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The Right to Food and the Right to Intellectual Property in the United Nations (including International Human Rights) and International Trade: Finding the Definition

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A thesis submitted in partial fulfillment of the requirements for the Master of Studies in Law degree in Studies in Law

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Abstract

Intellectual property (IP) is omnipresent in both the context of the United Nations (UN) system (including international human rights law and the World Intellectual Property Organization (WIPO)), and international trade law, while the right to food has a much lower international profile. IP moved into international trade in 1994 through the *TRIPS Agreement*. The right to food has no presence in international trade. These two rights are the focus of this study – but are contrasted with several other rights: the right to health and the rights of persons with disabilities. The right to health was not present in international trade until 2001 when in the *Doha Declaration*, it first appeared paired with IP. The rights of persons with disabilities still do not appear in the international trade context but the 2013 *Marrakesh Treaty* nonetheless connects them with IP. This thesis traces the definition of the right to food and the right to IP using doctrinal and historical analysis. The author concludes that (a) that lack of clarity in the definition of the right to food, and (b) lack of strength in international institutions, both make the right to food ill-prepared for the challenges presented by the increasingly powerful position of IP in international arenas.

Keywords

Right to Food, Right to Intellectual Property, International Public Law, Right to Health, Rights of Persons with Disabilities, International Human Rights Law, Intellectual Property, International Trade, *Doha Declaration*, *Marrakesh Treaty*

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Chapter 1

- 1 Introduction to the Thesis
 - 1.1 Introduction to the Primary International Documents Studied
 - 1.2 The Research Question and Hypotheses
 - 1.3 Introducing the Right to Food
 - 1.4 Introducing the Right to Intellectual Property
 - 1.5 Connecting the Right to Health and the Rights of Persons with Disabilities
 - 1.6 Conclusion

1 Introduction to the Thesis

Intellectual property (IP) has been expressly recognized to be part of international trade since 1994 when the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS)¹ was concluded. Since then various Non-Governmental Organizations (NGOs), social groups, and activists around the world have commented that the agreements like the *TRIPS Agreement*² have created a ‘conflict’ between the right to IP and the other human rights expressed in international human rights law.³

This apparent ‘conflict’ was first recognized shortly after the *TRIPS Agreement* was concluded when “less developed” and “least developed” member states of the World Trade Organization (WTO)⁴ considered the effect of the *TRIPS Agreement* on the right to health of their citizens and focused their concern upon the issue of access to medicines that under the *TRIPS Agreement* were required to be protected by the nations’ IP. The problem became evident when HIV/AIDS became a crisis and also in connection with problems arising from similar life-threatening diseases. Nations realized their protection of public health could not occur always at the same time as the fulfillment of their

¹ *Agreement on Trade-Related Aspects of Intellectual Property*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, 1869 UNTS 299; 33 ILM 1197 (1994) (entered into force 1 January 1995) [*TRIPS Agreement*].

² Member states of the World Trade Organization (WTO) are obliged to meet minimum standards set by the *TRIPS Agreement*, such as the minimum number of years of protection for IP devices. Each country is also free to set its own standards at a higher level than the agreement requires, sometimes called “TRIPS-plus”, so long as this is consistent with the *TRIPS Agreement*. It is regulated by the *TRIPS Agreement* Article 1(1) (“Members shall give effect to the provisions of this Agreement. 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. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”)

³ See e.g. Laurence R. Helfer, “Human Rights and Intellectual Property: Conflict or Coexistence?” (2003) 5:1 *Minnesota Intellectual Property Rev* 47.

⁴ The classification of “less developed” and “least developed” nations were creations of the WTO. *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154.

countries' obligations in patent under the *TRIPS Agreement*. This situation will be further explored in Chapter 4.

This pressure of NGOs and other social groups on United Nations (UN) human rights authorities resulted in the Sub-Commission on the Promotion and Protection of Human Rights' *Intellectual Property Rights and Human Rights Resolution 2000/7*.⁵ Article 2 of the Resolution 2000/7

Declares, 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 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.⁶

This Article 2 from Resolution 2000/7 includes a reference to “indivisibility” – one of several core principles on which the 1948 UN *Universal Declaration of Human Rights* was established.⁷ This concept will be further discussed below in this Chapter.

⁵ *Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7*, UNESCOR, 52nd Sess, UN Doc E/CN.4/Sub.2/RES/2000/7, (2000) [Sub-Commission on Human Rights Resolution 2000/7].

⁶ Sub-Commission on Human Rights Resolution 2000/7, *supra* note 5, art 2.

⁷ That all human rights are universal, indivisible and interdependent and interrelated has been reiterated at the World Conference on Human Rights on 25 June 1993, in Vienna (Austria) at which the *Vienna Declaration and Programme of Action* was adopted. The *Vienna Declaration and Programme of Action*, (25 June 1993), GA Conf. A/CONF.157/23(12 July 1993), part I at para 5 (“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. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”) [Vienna Declaration].

The *Vienna Declaration* established the UN High Commissioner for Human Rights Office, endorsed by General Assembly Resolution 48/121.

The declaration in Article 2 from Resolution 2000/7 that “there are apparent conflicts between the IP rights regimes embodied in the *TRIPS Agreement* and international human rights law” sparked this research.⁸

This thesis approaches the right to food and the right to IP in a manner that has not been used before. It approaches these rights by exploring the definition of the right to food and the definition of the right to IP as developed in primary international sources. This thesis also similarly examines the definitions of the right to health and the rights of persons with disabilities. The thesis also explores the concept of freedom of expression but only in the context of the rights of persons with disabilities.

The 1948 *Universal Declaration of Human Rights* (UDHR)⁹ in Article 25(1) declares:

Everyone has the right to a “standard of living adequate for the **health** and well-being of himself and his family, including **food**, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, **disability**, widowhood, old age or other lack of livelihood in circumstances beyond his control.”¹⁰

While the rights to health, food and the right to security in the event of disability are all embedded in the UDHR under the rubric of the right to an adequate standard of living, the right to IP in the UDHR is implicitly declared in a separate provision. Article 27(2) reads as follows:

⁸ The initial interest in the right to food and the right to IP, and the inspiration for this thesis, came from the intensive course on Human Rights and Intellectual Property taught at Western Law, in the fall of 2015, by Visiting Professor Graeme Austin from the University of Victoria, New Zealand. The main reading for this course was the book Professor Austin co-authored with Laurence Helfer. See Laurence R. Helfer & Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge, UK: Cambridge University Press, 2011), particularly chapter 6 “The Human Right to Food, Plant Genetic resources, and Intellectual Property” at 364-431.

⁹ *Universal Declaration of Human Rights, 10 December 1948. General Assembly Resolution 217 A (III)* (entered into force 16 December 1949) [UDHR].

¹⁰ UDHR, *supra* note 9, art 25(1) [emphases added].

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.¹¹

In this 21st century two international agreements have been concluded which contrast balances between IP and the rights under examination: the right to health is balanced with IP in the 2001 *Doha Declaration*¹² and the rights of persons with disabilities are balanced with IP through the 2013 *Marrakesh Treaty*.¹³ The first was concluded in the WTO, the second in the UN environment. The two are analyzed in this thesis in order to compare instruments of trade and instruments developed within the UN in terms of which best supports expression of the human rights within this study.

The Research Question this thesis posits is:

Can competing human rights, such as the right to food and the right to intellectual property (IP), better be balanced through international trade mechanisms which already balance the right to health and right to IP or should the right to food balance the right to IP following the model of balance between the rights of persons with disabilities and right to IP in the UN?

In order to analyze the positions of the right to food and the right to IP (and the right to health and the rights of persons with disabilities (and freedom of expression in the context of the rights of persons with disabilities)) here, this thesis proposed four hypotheses:

H1 – That the definition of the right to food currently lacks clarity

¹¹ UDHR, *supra* note 9, art 27(2).

¹² *Doha Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, adopted on 14 November 2001 [*Doha Declaration*].

¹³ *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled*, signed 27 June 2013 (entered into force 30 September 2016, accession by Canada 30 June 2016) [*Marrakesh Treaty*].

H2 – That the right to IP, as well as the right to health and the rights of persons with disabilities (and freedom of expression in the context of rights of persons with disabilities), have all been better articulated in international law than the right to food.

H3 – That inclusion of IP in international trade law has given the right to IP greater definition as a concept than has occurred for the concepts of other rights under investigation.

H4 – That the right to health has found a better balance with the right to IP through the international trade mechanisms of the *Doha Declaration* than the rights of persons with disabilities (and freedom of expression in the context of the rights of persons with disabilities) have found through their balance with the right to IP in the *Marrakesh Treaty* in the UN's WIPO.

1.1 Introduction to the Primary International Documents Studied

Conversations about the right to food and human rights were first observed in 1948 United Nations (UN) *Universal Declaration of Human Rights*.¹⁴ The UDHR refers to the right to food in relation to the provision about the right to an adequate standard of living.¹⁵ It means that there is not a separate provision about the right to food in the UDHR.

Food is a tangible good and has been traded long before the establishment of national boundaries and the introduction of tariffs in trade. For the purpose of that trade, food did not require definition. However, the “right to food” was a distinctive new concept when

¹⁴ UDHR, supra note 9.

