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An Overview of Human Rights and Intellectual Property Protection

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ABSTRACT

The purpose of this article is to discuss the legal framework of human rights and intellectual property in terms of state obligations to afford a protection for both human rights and intellectual property. The relationship between intellectual property and human rights, under bilateral, regional and multilateral treaties, is a matter of concern. In focusing on the relationship between intellectual property and human rights, this article argues that there are many challenges on the wide use of Intellectual property rights that given possible conflict between intellectual property and human rights.

Keywords: Human Rights, Intellectual Property, International Protection, State Obligations.

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1.0 Introduction

Human rights are protected and guaranteed by law, whatever the sources of the law, treaties, customary international law, general principles and other sources of international law as stated in article 38 of the International Court of Justice Statute.

The international human rights law is embodied in the United Nations Charter, the Universal Declaration on Human Rights in 1948, the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966) and other declarations. Such international instruments led to the recognition of the universality of human rights as a cornerstone of international human rights law.

2.0 Methodology

Both primary and secondary sources are used in the recognition of the universality of human rights and intellectual property rights. In this sense, the descriptive and analytical method is approached in order to shed lights on the main objectives of this article.

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3.0 The universality of human rights

The human rights law sets universal standards using legal rationality. The main source of the universality of human rights could be derived from the obligations stated under the UN Charter. The UN Charter has been considered as a constitution. In this regard, it is correctly maintained that the UN Charter "is not just a legal text intended to describe with precision the rights and duties of parties like a conveyance or a contract of sale, it is a political document designed to embody statements of ideas, of principles, and of moral sentiment, such is the nature of constitutions, at least of those constitution which live in the minds of people and are adaptable to growth along with the societies they are intended to govern" (Feller, 1951).

Many constitutional characteristics of the UN Charter are embodied in the preamble of the UN Charter as follows: We the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

The protection of human rights is highly determined in the preamble of the UN Charter and its articles. One of the main Purposes of the United Nations as stated in Article 1 of the UN Charter is "to 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". In order to achieve the Purposes stated in Article 1, the UN and its Members, shall act in accordance with the following Principles (UN Charter, Article 1(3)):-

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. Article 2 of the UN Charter.

Moreover, article 55 of the UN Charter requires the promotion of human rights as follows (UN Charter, Article 55):

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- A. higher standards of living, full employment, and conditions of economic and social progress and development;
- B. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

C. universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The constitutional status of the UN Charter has been confirmed and strengthened in article 103 of the UN Charter. Article 103 clearly expresses the priority status of the Charter obligation over any obligation conflicts with the UN Charter. Article 103 of the UN Charter runs as follows (UN Charter, Article 103):

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Although Article 34 of the Vienna Convention on the Law of Treaties (Vienna Convention 1969) established a general rule regarding third states obligations as it stated that “treaty does not create either obligations or rights for a third State without its consent” (Villiger, Mark E, 2009) it is well established in the Law of treaties that there are certain exceptions for such a rule such as the nature of the UN Charter as a constitution of community members.

Chapter VII of the UN Charter gives the Security Council powers in terms of its responsibilities for the maintenance of international peace and security. Under Article 39 of the UN Charter the Security Council ‘shall determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and in accordance to article 41 the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations” (UN Charter, Article 39) . Also, Article 42 of the UN Charter states that “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations”.

The binding feature of the Security Council decisions to all states is a fundamental character of the UN Charter (Christian Tomuchar, 1993). It is correctly maintained that " it has become a constant practice of the Security Council to address any embargo resolutions to all States, making it clear by the language chosen (decides) that it is incumbent upon non member States, to, to heed the measures determined by it" (Christian Tomuchar, 1993) .

The UN has drafted and promulgated and help implanting more than eight human rights treaties and declarations also, the UN established many political institutions and expert bodies (David Weissbrodt and Connie de la Vega, 2007, Jacob, Robnsion, 1946, Bardo Fassbender, 2009). By way of example, one might mention the Uniting for peace resolution of 1950, the codification and development of Charter principles and rules by the General Assembly through the Universal Declaration of Human Rights.

