emphasising private rights, channels all benefits to an individual person and lacks a framework for the equitable sharing of benefits and compensation to those actors who have played a role in the management of biodiversity. There is thus a need to create alternative systems that reward farmers, indigenous peoples, local communities and other groups.

One of the most direct impacts of patents is to raise the price of patented seeds compared to other seeds. In addition, farmers become dependent on private firms for their seeds and also for farming inputs such as fertilisers and pesticides.[177] Furthermore, and perhaps most crucial in Africa, farmers will be unable to save and

[176] *See* paras. 5 and 6 of the preamble, Part I(c)(d), Part II – Articles 1 and 2(2)(ii), Part III, Part IV – Articles 18 – 22, Part V – Article 26(1)(b), and Part VIII – Articles 66, 67(2)(iii)(iv) and 68.

[177] Especially as regards GURTs since seeds will only germinate on the application of inputs available from the same MNCs (Correa, *supra* note 140, p. 171).

replant seeds of patented varieties, exacerbating food insecurity and worsening an already desperate situation.[178]

Access to food still remains the main food security concern in Africa. Concerted efforts are needed to address access related problems such as those arising from IPRs on biotech products and processes while also addressing poverty alleviation, land rights and land redistribution.

For Africa, TRIPS, the UPOV Convention, the CBD, the FAO Treaty and the African Model Law are key instruments to govern and influence a system of access for PGRs for food and agriculture.[179] At least, at the international and regional levels, there is a basic agreement of ensuring that for key food and feed crops there should be a system that facilitates access to and exchange of PGRs for food and agriculture and the equitable sharing of benefits arising from their use. Access to PGRs for food and agriculture – either for production, reproduction, research or breeding – is essential in any system that seeks the conservation, sustainable use, exchange and equitable sharing of benefits of such resources.

Indeed, IPRs are meant to serve a societal function; their grant should serve the wider public. The challenge is for national, regional and international policy makers to ensure that a balance is struck between the interests of IPRs holders and those of the public so as to maximise and not block or restrict access to agro-biodiversity and biotech products or processes.

5. TOWARDS COMPLIANCE WITH TRIPS

Beyond the food security implications brought about by TRIPS, it is necessary for African countries to fulfil their obligations under this legally binding treaty. African states should take advantage of the flexibility under Article 27(3)(b) of TRIPS to devise an IPRs system adapted to their own needs and conditions (*sui generis* system) and avoid any system that involves private exclusionary rights such as patents or PBRs.

As we have seen, private exclusionary rights are ill suited to provide the conditions necessary to ensure the fulfilment of basic food needs of individuals, households and nations in Africa and also the sustainable management of biological resources. An optimal balance could be achieved by determining the scope of protectable subject matter, the scope of rights, the permissible limitations or exceptions and the terms of protection.

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[178] In practice, I think that most small-scale farmers in Africa would be able to carry on the practice of saving seeds because litigation against millions of small farmers by seed companies is simply not feasible, unless seed companies produce seeds for staple foods with in-built protection such as 'terminator technology' or 'traitor technology'.

[179] The notion of access has shifted from a concept of 'unrestricted' or 'free- access' to one of 'shared-access'. It is observed that some countries may find it difficult to agree on a system of 'shared-access' if the genetic resources maintained and developed by their farmers and local communities may be appropriated under IPRs by foreign MNCs, especially if such IPRs create barriers to access to and use of the protected materials. Correa, *supra* note 140, p. 171.

The following various strategies can be employed towards compliance with Article 27 of TRIPS.

5.1. Exclusions from Patentability

Nothing in TRIPS obliges members to follow an expansive approach regarding the patenting of life forms.[180] Access-related problems in relation to patents on plant varieties or processes would partly be solved if countries formulated in their domestic laws exclusions banning the total patenting of substances existing in nature, such as genes, cells or entire plant varieties. Article 27(2) and 27(3) of TRIPS also specify exclusions that a member country can establish in its domestic law, e.g. based on morality, protection of human, animal or plant life or health, or to protect the environment. Article 27(3)(b) of TRIPS specifically provides for the exclusion of patentability of plants. Another possible exclusion from patenting would relate to "essentially biological processes for the production of plants or animals".

Article 30 of TRIPS provides for limited exemptions to the exclusive rights conferred by a patent. Developing countries should take advantage of this by providing research exemptions in their domestic laws to enable their public sector agricultural research to continue without the threat of infringing on patents.

5.2. Flexibility

If patents are granted then flexibility can be built in the:

(A) Conditions for patentability as stipulated in Article 27(1) of TRIPS;
(B) Scope and interpretation of claims;
(C) Access to samples of patented materials;
(D) Compulsory licenses as allowed in Article 31 of TRIPS. TRIPS does not limit the *grounds* for the grant of compulsory licences, but establishes the *conditions* under which the grant may take place; and[181]
(E) Revocation of patents especially viewed from the rest of the international legal system on access to genetic resources such as the CBD and the FAO Treaty.