¹⁵ UDHR, art 25(1). Note the term “an adequate standard of living” is taken directly from the UDHR Article 25(1) in the phrase “a standard of living adequate for the health and well-being...”.

introduced in the post-WWII international human rights law arena. A distinction can be made between food, and the right to food: food is a tangible good – a commodity now subject to various types of trade agreements, while the right to food, being a human right, is an intangible entity and cannot be traded. This distinction is further explained in Table 1.

Table 1: Food and the Right to Food

Food	Tangible	Tradable since prehistory	Definition not required
The Right to Food	Intangible	Recognized as part of human right, in 1948	Definition required

In contrast to the right to food, the UDHR does not refer directly to the term “intellectual property”. Indeed, this right is expressed in the UDHR Article 27(2) as “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.”¹⁶

Intellectual property (IP) is generally defined as a product of human original thought,¹⁷ and is therefore intangible. However, intellectual property requires manifestation of that original thought in material form – frequently in writing but also in art and other forms - in order to be protected by law. The legal protection of IP means that a limited term monopoly is granted to the inventor or the creator or other right’s holder of the IP.¹⁸

¹⁶ UDHR, *supra* note 9, art 27(2).

¹⁷ See Adam Moore & Kim Hanna, “Intellectual Property” in The Stanford Encyclopedia of Philosophy, Winter 2014 ed., online: <<https://plato.stanford.edu/archives/win2014/entries/intellectual-property/>> [Moore & Hanna].

¹⁸ IP rights are limited term monopolies under international treaties regulating IP rights such as copyright, patent, or trademark. The IP rights are different from the human rights concept of the right to IP.

IP has become an important legal focus since the industrial revolution – which also coincidentally was the time of the first appearance of the term “intellectual property”.¹⁹

The advancement of technological development in the 19th century led to an international codification of intellectual property. This codification came through international agreements to harmonize economic monopolies for certain of the intangibles that comprise intellectual property.

The first in a series of international agreements on IP was the 1883 *Paris Convention*²⁰ followed by the 1886 *Berne Convention*.²¹ However, it was not until the drafting of the UDHR in 1948 that intellectual property was recognized as a human right. Table 2 compares the recognition of IP, with the recognition of IP as a human right.

¹⁹ First appearance of the term “intellectual property” is found in the book review titled “Conclusion of the Account of Dr. Smith’s *New and General Systems of Phisic*, (1769) 41 Monthly Rev 290. As Stuart Banner explains, the term “intellectual property” in the 18th century “meant something closer to the sum of knowledge possessed by a person or a society.” in Stuart Banner, *American Property: A History of How, Why, and What We Own* (Cambridge, MA: Harvard University Press, 2011) at 23. However, the first discussion in which the term “intellectual property” appeared in the context of medical patent rights protection appeared in “New-England Association in favour of Inventors and Discoverers for the Protection of **Intellectual Property**.” (1808) 11 The Medical Repository of Original Essays and Intelligence at 303. The term “intellectual property” is discussed in Chapter 3 of this thesis.

²⁰ *Paris Convention for the Protection of Industrial Property*, 20 March 1883, 828 UNTS 305 (amended 28 September 1979, entered into force 3 June 1984) [Paris Convention].

²¹ *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as revised in Paris, 24 July 1971, 1161 UNTS 30, Can TS 1998, No 1 (Index) (as amended on 28 September 1979, entered into force 19 November 1984) [Berne Convention].

Table 2: Intellectual Property and the Right to Intellectual Property

IP	Tangible (tradable) legal monopoly	Did not exist until the Industrial Revolution*	Definition required (to create monopoly)
The Right to IP	Intangible	Recognized as human right in 1948	Definition required

*Industrial Revolution - marked the transition from hand production to machine manufacturing - began in Great Britain. Usually referred to as a period from about 1760 to sometime between 1820 and 1840.

This thesis explores the historical instantiation of the right to food and the right to IP in international law.

This thesis explores the consequences of the fact that of the two rights, the right to food and the right to IP only the monopolies related to the right to IP (and not provisions intended to realize aspects of the right to food) were expressly recognized as part of international trade law through the *TRIPS Agreement*.²² The right to IP markedly advanced, in 1994, when IP monopolies entered international trade law. With that move, the right to IP secured a presence in both international human rights law (by being added to the UDHR and international trade law) through the *TRIPS Agreement*.

That there is a competition between the right to food and the right to IP has, as will be established, been widely commented upon and the tension between the two has been described in the official annals of the UN as a conflict. In 2000, the Office of the High Commissioner for Human Rights (OHCHR) concluded the resolution titled *Intellectual*

²² *TRIPS Agreement*, supra note 1.

Property Rights and Human Rights Resolution 2000/7 adopted by the *Sub-Commission on Human Rights* (mentioned above).²³

This thesis focuses on this conflict and examines whether there is an optimal way for the right to food to achieve a better balance with the right to IP than it experiences at present.

1.2 The Research Question and Hypotheses

The research question this thesis seeks to answer is twofold:

- (1) Can competing human rights, such as the right to food and the right to intellectual property (IP), better be balanced through international trade mechanisms which already balance the right to health and right to IP, or
- (2) should the right to food balance the right to IP following the model of balance between the rights of persons with disabilities and right to IP in the UN?

This thesis explores whether the right to IP has gained stronger articulation through acceptance into the international trade environment, while the right to food has not since the adoption of the UDHR. As indicated in Tables 1 and 2 above, rights require definition to be understood and then realized. This thesis postulates in partial exploration of the research question, that “the definition of the right to food currently lacks clarity”.

The hypotheses established prior to embarking on the research were:

²³ Sub-Commission on Human Rights Resolution 2000/7, *supra* note 5 at paras 2, 7.

para 2 Declared, 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 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;

para 7 Calls upon States parties to the International Covenant on Economic, Social and Cultural Rights to fulfil the duty under article 2, paragraph 1, article 11 paragraph 2 and article 15, paragraph 4, to cooperate internationally in order to realize the legal obligations under the Covenant, including in the context of international intellectual property regimes.

H1 - That the definition of the right to food currently lacks clarity.

This thesis contrasts the definitional clarity of the right to food with that of the right to IP. It also compares this question of definitional clarity in the context of rights related to the right to food, with those of the right to health, and the rights of persons with disabilities (and freedom of expression in the context of rights of persons with disabilities).

Therefore, the following hypothesis was established:

H2 - That the right to IP, as well as the right to health and the rights of persons with disabilities (and freedom of expression in the context of rights of persons with disabilities), have all been better articulated in international law than the right to food.

As this thesis will establish, the right to IP was the first to “crossover” from the international human rights law and expression in the UN into the realm of international trade law. The right to health was second (as will be described in Chapter 4). Other rights discussed in this thesis have yet to cross this divide. This thesis asks whether crossing this divide is important to the full realization of rights. For this purpose, this thesis sets the third hypothesis:

H3 - That inclusion of IP in international trade law has given the right to IP greater definition as a concept than has occurred for the concepts of other rights under investigation.

As will be explained below, while the right to IP gained traction in international trade law in 1994, the right to health was expressly recognized in international trade law for the first time through the 2001 *Doha Declaration*.²⁴ On the other hand, in 2013, states created the first ever “users’ rights” treaty in copyright – the *Marrakesh Treaty*²⁵ – which balances the rights of persons with disabilities (the users on which this treaty is focused)

²⁴ *Doha Declaration*, *supra* note 12.

²⁵ *Marrakesh Treaty*, *supra* note 13.

and IP rights.²⁶ The *Marrakesh Treaty* (created entirely within WIPO) respects the rights of persons with disabilities and gives them rights to access printed copyrighted materials.²⁷ These rights for persons with disabilities not only relate to their specific rights but also allow for a more fulsome exercise of their rights to freedom of expression. It is in this limited context that the right to freedom of expression is engaged in this thesis.

Currently, there are no similar mechanisms in either international trade or within the UN that balance the right to food with the right to IP. If such a mechanism were to be created to better balance the right to food with the right to IP this thesis explores which avenue within international trade or within the UN would be the more productive venue for change. This enquiry leads to the fourth and final hypothesis explored in this thesis:

H4 - That the right to health has found a better balance with the right to IP through the international trade mechanisms of the *Doha Declaration* than the rights of persons with disabilities (and freedom of expression in the context of the rights of persons with disabilities) have found through their balance with the right to IP in the *Marrakesh Treaty* in the UN's WIPO.

The research question postulated in this thesis is important because approaching rights such as the right to IP and the right to food, seeking to effect balance between them, has not been tried in the literature before. Indeed, analyzing these rights (to food, IP, health, and for persons with disabilities (and freedom of expression with respect to persons with

²⁶ Margaret Ann Wilkinson, "International Copyright: Marrakesh and the Future of Users' Rights Exceptions", in Mark Perry (ed), *Global Governance of Intellectual Property in the 21st Century: Reflecting Policy Through Change* (Springer, 2016).