Thus, the preamble of UN Charter and the above mentioned article of the UN Charter and the binding decisions of the Security Council to a non-member state, and the instruments that promulgated by the UN in order to promote human rights are fundamental rules in terms of the universality of the human rights

Intellectual property refers to a group of rights that related to the ownership in a precise dimension. In this sense it refers to creations of the mind protected in patents, copyright and trademarks laws such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce (World Intellectual Property Organization 1967).

However, it is truly maintained that "Trying to define the essence of intellectual property is difficult. Most definitions in fact simply list examples of intellectual property rights or the subject-matter of those rights (often in inclusive form) rather than attempting to identify the essential attributes of intellectual property" (Peter, Drahos, 1998).

Article 2 (viii) of the Convention Establishing the World Intellectual Property Organization that Signed at Stockholm on July 14, 1967 and amended on September 28, 1979 stated that "intellectual property" shall include the rights relating to (World Intellectual Property Organization 1967):

- Literary, artistic and scientific works,
- Performances of performing artists, phonograms, and broadcasts,
- Inventions in all fields of human endeavor,
- Scientific discoveries,
- Industrial designs,
- Trademarks, service marks, and commercial names and designations,
- Protection against unfair competition,

And all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

It is worth mentioning that the elastic and open ended meaning for both definitions could constitute a challenge on the both concepts. However, the main debatable issue is to make a balance between the interests of authors or innovators and the universality of human rights in such a way that to keep the benefits for inventions and creation and at the same time the public interest benefit also from such creation or invention.

4.0 The state obligations

Human rights have both rights and obligations. The responsibility of States under international law to prevent human rights abuses is seriously considered, particularly with regard to fundamental human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. In this sense the obligation upon states, for example, international organizations positively to protect human rights is becoming part of the agenda of international human rights law. The obligation to fulfill means that "States must take positive action to facilitate the enjoyment of basic human rights. At the individual level, while we are entitled our human rights, we should also respect the human rights of others" (The Office of the United Nations High Commissioner for Human Rights).

In light of international law, the sources of international law as defined in Article 38 (1) of the Statute of the International Court of Justice as "the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nation ...". (The Statute of the International Court of Justice Article 38) this Article in fact entails legal obligations upon states. By analogy with the international responsibility of States, one of the conditions in order to be held responsible is a breach of international obligations. Where a breach of international obligation exists, international responsibility may be invoked. Wrongful acts result from a breach in international law. In this sense, it is maintained that 'The obligation may result either from a treaty binding the international organisation or from the any other source of international law applicable to the organisation' (UN .Doc. A/58/10).

Although, Article 32 of Draft Articles on State responsibility (2001) states that 'the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part, it is debatable whether such a breach could be lawful in accordance with the internal law of the international organisation (UN. Doc. A/56/10.).

This is the case even if the action has been taken in accordance with internal law, as it might at the same time consist of a breach of international law.

As the distinction between “primary” and “secondary rules” has taken place in the draft articles of state responsibility (Crawford, James 2002), it might be controversial to go into the content of the obligation that the state can have. The issue is no less controversial in the case of obligations for international organisation.

5.0 The nature of intellectual property right

The preamble to the universal declaration of Human rights adopted 10 December 1948 emphasizes that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"

It is worth mentioning that human rights are implemented by the state and matters basically and crucially within the domestic affairs of the state.

The tension between the universalism of human rights and the relativism of cultural traditions is debatable (Brems 2001, Renteln, 1990). Moreover, the question whether the intellectual property rights could be recognized now as human rights and whether there is a universal recognition is also debatable (Chapman 2002, Farida Shaheed, 2015).

The main international constitution document of human rights law is the Universal Declaration of Human Rights 1948. Human rights are "rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible"(The Office of the United Nations High Commissioner for Human Rights).