5.3. Sui generis Protection of Plant Varieties

A *sui generis* system for the protection of plant varieties would allow African countries to develop IPRs over plant varieties, which are suited to their needs and conditions. The *sui generis* PVP system envisaged should first seek to foster food security for all and not contribute to food insecurity. A *sui generis* system should also be all encompassing, taking into account other international obligations that

[180] Correa, *supra* note 140, p. 186.
[181] *Ibid.*, p. 191.

African states could be party to, such as the CBD and the FAO Treaty. In addition, such a system should provide rights to all relevant actors in agricultural management, focusing on broadening the range of rights holders and not excluding any specific actors.

In devising such a system, African countries can recognise concurrently and equally farmers' rights, rights of local communities and indigenous peoples, rights of commercial breeders and rights of national agricultural research institutes. Such rights should be clearly spelt out and should not be exclusive; in this way, none of the actors can stop others from carrying out their activities.

5.4. Review of TRIPS

The review of Article 27(3)(b) of TRIPS began in 1999 and in 2000 a review of the entire TRIPS agreement began. Currently, neither of the reviews have been concluded. This is because developed and developing countries have differing interpretations on the scope of the review of Article 27(3)(b) of TRIPS.

It is evident that African negotiators are not as influential in the WTO as their counterparts from the USA, Europe and Japan. Consequently, if the latter three unite and adopt a common position on both reviews, they will likely determine the outcome of the process. Therefore, the challenge is for African countries to present alternative frameworks that will address their interests. There is a need for *sui generis* legislation to protect farmers' rights and TK. These issues should be looked into so as to guarantee a multilateral system of access to PGRs for food and agriculture.

The need to establish the relationship between TRIPS and CBD has also been realised by the WTO.[182] In November 2001, at the WTO's Fourth Ministerial Conference in Doha, Qatar (which ushered in a new trade round dubbed the 'Development Round'), the Council for TRIPS was instructed to include in its work programme, which includes the review of Article 27(3)(b) and the review of the implementation of TRIPS under Article 71(1), to examine, *inter alia,* the relationship between TRIPS and the CBD, the protection of TK and folklore and other relevant developments raised by member states pursuant to Article 71(1). It was stated that the TRIPS Council's work on these issues is to be guided by the objectives of TRIPS (Article 7) and its principles (Article 8) and must take development into full account.[183] The debate and political appeal of the primacy of the CBD over TRIPS on biodiversity issues is ongoing and also needs to be looked into.

[182] This has been discussed by the WTO Committee on Trade and Development, *Environment and TRIPS*, WT/CTE/W/8.

[183] *See* para. 19 of the Doha Ministerial Declaration and also the WTO Annual Report (2002), p. 79, <www.wto.org>.

6. CONCLUSION

Generally, there is a need to build human rights safeguards into TRIPS and its implementation so as to forestall the potential negative implications on human rights, such as the right to food as shown.

It is my view that intellectual property rights are instrumental rights in the sense that their grant and exercise should promote and protect all human rights. Human rights should guide the development of intellectual property rights, and thus intellectual property rights would be of service to all humanity. At a time of such dramatic breakthroughs in new technologies, it is indefensible that hunger, malnutrition and poverty still persist since the same technologies can have a huge impact on poverty eradication and generally improve the standard of living of many poor people in developing countries, including Africa.

There is a need to put human concerns and rights at the centre of the global governance of technology, which must respect and include diverse needs and cultures. MNCs need to put precaution before profits and reshape technology's path to benefit all humanity. Technology's path needs to be reshaped and redirected so that it benefits rural farmers and promotes innovation and sharing of knowledge, respects diverse systems of property ownership, restores social balance, brings its benefits to the majority, empowers people, and makes it accessible to those who need it. As shown, TRIPS strengthens IPRs and favours those who develop and market modern forms of technology rather than the majority of the end users of such technology, who are usually informal innovators.

There is a need to strengthen global ethics and responsibility, which values are enshrined in, *inter alia,* international human rights treaties. Article 28 of the UDHR states that everyone is entitled to a social order in which all the rights guaranteed therein can be realised. As MNCs are now very dominant in the global scene shaping the path of globalisation, there is a need to develop a legally binding global code of conduct to regulate them and a global forum to monitor their activities to ensure compliance with human rights.[184]

[184] A notable effort is the UN Global Compact that now brings companies (from all over the world) together with UN agencies (particularly the United Nations Environment Programme (UNEP), UNDP, Office of the United Nations High Commissioner for Human Rights (OHCHR), and ILO), governments, NGOs and civil society to foster action and partnerships in the pursuit of good corporate citizenship. The Global Compact is a voluntary initiative and not intended to be regulatory and is based on nine internationally accepted principles of human rights (i.e. UDHR), labour and the environment. Principle 1 states "*[b]usinesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence*"**.** Principle 2 states "*[b]usinesses should make sure that they are not complicit in human rights abuses*" (*see* <www.unglobalcompact.org/Portal/>).

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