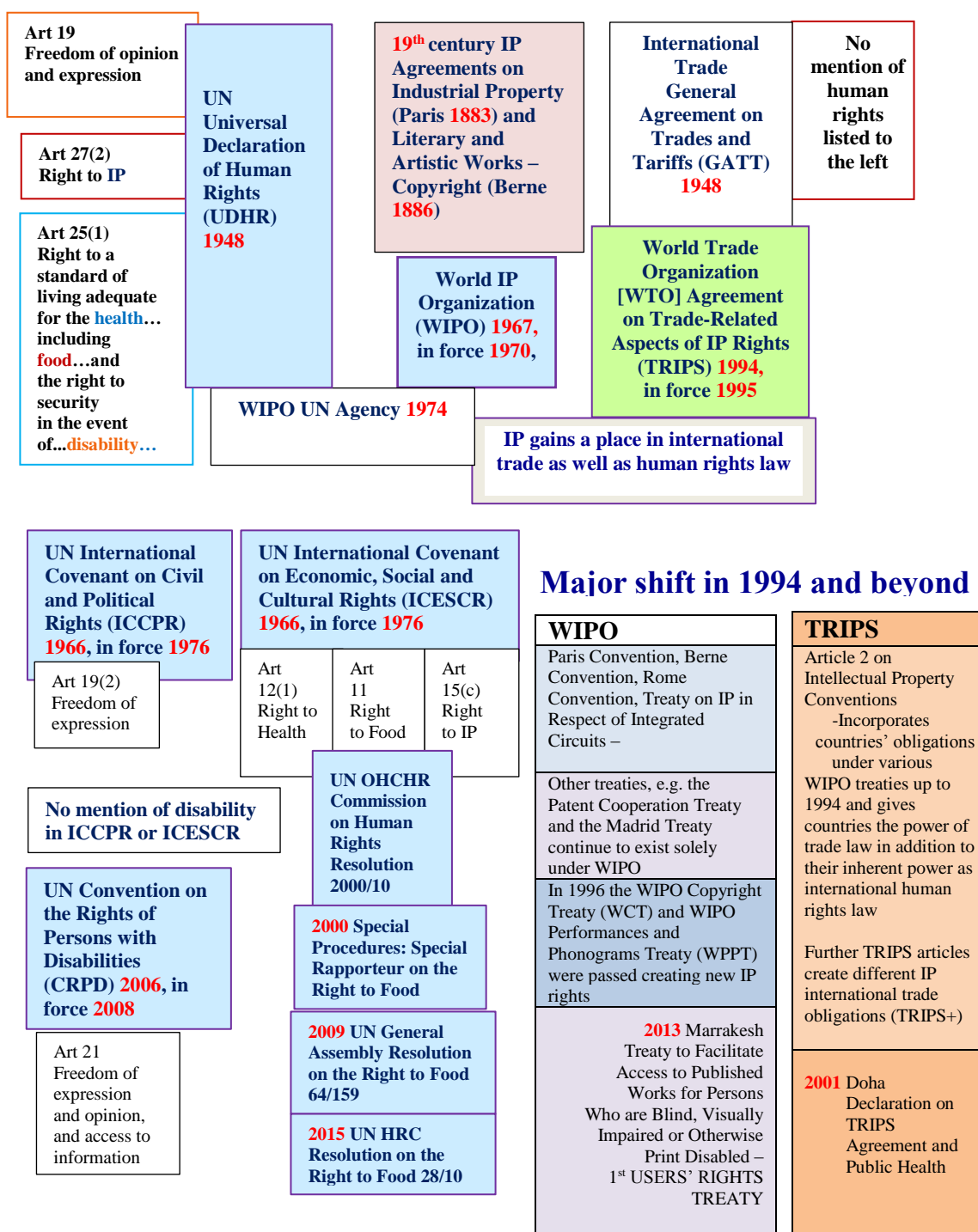
²⁷ *Marrakesh Treaty*, *supra* note 13, arts 4-6.

disabilities)) in the past has largely been a siloed exercise, with authors each writing only about one right.²⁸

Figure 1, below is a graphical representation of the relationship and history of rights explored in this thesis.

²⁸ It will be noted that those authors discussed as part of my analysis, to the right to food in Chapter 2 are different authors than those I cite in my Chapter 3 analysis on the right to IP, which demonstrates this siloing.

Figure 1: Overview of the Relationship and History of Rights to Food, Intellectual Property (IP), Health, and the Rights of Persons with Disabilities (and Freedom of Expression in the Context of the Rights of Persons with Disabilities*)



*The term for the right to freedom of expression appears in variant forms such as “freedom of opinion and expression”, or “freedom of expression and opinion, and access to information”

1.3 Introducing the Right to Food

This thesis will focus on the primary international legal documents that have expressed certain human rights in the environment of the UN as well as in the case of IP rights in international trade.

The concept of human rights, however, and the context in which these legal expressions have arisen has been explored by authors coming from scholarly traditions other than law. These traditions include scholarship in philosophy, economics, political and social sciences.

For example, Amartya Sen discusses the right to food (after) asking a philosophical question: “Do people have right to be free from hunger?”²⁹ Sen points to Ronald Dworkin’s distinction between “concrete” and “abstract” rights with the intention to “identify the variety of forms in which rights related to adequate means could arise.”³⁰

In 1985, Robert Bard wrote an article simply titled “The Right to Food”.³¹ He explored the right to food in the context of political decisions. He said: “The supporters of the existence of a legally recognized international right to food fail to recognize that the establishment of a right to food requires a prior political decision to that effect.”³² And he added: “Arguments for the existence of a right to food are based on the moral necessity of respecting human life.”³³ In his conclusion, however, Bard noted: “Legal theory cannot

²⁹ Amartya Sen. “The Right Not to Be Hungry” in Philip Alston & Katarina Tomasevski, eds, *The Right to Food*. (Boston & Utrecht: Martinus Nijhoff Publishers & Stichting Studie- en Informatiecentrum Mensenrechten, 1984) 69 at 69.

³⁰ Sen, *supra* note 29 at 29.

³¹ Robert L. Bard, “The Right to Food” (1985) 70 Iowa I. Rev 1279. [Bard]

³² Bard, *supra* note 31 at 1280.

³³ Bard, *ibid*. This is a point that will not be further studied here as this thesis is limited to an analysis of the definition of the right to food already in place in international policy.

change the political reality of a world of national actors that will cede their autonomy only to power or to the extent of their consent.”³⁴

Whereas Bard focuses on the political influence of various nations, and Sen focuses on philosophical question and the abstract meaning of various forms of rights, this thesis will offer a perspective based on choice of international forum for formalizing the relationship between competing rights (see especially Chapter 4).

Henry Shue, another philosopher, on the other hand, in an article on interdependence of duties with respect to the right to food, examines a typology of duties (the duty to respect, the duty to protect, the duty to fulfill, and the duty to promote) when discussing how governments seek to implement their international obligations with respect to the right to food. Shue is writing in the context of principles for a new human rights treaty on the right to food.³⁵

Associated rather with food as a tangible tradable good than the intangible right to food, two new concepts arouse out of the right to food in the late 1990s. These are “food security” and “food sovereignty”. These two concepts were introduced to the public at the 1996 World Food Summit. As per Michael Windfuhr and Jennie Jonsen, the food security concept has been further broadened especially since the term “food sovereignty” was coined by Via Campesina, an NGO, – in early 1990s.³⁶

³⁴ Bard, *supra* note 31 at 1291.

³⁵ Henry Shue, “The Interdependence of Duties” in Philip Alston & Katarina Tomasevksi, eds, *The Right to Food* (Boston & Utrecht: Martinus Nijhoff Publishers & Stichting Studie- en Informatiecentrum Mensenrechten, 1984) 83 at 85. (“The important sub-committee of the International Lawyers Association, which is being chaired by Asbjørn Eide as it drafts a convention on the right to adequate food, and the chapter in this volume by G.J.H. van Hoof use the following four-part typology: A. The duty to respect, B. The duty to protect, C. The duty to fulfill, D. The duty to promote.”).

³⁶ Michael Windfuhr & Jennie Jonsen, *Food Sovereignty: Towards Democracy in Localised Food Systems* (Rugby, UK: ITDG Publishing, 2005) at Executive Summary xi. (“Via Campesina, the global farmers' movement, developed the concept in the early 1990s, with the objective of encouraging NGOs and CSOs to discuss and promote alternatives to neo-liberal policies for achieving food security. Since the concept was launched to the general public at the World Food Summit in 1996 an ever-growing number of NGOs,

The brief descriptions of the right to food provided by scholars other than those in law, discussed above, demonstrate that the siloing of scholarship around the right to food occurs not only in law, but also in other disciplines. This thesis sets the right to food squarely in its context amongst other rights and that is one of its pioneering aspects.

These scholars writing from different fields each are leading commentators in their respective fields. Indeed, in my research for scholarly approaches on the right to food, these are the authors I accessed and relied upon.³⁷

There are also legal scholars who approach questions about the right to food from an interdisciplinary perspective. For example, Chidi Oguamanam uses “the food security imperative”³⁸ as the heading in his book to point to this newly emerging concept that has been of particular interest to numerous authors in post-modern development studies around the globe.³⁹ However, Oguamanam cautions that “there is at the moment no authoritative legal articulation of the concept”.⁴⁰

This thesis sets out to document and analyze this assertion by Professor Oguamanam (see particular Chapter 2).

CSOs and social movements have made policy statements on Food Sovereignty directed at a broad array of institutions.”).

³⁷ Note that the author is professional librarian with extensive experience in government documents.

³⁸ Chidi Oguamanam, “The Food Security Imperative” in ch 5 “Intellectual Property and the Political Economics of Agriculture” in Chidi Oguamanam, *Intellectual Property in Global Governance: A Development Question* (London, New York: Routledge, 2012) at 105.

³⁹ See e.g. Ian Scoones, *Agriculture Biotechnology and Food Security: Exploring the Debate*, (Brighton UK: Institute of Development Studies, 2002) (IDS Working Paper 145).