One of the human rights that stated in the Universal Declarations is the right of property. The Universal Declaration of human rights does not expressly refer to intellectual property. However, a general right of property embodied on Article 17 states that:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 27 of the Universal Declaration of human rights sheds the light on the right to the protection of the moral and material interests of authors and at the same time the right of everyone to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Article 27 states that:

1. 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.
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

At the same vein the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) recognized the protection of the moral and material interests of authors and at the same time the right of everyone to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. The right to science and culture also appears in Article 15 of the International Covenant on Economic, Social and Cultural Rights as follows:

- (1) The States Parties to the present Covenant recognize the right of everyone (International Covenant on Economic, Social and Cultural Rights Article 15):
 - (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.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. (3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

(4) The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Moreover, the regional human rights instruments address general rights of property such as Article 31 of Arab Charter on Human Rights states that:

Everyone has a guaranteed right to own private property. No person shall under any circumstances be divested of all or any part of his property? In an arbitrary or unlawful manner (Arab Charter on Human Rights states, Article 31)

The African Charter on Human and Peoples' Rights 1981 also recognizes the right to property as Article 14 runs as follows (The African Charter on Human and Peoples' Rights, 1981):

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 and in accordance with the provisions of appropriate laws.

The American Convention on Human Rights of 1969 also included such right of property as Article 21 states that (The American Convention on Human Rights, 1969):

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Thus, one can safely maintain that the international law recognized the right of property in general; however, it is argued that the international recognition of a right of property does not apply with equal force to all different types of property. Schermers concludes that "most property rights cannot be included in the category of fundamental human right. His argument assumes that human rights and property rights can be broken up into categories". Schermers suggests Fundamental human rights, are ""human rights of such importance that their international protection includes the right, perhaps even the obligation, of international enforcement" (Schermers, 1988).

The globalization plays a wide impact on human rights and the right of intellectual property. The globalizations of the media, communications and information systems directly affect political orders, social patterns and values (Seidelmann, Reimund, 1996). In fact, the value of globalization is being at issue since the New World order, as 'the rapid growth of international trade, the expansion of transnational corporation, and emergence of global financial markets have produced a truly global economy and globalization of production, markets, labour, and technology in many sectors (Mingst and Karns 2000). The concept of globalization has been viewed from several dimensions. In this regard, Kofi Annan defined globalization as being 'commonly understood to describe those advances in technology and communication that have made possible an unprecedented degree of financial and economic interdependence and growth. As markets are integrated investments flow more easily, competition is enhanced, prices are lowered and living standards everywhere are improved' (Annan, 2000, Levy-Livermore, 1998, Waters, 1995, Wood, 1998).

The problem created by this globalization is that any conflict between national and global norms has to bring global identity to the test (Seidelmann, Reimund, 1996). In this respect, Seidelmann has maintained that “in contrast to the relatively homogenous nation-states with all its classical means for identity-building the global order faces the problem that common grounds are limited and that some of the most effective identity-building strategies such as external federation, ... identity-formation through conflicts with an outside enemy, do not exist for the supranational actor” (Seidelmann, Reimund, 1996).

In this regard, Durch maintained that:

The revolution in electronics allowed the news media to drop into remote, troubled areas and to broadcast live images using portable, satellite-linked equipment. Television crews extracted graphic images of mass suffering and over-stretched relief workers and broadcast them around the world. The images tended to give rise, first, to increased support for those agencies, private or international, who were attempting to deal with the crisis and, second, to public pressure on governments, at least among the industrial democracies, to do something as well (Durch, 1997).

6.0 Concluding remarks

The international recognition of intellectual property and human rights received significant attention in the accessing sciences and it would be immoral to deprive others and threaten the life of people within the argument of protecting intellectual property. Thus, approaching intellectual property as a human right leads to the conclusion that States have a human rights obligation to ensure that national laws and regulations are designed to promote creators' ability to earn a livelihood and to protect their scientific and creative freedom, the integrity of their work.

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