⁴⁰ Oguamanam, *supra* note 38 at 124.

1.4 Introducing the Right to Intellectual Property

Post WWII, after the term intellectual property became more present in legal literature,⁴¹ an array of scholarship has been engaged in broad discussions about IP's position – both nationally and internationally. The discussions include the philosophical, social, economic and political paradigm(s) by which IP is viewed in the 21st century access-to-information driven and knowledge-economy based world.

Audrey R. Chapman, with a background in political science but with research interests spanning philosophical, social, economic and political paradigms, has discussed intellectual property as a human right in the aftermath of the adoption by the UN Sub-Commission on Human Rights Resolution 2000/7.⁴² At the beginning of her article, Chapman states “[u]nless human rights advocates provide an effective intellectual and organizational counterweight to economic interests, the intellectual property landscape will be reshaped in the years ahead without adequate consideration of the impact on human rights.”⁴³ Chapman also points that “[v]ery little attention has been paid to the interpretation of intellectual property as a human right.”⁴⁴ She emphasises that “[i]ntellectual property regimes should have an explicit human rights and ethical orientation.”⁴⁵ She points to the “lack of democratic controls and participation” after

⁴¹ In Chapter 3 of this thesis, the origins of the term “intellectual property” are explored and though the term occurs earlier in print than post-WWII Chapter 3 demonstrates that its current legal meaning became settled after WWII.

⁴² Resolution 2000/7, *supra* note 5.

⁴³ Audrey R. Chapman, “Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)” (2001) 35:4 Copyright Bull 4 at 6 [Chapman].

⁴⁴ Chapman, *supra* note 43 at 13.

⁴⁵ Chapman, *supra* note 43 at 15.

intellectual property entered the World Trade Organization⁴⁶ through the *TRIPS*⁴⁷ *Agreement* because of the possible trade sanctions applied against a member country that does not fulfil its intellectual property obligations.⁴⁸ Specifically, Chapman focusses on how “intellectual property regimes have threatened” specific human rights, such as the right to health and the right to food.⁴⁹

Taking a global economy approach, David Vaver posits that “IP has become the new wealth of the twenty-first century” and, therefore, “the new law in Canada and most Western nations has come to accept this capitalist imperative.”⁵⁰ However, he questions the correctness of this view, arguing that “[n]ot all rights associated with IP can technically be called “property”.”⁵¹

Mistrale Goudreau and Margaret Ann Wilkinson, both legal academics with multidisciplinary research agendas in IP, discuss the juxtaposition of IP functions as a corporate asset and at the same time as a field in direct engagement with international human rights. As Goudreau has written, “the global economy is being reshaped by the rise of large, multinational corporations, which perceive industrial property rights as corporate assets and investments.”⁵² Both Wilkinson and Goudreau are concerned that

⁴⁶ *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 [Marrakesh Agreement Establishing the WTO].

⁴⁷ See *TRIPS Agreement*, *supra* note 1.

⁴⁸ Chapman, *supra* note 43 at 23.

⁴⁹ Chapman, *supra* note 43 at 26-27.

⁵⁰ David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks*, 2nd ed. (Toronto: Irwin Law, 2011) at 7.

⁵¹ Vaver, *supra* note 50 at 9 [reference omitted]. Vaver also dissects the term intellectual property, separately analysing the terms “intellectual” and “property” though he has not produced a definition of the actual phrase. In Chapter 3 of this thesis the question of the definition of the term “intellectual property” is fully explored by this author.

⁵² Mistrale Goudreau, “Industrial Property at the Crossroads of Paradigms / La propriété industrielle à la croisée des paradigmes” (Public session open to all / Conférence ouverte à tous – Challenging the Role of

such an approach to industrialization and corporatization of intellectual property ignores individuals and their assets.⁵³

1.5 Connecting the Right to Health and the Rights of Persons with Disabilities

As set out in the research question guiding the research, the focus of this thesis is on the right to food and its relationship with the right to IP. However, as the hypotheses indicate, examining the right to food in contrast to IP for this thesis has necessitated an exploration of the right to health, and the rights of persons with disabilities (and freedom of expression in the context of the rights of persons with disabilities). The reason why three other rights are necessarily involved in this analysis relate to the history of all five rights in the international arena.

This history begins in 1945, at the San Francisco Conference, where the representatives of fifty states gathered together to sign the *Charter of the United Nations*,⁵⁴ marking the inauguration of the United Nations (UN). The main goal of the UN member states was to secure peace and maintain international stability in the aftermath of World War II, during which millions of persons were killed in proportions and with a brutality the world had never seen before. Millions of people had also been deprived of basic, fundamental life necessities like food, water, health, clothing and housing – in ways that led to the complete destruction of human dignity. These hardships led to immediate concerns in the

Intellectual Property: La propriété intellectuelle mise en cause) delivered at the Université d'Ottawa / University of Ottawa 2017 Canadian IP Scholars' Workshop / Conférence académique de propriété intellectuelle de 2017, 10 May 2017) [Goudreau]. Margaret Ann Wilkinson, "What is the Role of New Technologies in Tensions in Intellectual Property?" in Tana Pistorius (ed) *Intellectual Property Perspectives on the Regulation of Technologies* [ATRIP Intellectual Property Law Series] (Cheltenham, UK: Edward Elgar) (refereed, in press).

⁵³ Goudreau, *ibid.* Margaret Ann Wilkinson, "What is the Role of New Technology in Tensions in IP?" (Presentation at the 33rd Annual Congress of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), Montpellier, France, 7 July 2014).

⁵⁴ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [UN Charter].

postwar period that left the human rights agenda peripheral in the immediate postwar stage of the UN.⁵⁵

Nonetheless, many politicians as well as jurists, diplomats, academics, and government officials (particularly from the socialist and worker-oriented countries from Latin America and China), believed that the UN *Charter* should also include an authoritative document (with instruments for its implementation), as a legal obligation for member states, to protect fundamental human rights and freedoms in addition to military-secured peace and stability.⁵⁶

This latter reaction culminated in the adoption of the UN *Universal Declaration of Human Rights* (UDHR)⁵⁷ even while issues introduced around future global stability became polarized between the newly emerging powers: the United States of America (USA) and the Union of Soviet Socialist Republics (USSR).⁵⁸

⁵⁵ Stephen James, *Universal Human Rights: Origins and Development* (New York: LFB Scholarly Publishing LLC, 2007) at 118 (“In 1944, the postwar Informal Political Agenda Group made only one reference to human rights, and decided not to include reference to them in the list of purposes of the proposed postwar International Organization. This was an indication of internal departmental and Allied reluctance.”).

⁵⁶ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999) at 2 (“This pressure for a bill was not just domestic, for at the Inter-American Conference on War and Peace, held in Mexico City in February and March 1945, twenty-one American countries said they wanted to see a bill of human rights as part of the very Charter of the United Nations which was soon to be organized. Three of these nations (Cuba, Chile, and Panama) were the first ones to submit to the United Nations a draft for such a bill and at the 1945 San Francisco Conference they tried to get a human rights bill included in the Charter of the United Nations. Their efforts were greatly amplified by the forty-six civic and religious groups which U.S. Secretary of State Edward Stettinius had invited to San Francisco to help in the founding. All this international and national pressure paid off when on May 4 Secretary Stettinius accepted the idea that the United Nations Charter should include, if not an outright bill of rights, then certainly explicit references to the need for international recognition and protection of human rights.”).

⁵⁷ See UDHR, *supra* note 9.

⁵⁸ While the two were allies in fighting the Nazi regimes, the increasing political and social discrepancies between those two Superpowers pulled apart the rest of the world, creating two coalition blocs (with a few countries remaining neutral) and would eventually bring them, by 1947, to the brink, to the Cold War.

Nonetheless, the task of creating a document, intended to lead to an International Bill of Human Rights, was entrusted to the newly appointed UN Commission on Human Rights (founded in April 1946, and meeting for the first time in January 1947).⁵⁹

The inaugural membership of the Commission brought together not only jurists and government officials but also other individuals sharing views from all corners of the world. Several philosophers were consulted and encouraged to submit their views on human rights.⁶⁰ A common ground keeping the work of the Commission together was that human rights were of equal concern for all people.⁶¹

The work of the Commission eventually created not an International Bill of Human Rights but the *Universal Declaration of Human Rights* – a non-binding document that would become a foundation of human rights law.⁶² Although politics played a role in the drafting of the document, not a single member state of the UN opposed the *Universal Declaration* in the final voting stage.⁶³

⁵⁹ UN *Charter*, *supra* note 54, art 68.

⁶⁰ See “A Philosophical Investigation” in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 73-78.

⁶¹ As Mary Ann Glendon observes “what made universal human rights possible – was the *similarity* among all human beings.” Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 232.

⁶² The International Human Rights Law fundamental documents are: the UN *Universal Declaration of Human Rights* (UDHR), the two UN Covenants: *The International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and two Optional Protocols to the ICCPR, and the Optional Protocol to the ICESCR.

⁶³ Voting record for the UDHR available from the UN OHRC, online: < <http://www.ohchr.org/EN/Library/Pages/UDHR.aspx> > (Voting record for the UDHR of total voting membership of 58 states was as follows: Yes: 48, No: 0, Abstentions: 8, Non-Voting: 2). The political discourse behind the final voting, witnessed and described in the memoirs of John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, NY: Transnational Publishers, 1984) at 72-73.

Although the UDHR did not comprise part of the UN *Charter*,⁶⁴ the references to human rights throughout the UN *Charter* created a broadly accepted view that the UDHR was a *Charter*-based document.⁶⁵ Both the UN Charter provisions about human rights and the UDHR proclaiming these rights prepared the stage for future development in public international human rights law. This history is explained in the context of the rights under examination in this thesis in each of Chapters 2, 3 and 4. The two current instruments effecting a re-balancing of the right to IP since it alone entered the international trade space in 1994, are both fully explored and contrasted in Chapter 4. These two instruments are the 2001 *Doha Declaration* (re-balancing IP rights with the right to health in the

⁶⁴ UN *Charter*, *supra* note 54, preamble (“We the people 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.”); art 3 (“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.”); art 13 (“promoting international co-operation in the economic, social, cultural, educational, and **health fields**, and assisting in the realization of **human rights and fundamental freedoms for all** without distinction as to race, sex, language, or religion”); art 55(c) (“universal respect for, and observance of, **human rights and fundamental freedoms for all without distinction** as to race, sex, language, or religion”); art 62(2) ([Economic and Social Council]“It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all”); art 68 (“**The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights**, and such other commissions as may be required for the performance of its functions”); art 76(c) (“to encourage respect for **human rights and for fundamental freedoms for all** without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world;”) [emphasis added]. (See Appendix A: Provisions with Reference to Human Rights in the UN Charter)

⁶⁵ Not only is there a strong relationship between the language in the Charter (see note 36 above) but there is also a broadly accepted view that the legal standing of the UDHR is extended by its connection with this language in the Charter. Special attention is given in this study to the existence of UN Charter, art 68 which requires promotional support of human rights: rights which are given expression and definition through the UDHR. See Morsink, *supra* note 56 at 3 (“Article 62 of the Charter says that the Economic and Social Council (ECOSOC) “may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.” The Council used this power when it recommended on December 10, 1948, that the Third General Assembly of the United Nations adopt and proclaim the *Universal Declaration of Human Rights*. In Article 68 the Charter Tells this same Council that it “shall set up commissions in economic and social fields and for the promotion of human rights.” This shows that the Economic and Social Council had no choice but to set up the Human Rights Commission that was to draft the Declaration. **It is the only commission of the entire United Nations system that is mandated by the UN Charter**, which goes to show how important the cause of human rights protection and recognition was to the founders of the United Nations.”) [emphasis added]. See also “The U.N. Charter and the *Universal Declaration of Human Rights*”, Chapter 3, in Stephen James, *Universal Human Rights: Origins and Development* (New York: LFB Scholarly Publishing LLC, 2007) at 117-173.

international trade space) and the 2013 *Marrakesh Treaty* (re-balancing the right to IP and the rights of persons with disabilities (and freedom of expression in the context of the rights of persons with disabilities) entirely into the WIPO space.

The UN Charter itself does not declare specific human rights. It is the UDHR which gives form to the concept of individual human rights. In Chapter 2, this thesis describes how current conception of the right to food evolved over time from its origins in UDHR as part of the conception for the right to an adequate standard of living. This right, as will be explained and documented in Chapter 2, gives rise not only to the right to food but also to the right to health and the rights of persons with disabilities. These two rights – the right to health and the rights of persons with disabilities - became key to two international developments that are the focus of Chapter 4 of this thesis – the 2001 *Doha Declaration* in the international trade environment and the 2013 *Marrakesh Treaty* in the UN environment.

1.6 Conclusion

These analyses, based on documentation evidence of instruments of international law, provide the evidence necessary to establish whether each of hypotheses (H1–H4) is supported. As Chapter 5 will demonstrate, they are. The answer to the research question posited by this thesis is, as more fully discussed in Chapter 5, that competing human rights – the right to food and the right to IP - can be better balanced within international trade mechanisms.

Chapter 2

- 2 Finding a Role and Definition for the Right to Food
 - 2.1 Introduction
 - 2.2 The Definition of the Right to Food Prior to its Adoption in the Universal Declaration of Human Rights
 - 2.3 The First UN Human Rights Commission Draft: Article 42
 - 2.4 The Right to Food Post Universal Declaration of Human Rights
 - 2.5 UN Specialized Agencies and the Right to Food
 - 2.6 Conclusion

2 Finding a Role and Definition for the Right to Food

2.1 Introduction

In scholarly literature, authors⁶⁶ agree that the right to food (like the right to intellectual property (IP)) received its first normative recognition in the 1948 *Universal Declaration of Human Rights* (UDHR).⁶⁷ Scholars also agree that the position of the right to food was further enhanced in the 1966 *International Covenant on Economic Social and Cultural Rights* (ICESCR)⁶⁸ and in UN documents succeeding the ICESCR.⁶⁹ However, the right to food was not articulated in the UDHR and the meaning of the right to food became more diffuse when the ICESCR was drafted,⁷⁰ and this trend continued in subsequent UN documents. This diffusion represents an ongoing problem because unambiguous definition is a precursor for recognition, respect, and the protection of any right in law. In their recently published book, Constantin Stefanou and Helen Xanthaki ask and answer the question “Why do we need clarity and precision?”

First, without clarity, precision and consistency[,] the law lacks predictability. Second, democratic governments seeking to induce transformation require that the

⁶⁶ E.g. Philip Alston “International Law and the Human Right to Food” in Philip Alston & Katarina Tomasevski, eds. *The Right to Food* (Boston & Utrecht: Martinus Nijhoff Publishers & Stichting Studie- en Informatiecentrum Mensenrechten, 1984) at 21. Also, “The Right to food under International Law” in Claudia Tofan, ed, *Human Rights and the Right to Food*, vol 1 (Hague: International Courts Association, 2013) at xii.

⁶⁷ UDHR, *supra* note 9.

⁶⁸ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR]. The ICESCR was created by the Office of the High Commissioner for Human Rights [OHCHR] with the Human Rights Council responsible for implementation of the Covenant. It has more binding power than the UDHR.

⁶⁹ E.g. Laurence R. Helfer & Graeme Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge, UK: Cambridge University Press, 2011), ch 6 at 371. Also, “The Right to Food Stipulated as Independent Right” in Bart Wernaart, *The Enforceability of the International Human Right to Adequate Food* ((Netherlands: Wageningen Academic Publishing, 2013) at 60.

⁷⁰ Christophe Golay, *The Right to Food and Access to Justice: Examples at the National, Regional and International Levels* (Rome: FAO, 2009) at 11.

law is understood and followed by common people. Third, democracy requires clarity and precision: the rule of law requires that officers of the law understand and apply the law. Fourth, there are high costs to inaccessible law related to enforcement, application and interpretation of texts whose meaning is under doubt.⁷¹

The first hypothesis of this thesis (established in Chapter 1) that the right to food currently lacks clarity will be explored in this chapter. This chapter will begin by identifying whether the right to food existed in any major source documents that may have influenced the creation of the UDHR. Second, the chapter will trace the drafting history of the right to food from the first draft created by Canadian law professor John P. Humphrey⁷² to the final adopted version of the UDHR. Third, the chapter will describe the right to food in post-UDHR documents: in the ICESCR, General Comment 12,⁷³ reports of the Special Rapporteur on the Right to Food,⁷⁴ UN General Assembly

⁷¹ Constantin Stefanou & Helen Xanthaki, eds., *Drafting Legislation: A Modern Approach* (Abingdon & New York: Routledge, 2016) at 11.

⁷² John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (New York: Transnational Publishers, 1984). Coming from the creator of the UDHR first draft, this is probably the most authentic source depicting the circumstances surrounding the development of the UDHR.

⁷³ Office of the High Commissioner for Human Rights, CESCR *General Comment* No. 12, *The Right to Adequate Food* (Art. 11) (12 May 1999), 20th Sess, E/C.12/1999/5. [General Comment 12].

⁷⁴ United Nations Human Rights Office of the High Commissioner, *Overview of the Mandate* [Special Rapporteur on the Right to Food], online: OHCHR <<http://www.ohchr.org/EN/Issues/Food/Pages/Overview.aspx>>. (“At its fifty-sixth session, the Commission on Human Rights adopted resolution 2000/10 of 17 April 2000, in which it decided, in order to respond fully to the necessity for an integrated and coordinated approach in the promotion and protection of the right to food, to appoint, for a period of three years, a Special Rapporteur on the right to food. The Commission on Human Rights was replaced by the Human Rights Council by the General Assembly Resolution 60/251 of 15 March 2006. The mandate of the Special Rapporteur on the right to food was extended by the Human Rights Council by its resolutions 6/2 (2007) and 13/4 (2010).”).

Resolution 2009 on the right to food,⁷⁵ and UN Human Rights Council Resolution 2015 on the right to food.⁷⁶

The chapter will conclude with a discussion of the right to food as it has been conceived within the UN special agency, the Food and Agriculture Organization (FAO).

2.2 The Definition of the Right to Food Prior to its Adoption in the *Universal Declaration of Human Rights*

The UDHR⁷⁷ was adopted less than two years after the UN Commission on Human Rights first met on 27 January 1947, with “a clear mandate to draft the International Bill of Rights.”⁷⁸ Canadian law professor John P. Humphrey crafted the first complete draft of the *Declaration*.⁷⁹ Humphrey’s draft and all other subsequent drafts were put forward for discussion, with opportunity given to all UN member states and experts to suggest changes and propose new provisions. This latter was a novel practice by the UN for the discussion of the draft UDHR. Not only did official government representatives of UN member states have their say in drafting the Declaration, invited experts from all parts of the globe also contributed their views. Elected as representatives of their own governments, the ‘nuclear’ Commission on Human Rights “had recommended that the members of the definitive commission should also be individuals elected to act in their

⁷⁵ *Resolution Adopted by the General Assembly on 18 December 2009: 64/159. The Right to Food*, A/RES/64/159, 10 March 2010 [General Assembly the Right to Food Resolution 2009].

⁷⁶ *Resolution Adopted by the Human Rights Council (adopted on 26 March 2015): 28/10. The Right to Food*, A/HRC/RES/28/10, 2 April 2015 [Human Rights Council the Right to Food Resolution 2015].

⁷⁷ UDHR *supra* note 9.

⁷⁸ Humphrey, *supra* note 72 at 17.

⁷⁹ The first draft of the Declaration written by John P. Humphrey comprised 48 articles under the title “Draft Outline of an International Bill of Human Rights (Prepared by the Division of Human Rights of the Secretariat)”, UN Doc E/CN.4/AC.1/3/; published as Annex in the *U.N. Human Rights Yearbook for 1947* at 484-487. It is also available (as Appendix 1) in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 271.

personal capacity.”⁸⁰ The experts certainly contributed to the shaping of the Declaration’s specific provisions.⁸¹

Humphrey’s first draft was edited by French law professor René Cassin,⁸² the UN representative for France. René Cassin either copied or rewrote the articles from Humphrey’s “draft outline” document. Cassin removed several provisions from Humphrey’s draft, including Article 42 on the right to food. Article 42 had said: “Every one has the right to good food and housing and to live in surroundings that are pleasant and healthy.”⁸³ Cassin replaced the right to food reference with several provisions indicating a right to “a decent standard of living”⁸⁴, or a right to “betterment of housing conditions and nutrition.”⁸⁵

Cassin’s draft was put up for discussion, line by line, with opportunity given to all UN member states and all invited consultants, non-governmental organizations, and

⁸⁰ Humphrey, *supra* note 72 at 17.

⁸¹ See Humphrey, *supra* note 72. Canadian John P. Humphrey, McGill Law professor, wrote about his time spent in UN. His book is a personal view about his 20 years in the UN Human Rights Division, including his experience in creating the first draft and his views on the emergence of the UDHR. Although he purposely omitted references, the initial chapters of Humphrey’s book are valuable testimony to the process, as well as the people who contributed to the shaping of the UDHR as we know it.

⁸² Jay Winter & Antoine Prost, *René Cassin and Human Rights: From the Great War to the Universal Declaration*, (Cambridge: Cambridge University Press, 2013). René Cassin received a Nobel Peace Prize in 1968 for his contribution to the development of human rights and building peace through international human rights law. Cassin, unjustly, never acknowledged the role John P. Humphrey played in creating the UDHR. This naming of Cassin – for the editing of Humphrey’s draft – was the last time that individual names were associated with the drafts of the Declaration.

⁸³ [John P. Humphrey] Commission on Human Rights Drafting Committee, *Draft Outline of International Bill of Rights (prepared by the Division of Human Rights)*, UN ECOSOC E/CN.4/AC.1/3, 4 June 1947, art 42. [Humphrey’s Draft].

⁸⁴ [Rene Cassin] Commission on Human Rights Report of the Drafting Committee on an international Bill of Human Rights Suggestions Submitted by the Representative of France for Articles of the International Declaration of Human Rights Annex D, UN ECOSOC E/CN.4/21, 1 July 1947, art 37 [Cassin’s Draft].

⁸⁵ Cassin’s Draft, *ibid*, art 39.

individual citizens to suggest changes and propose new provisions.⁸⁶ There then ensued several hundred meetings at various levels before the final version of the Declaration was presented at the Third Session of the UN General Assembly in Paris.⁸⁷ The UDHR was adopted on 10 December 1948. Two years later, recognizing the historical significance of that event, the UN General Assembly declared the 10th of December to be International Human Rights Day.⁸⁸

In 1946, before the Human Rights Commission embarked on its journey of crafting the UDHR, many documents were made available to the Commission and used as preliminary source instruments. Three of those source documents are particularly interesting when investigating the definition of the right to food. First, a document was created for the UN inaugural San Francisco Conference in 1945, the *Draft Declaration of the International Rights and Duties of Man and Accompanying Report*, prepared by the Inter-American Council of Jurists of the Organization of American States, and submitted by the delegation from Chile.⁸⁹ This document does not refer to a right to food, but does refer to a right to an “adequate standard of living”, much like Cassin’s later reference to “a decent standard of living”.⁹⁰ The second source document is the Cuban original *Draft*

⁸⁶ See e.g. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999) at 9 (“The opinions of groups that did not have consultative status were forwarded to the Commission by the Secretariat in forms of précis...All indications are that most of this more or less informal, non-governmental input was appreciated and often used.” [reference omitted]).

⁸⁷ Morsink, *supra* note 56 at 11. (“The seventh drafting stage was the debate in the Plenary Session of the Third General Assembly, which led to the adoption of the Declaration that same day, on December 10, 1948. This was the fourth time the rest of the UN membership could amend what the eighteen-member Commission had done. Both the General Assembly and the Third Committee met in Paris that year.”).

⁸⁸ At the 5th session of the UN General Assembly, during its 317th plenary meeting, held on 4 December 1950, the Resolution adopted on reports of the Third Committee declared the 10th of December the Human Rights Day, GA Res 423(V) (1950).

⁸⁹ Inter-American Juridical Committee, *Draft Declaration of the International Rights and Duties of Man and Accompanying Report* (1946) 40:3 AJIL/Am J Intl L Supplement: Official Documents 93-116. [Chilean Submission].

⁹⁰ Chilean Submission, *supra* note 89, art XVI.

Declaration on Human Rights.⁹¹ The Cuban Delegation put forward a draft “Declaration of Human Rights” which was prepared as a proposal for the agenda of the UN General Assembly session. As this proposal was rejected at the Assembly level, the Cuban Delegation submitted the Draft to the Economic and Social Council to be used as a “working document”. This document referred to “the right to adequate food”.⁹² The third source document submitted by the UN delegation from Panama was the American Law Institute’s “Statement of Essential Human Rights”.⁹³ This document also referred to “the right to adequate food and housing”.⁹⁴ Although Humphrey knew about all three source documents, he wrote that he drew inspiration for his first draft of the UDHR from the document submitted by the delegation from Panama,⁹⁵ and thus included reference to “the right to good food and housing.”⁹⁶ The language of each of these documents, as they relate to the development of the right to food, is shown in Appendix B.

⁹¹ *The Cuban Delegation to the General Assembly of the United Nations Draft Declaration on Human Rights* (1946) London 12 February 1946, UN ECOSOC E/HR/1, 22 April 1946. [Cuban Draft].

⁹² Cuban Draft, *supra* note 91, art 11.

⁹³ *Statement of Essential Human Rights Presented by the Delegation of Panama*, UN Economic and Social Council E/HR/3 (26 April 1946); UN General Assembly A/148 (24 October 1946) [Panamanian Submission].

⁹⁴ Panamanian Submission, *supra* note 93, art 14.

⁹⁵ Humphrey, *supra* note 72 at 31-32 (“I was no Thomas Jefferson and, although a lawyer, I had had practically no experience drafting documents. But since the Secretariat had collected a score of drafts, I had some models on which to work. One of them had been prepared by Gustavo Gutierrez and had probably inspired the draft declaration of the international duties and rights of the individual which Cuba had sponsored at the San Francisco Conference. [...]. Still others came from the American Law Institute, the American Association for the United Nations, the American Jewish Congress, the World Government Association, the *Institut de droit international* and the editors of *Free World*. The American Bar Association had sent an enumeration of subjects. [...]. The documentation which the Secretariat brought together *ex post facto* in support of my draft included texts extracted from the constitutions of many countries. But I did not have this before me when I prepared my draft. The best of the texts from which I worked was the one prepared by the American Law Institute, and I borrowed freely from it. This was the text that had been unsuccessfully sponsored by Panama at the San Francisco Conference and later in the General Assembly. It had been drafted in the United States during the war by a distinguished group representing many cultures, one of whom was Alfredo Alfaro, the Panamanian foreign minister.”).

⁹⁶ Humphrey’s Draft, *supra* note 83, art 42.

2.3 The First UN Human Rights Commission Draft: Article 42

An explicit right to food provision was short-lived. As mentioned above, Humphrey introduced it as Article 42 in his first draft of the UDHR, where it read as follows: “Everyone has **the right to good food** and housing and to live in surroundings that are pleasant and healthy”.⁹⁷ The text of Humphrey’s Article 42 was not completely original.⁹⁸ As Johannes Morsink said “[r]egarding the right to food and housing Humphrey had before him a clear statement drafted by the American Law Institute⁹⁹ and submitted by the delegation for Panama. Humphrey also had an earlier original Cuban proposal in which the right to food was explicitly declared.”¹⁰⁰ At this point, the right to food was new to human rights, whereas the right to housing (in the same Article 42) had

⁹⁷ See the source document described in Chilean Submission, *supra* note 89, art 42.

⁹⁸ Morsink, *supra* note 56 at 193 (“Regarding the rights to food and housing Humphrey had before him a clear statement drafted by the American Law Institute and submitted by the delegation of Panama: “Everyone has the right to adequate food and housing.” Humphry borrowed this and added to it a second phrase that he gleaned from the Cuban proposal.”).

⁹⁹ The American Law Institute (ALI) created the Statement of Essential Human Rights in 1944. The Statement was never adopted by the ALI, although it was soon published. However, one of the ALI members, Ricardo J. Alfaro, the president of Panama, also the government representative of his country to the UN, submitted the integral text of the Statement to the Economic and Social Council of the UN in April 1946. The Statement became the proposal of the Panama delegation to the UN General Assembly, held in October 1946, with the intention to be adopted as an integral part of the UN Charter. The General Assembly was not ready to vote in its favour. However, the text of the Statement became the significant resource which John P. Humphrey used in creating the first draft of the UDHR.

¹⁰⁰ Morsink, *supra* note 56 at 193.

already been included in several constitutions, predominantly constitutions of countries with socialist traditions.¹⁰¹ As Morsink noted, “the right to food was a novel addition.”¹⁰²

As quoted above, Humphrey’s version was “the right to good food”, whereas the earlier proposal of the Panamanian delegation, discussed above, from which he drew inspiration, used the form “the right to adequate food”. The UDHR simply referred to “food”. The Panamanian concept reappears in the expression “including adequate food” in the *International Covenant on Economic, Social and Cultural Rights*¹⁰³ twenty years later.

While some basic rights - the right to clothing, housing and medical care, or health, as well as the right to social security - appeared in all of the UDHR drafts, the right to food was excluded from the Cassin’s draft and then from the Human Rights Commission Draft.¹⁰⁴ This could be partially due to pressure imposed on the Drafting Committee to make the Declaration a succinct document. For example, Morsink said that

[b]ecause the Third Session of the Commission was very eager to keep things short and to the point, it decided to merge the article on health care rights which we have been discussing (the Second Session’s Article 33) with another even longer article (then 34) on the rights to social security and the protection of motherhood and children.¹⁰⁵

It could also be that food, being an essential necessity for life, was not considered at ‘threat’ such that it would require the protection of law. The implementation of the right

¹⁰¹ Morsink, *ibid* at 193 (Regarding the right to housing, it was included in the constitutions of ten Latin American countries and Yugoslavia under different phrases such as ‘hygienic living conditions’ (Cuba), ‘cheap housing’ (Guatemala), ‘hygienic and economical dwellings’ (Uruguay), etc.); at 192 (Regarding the right to health “Countries whose constitutions either stated an explicit right to health care or had such a right imbedded in clauses about the duties of the government included Bolivia, Brazil, the BSSR, Chile, China, Cuba, Honduras, Panama, Paraguay, Peru, the USSR, Uruguay, and Yugoslavia”) [reference omitted].

¹⁰² Morsink, *supra* note 56 at 193.

¹⁰³ ICESCR, *supra* note 68, art 11(1). Also, in Appendix C.

¹⁰⁴ See again Appendix B: Drafting Stage.

¹⁰⁵ Morsink, *supra* note 56 at 195-196 [emphasis added].

to food was not seen as a direct responsibility of the state or the government, as explained in the comment added to Article 14 of the Panama delegation proposal.¹⁰⁶ Also, an explanation that “[w]hat is “adequate food and housing” must be determined at any given time in the light of developing knowledge and or the material and technical resources within a country”¹⁰⁷ is found in the same comment to Article 14.

The intervention of the Chinese delegation¹⁰⁸ ‘saved’ the right to food (and clothing) and placed it back in the Geneva Draft of 1947. At that time, the right to food was included in all formal and less formal drafts (see further Appendix B) and kept its presence all the way to the final version of the *Universal Declaration of Human Rights*, in which it appears as follows:

Article 25(1)

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, **including food**, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹⁰⁹

However, it must be noted that, at the end of the drafting stage, the right to food was not declared a right in itself. Rather, it was embedded into “a standard of living”: the concept of the right to adequate food, at that moment, remained merely a submission made by Panamanian delegation as described above.

Several cross-connected Articles appear in the UDHR. For example, Article 3 declares the right to life in the broadest sense, while Article 25 proclaims specific attributes about

¹⁰⁶ Panamanian Submission, *supra* note 93 at 12 (“The State is not required to provide food or housing unless the individual cannot under existing conditions obtain them by his own efforts.”).

¹⁰⁷ Panamanian Submission, *supra* note 93, art 14 Comment.

¹⁰⁸ Morsink, *supra* note 56 at 197 (“If it had not been for Chang’s intervention in this seventy-first meeting of the Commission, these rights probably would have been lost to the Declaration.”)

¹⁰⁹ UDHR, *supra* note 9 art 25(1) [emphasis added].

the life of an individual in society. In his book, Morsink describes this type of cross-connection as follows:

The drafters augmented the presumably minimal protection of the right to life in Article 3 with the **positive rights** to food, clothing, housing, and medical care in Article 25. The same point must be made about the social security benefits listed in Article 25. These were seen as **real rights**, which means that if – for reasons beyond one’s control – one becomes unemployed, sick, or widowed, or bereft of old age benefits, then it is incumbent upon the state to see to it that the substance of these things is provided.¹¹⁰

Morsink summarizes that the drafters of the UDHR added to the protection of the right to life (UDHR, art 3) “positive” rights to food, clothing, housing and medical care (UDHR, art 25). He also points out, that the “right to necessary social services” is viewed by others as a “real” right. Morsink also quotes Henry Shue,¹¹¹ a philosopher skeptical about the division of positive and negative rights, who speaks about rights to food, housing, clothing or medical attention as “basic rights”.¹¹²

Division of international human rights into positive and negative rights is one of the most common classification of rights in the legal scholarly literature.¹¹³ Stephen James in his book, describes the distinction between positive or negative as following:

Another familiar classification involves a distinction between standard “liberal”, negative rights (that bar the state, in particular, from interfering with rights and liberties of individuals) and positive rights that require the state to allocate appropriate resources and take action to ensure that people enjoy goods such as an adequate standard of living, welfare, adequate food, clothing, healthcare and housing.¹¹⁴

¹¹⁰ Morsink, *supra* note 56 at 237 [emphasis added]. See Appendix D: Relevant Provisions of the *Universal Declaration of Human Rights* (1948) containing the full texts of Article 3 and Article 25 that Morsink discussed.

¹¹¹ British philosopher, Henry Shue, best known for his book “Rights of Duties” (first published in 1980, 2nd ed. in 1996), is skeptical about the division to “positive” and “negative” rights because he believes that positive rights do not exclude characteristics of negative rights. Shue is also quoted in Chapter 1, introducing the right to food section.

¹¹² See Morsink, *supra* note 56 at 192.

¹¹³ James, *supra* note 55, at 3 [reference omitted] [emphasis in original].

¹¹⁴ James, *ibid.*

Indeed, in his work James identifies the concept of negative rights and positive rights in exactly the sense that these terms are used commonly by international law lawyers: positive rights are those rights whereby a state must take positive efforts to fulfil the right, such as by providing hospitals in order to allow citizens to benefit from the right to health. Negative rights indicate rights in which a state must refrain from doing something, such as torturing its citizens.

The division of human rights into classifications of “positive” and “negative” as documented by James focuses on requirements made of obligations on states. This thesis is operating at a more fundamental level than asking whether states recognize any human rights interest surrounding “food” that requires either “positive” or “negative” rights implementation by states. Generating a definition¹¹⁵ of any international human rights involving food (which this thesis explores) must be preliminary to any further discussion of the nature of states obligation to provide for that right. For this reason, classification of rights as “positive” and “negative” is not relevant to this thesis.

2.4 The Right to Food Post Universal Declaration of Human Rights

From its inception, the UDHR was recognized worldwide and respected as a highly authoritative document, although – as a simple declaration - it was considered non-binding. As Laurence Helfer and Graeme Austin observe, “[t]he Universal Declaration is not a treaty.”¹¹⁶ Helfer and Austin also indicate that the UDHR “was adopted by the United Nations General Assembly in the form of a resolution that has no force of law,

¹¹⁵ See above quotation from Stefanou and Xanthaki (*supra* note 71) in Introduction of this Chapter.

¹¹⁶ Helfer & Austin, *supra* note 69 at 8.

and it was not intended by the Assembly to create binding legal obligations. Contrary to popular myth, it was not signed, nor is it an instrument intended to be signed.”¹¹⁷

Those are the facts. However, a historical look at various stages in the process of drafting the UDHR (discussed in this chapter and presented in Appendix B) serve as a reminder that the initial task assigned to the Drafting Committee was to write an International Bill of Rights to be included in the UN *Charter*.¹¹⁸ In his memoirs, John P. Humphrey said that “[t]he general consensus after much discussion was that the bill would be a declaration to be adopted by resolution of the General Assembly. Only at the second session was it decided that it would have three parts: a declaration, a convention and measures of implementation”¹¹⁹ - and only the Declaration in fact occurred in 1948.

The UDHR consists of a preamble and thirty articles. These were not categorized. However, from an early drafting stage, it was obvious that there were two major, distinct categories of human rights: civil and political rights on the one hand and economic, social and cultural rights on the other.

With the adoption of the UDHR in 1948, the task of the UN Commission on Human Rights was not completed. The Commission continued working on two “legally binding covenants on civil and political rights, and economic, social and cultural rights, flanking

¹¹⁷ Helfer & Austin, *ibid*.

¹¹⁸ In support of this view, see Morsink, *supra* note 56 at 2 (“This pressure for a bill was not just domestic, for at the Inter-American Conference on War and Peace, held in Mexico City in February and March 1945, twenty-one American countries said they wanted to see a bill of human rights as part of the very Charter of the United Nations which was soon to be organized. Three of these nations (Cuba, Chile, and Panama) were the first ones to submit to the United Nations a draft for such a bill and at the 1945 San Francisco Conference they tried to get a human rights bill included in the Charter of the United Nations. Their efforts were greatly amplified by the forty-six civic and religious groups which U.S. Secretary of State Edward Stettinius had invited to San Francisco to help in the founding. All this international and national pressure paid off when on May 4 Secretary Stettinius accepted the idea that the United Nations Charter should include, if not an outright bill of rights, then certainly explicit references to the need for international recognition and protection of human rights.”).

¹¹⁹ Humphrey, *supra* note 72 at 26.

the UDHR.”¹²⁰ However, paradoxically, the work on a binding treaty took much longer than the work on the UDHR itself. With the emergence of two main political blocks after WWII, and with growing differences in the economic development of states, disagreements developed on how to express the UDHR’s standards in a binding international instrument.¹²¹

While the right to food was mentioned in connection with the right to life and therefore civil and political rights, there is no mention of the right to food in the *International Covenant on Civil and Political Rights* (ICCPR).¹²² The silence of the ICCPR on the right to food likely related to the fact that the right was only one attribute of “a standard of living adequate for the health and well-being of himself and his family”, and thus directly associated with health. It therefore re-appeared in the ICESCR rather than the ICCPR.

This first binding document to proclaim the right to food (although still not as a provision in itself) was the ICESCR. It remains today the only treaty that specifically identifies protection for an individual of the right to food.

¹²⁰ James, *supra* note 55 at 175.

¹²¹ Louis Henkin et al, *Human Rights* (University Casework Series), 2nd ed (Foundation Press & Thomson Reuters, 2009) at 219 (“The adoption of a legally binding international agreement to protect economic, social and cultural rights did little to resolve competing conceptions of how to structure the relationship between state values and human values. Although the drafters intended the ICESCR to be acceptable to socialist states, developing nations, and industrialized “free-market” countries, the differences between the two Covenants have been often characterized as reflecting political and ideological divisions between these groups of countries.”).

¹²² Bart Wernaart, *The Enforceability of the Human Right to Adequate Food* (Netherlands: Wageningen Academic Publishing, 2013) at 63 (“In some circumstances, the right to food may be considered to be a prerequisite to fulfil the right to life. Although the ICCPR is not too often viewed in the context of economic, social and cultural rights, Article 6 ICCPR implies, according to the Human Rights Committee, a duty for Member States to ‘take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.’ Furthermore, to withhold (access to) food with the purpose to destroy life is a clear violation of Article 11(c) of the convention on the Prevention and Punishment of the Crime of Genocide.” [reference omitted]); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976). Citation on the right to food being mentioned in context of right to life; and ICCPR citation.

The ICESCR modified the UDHR's wording of several human rights, including the right to food. The right to food in the ICESCR appears as follows:

Article 11

1. The States Parties to the present Covenant recognize **the right of everyone to an adequate standard of living** for himself and his family, **including adequate food**, clothing and housing, and to the continuous improvement of living conditions. The States 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.¹²³

2. The States Parties to the present Covenant, recognizing the **fundamental right of everyone to be free from hunger**, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.¹²⁴

In the ICESCR, while the right to food remained under “an adequate standard of living...including adequate food, clothing and housing,”¹²⁵ it was expanded and contained a different focus. Article 11(1) expanded the role of states in the realization of the right to food by shifting the focus to the “essential importance of international co-operation based on free consent”, thus signaling a new direction for the right to food in international human rights law. It emphasizes (i) the role of an individual in implementing the right, and (ii) the participation of States Parties in exercising the right to food by recommending international cooperation. Article 11(2) represented a significant shift by, first, referring to the right “to be free from hunger”, and second, the right to be free from hunger was declared a “fundamental right”. The right to be free from hunger is different from the right to food, although both likely stemmed, as earlier discussed, from the right to life.¹²⁶

¹²³ ICESCR, *supra* note 68, art 11(1) [emphasis added].

¹²⁴ ICESCR *supra* note 68, art 11.

¹²⁵ ICESCR, *supra* note 68, art 11(1).

¹²⁶ The example of an individual receiving nutrients through an intravenous (IV) drip is satisfying the right to be free from hunger. It is not the exercise of the right to food, though.

For comparison of the right to food in the UDHR and ICESCR, see the following two tables:

Table 3: UDHR: The Right to Food Included in (i) The Right to an Adequate Standard of Living

UDHR
Art 25(1) Right to a standard of living adequate for the health and well-being of himself and of his family, including:
- Food
-Clothing
-Housing
-Medical care
-Necessary social services
-Right to security in the event of
-unemployment
-sickness
-disability
-widowhood
-old age or other lack of livelihood in circumstances beyond his control

Table 4: ICESCR: The Right to Adequate Food in (i) The Right to an Adequate Standard of Living, and (ii) The Fundamental Right to be Free from Hunger

ICESCR
Art 11(1) ...[T]he right of everyone to an adequate standard of living for himself and his family, including:
- Adequate food
-Clothing
-Housing
-Continuous improvement of living conditions.
Art 11(2) ...[T]he fundamental right of everyone to be free from hunger shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.

The new provision - the right to be free from hunger - is the first explicitly declared fundamental treaty right associated with the right to food in international human rights law. This right is a mandatory obligation for States Parties as they “shall take,

individually and through international co-operation, the measures” for its implementation.

Article 11(2) has two additional sub-articles in which the measures that must be taken to fulfill the mandatory obligation of being free from hunger are explained. The first, Article 11(2)(a) talks about food production and the reforming of agrarian systems. It states:

To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as **to achieve the most efficient development and utilization of natural resources**;¹²⁷

Article 11(2)(a) draws attention to the importance of disseminating knowledge of nutrition principles and the importance of developing or reforming agrarian systems – both based on the technical and scientific achievements that can enhance production, conservation and distribution of food. Article 11(2)(b) refers to possible obstacles in the process of equitable food distribution imposed by trade. It states:

Considering the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.¹²⁸

In summary, the ICESCR made two advances for the right to food. It extended the concept of the “right to food” to the “right to adequate food” (Article 11(1)) and it proclaimed the right to be “free from hunger” (Article 11(2)) as a fundamental right. In scholarly literature, those are described as “two norms” or “two components” of the right to food as enshrined in international human rights law.¹²⁹

¹²⁷ ICESCR, *supra* note 68, art 11(2)a [emphasis added].

¹²⁸ ICESCR, *supra* note 68, art 11(2)b. Note that the ICESCR predates the establishment of the World Trade Organization (WTO) and the *Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)*. The ICESCR was adopted in 1966, came into force in 1976. *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 [WTO]. *Agreement on Trade-Related Aspects of Intellectual Property*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, 1869 UNTS 299 (entered into force 1 January 1995) [TRIPS].

¹²⁹ Philip Alston, “International Law and the Human Right to Food” in Philip Alston & Katarina Tomasevski, eds. *The Right to Food* (Boston & Utrecht: Martinus Nijhoff Publishers & Stichting Studie- en

Though the ICESCR is the first international treaty in which the right to food is recognized as the right to **adequate food**, recall that phrase was not new. It appeared in two preliminary UDHR documents submitted by delegations of Cuba and Panama. In the Cuban Draft Declaration, the relevant article stated “Every human being shall have the following rights: ... 11. The Right to adequate food.”¹³⁰ The Panamanian Submission stated: “Everyone has the right to **adequate food** and housing.”¹³¹

The treaty body of the ICESCR, the Committee on Economic, Social and Cultural Rights, subsequently explained the right to adequate food in the 1999 General Comment 12. It states that “[t]he human right to adequate food is of crucial importance for the enjoyment of all rights.”¹³² Further, it points out that, during the 1996 World Food Summit member states requested “a better definition of the rights relating to food in article 11 of the [ICESCR] Covenant.”¹³³ The 1999 General Comment, therefore, began by defining the scope of the right:

The right to **adequate food** 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.¹³⁴

Informatiecentrum Mensenrechten, 1984) [Alston] at 32; Christophe Golay, *The Right to Food and Access to Justice: Examples at the National, Regional and International Levels* (Rome: FAO, 2009) [Golay] at 11.

¹³⁰ Cuban Draft Declaration, *supra* note 91, art 11. (Cuban proposal to ECOSOC to serve as a “working document” for the Human Rights Commission, dated 12 February 1946.)

¹³¹ Panamanian Submission, *supra* note 93, art 14 [emphasis added].

¹³² General Comment 12, *supra* note 73 at para 1.

¹³³ General Comment 12, *supra* note 73, *ibid.*

¹³⁴ General Comment 12, *supra* note 73 at para 6. This explanation served later as a core concept for the first definition of the right to food introduced by the first appointed Special Rapporteur on the Right to Food, in 2000 (discussed further below) [emphasis added].

It then identified three types of state obligations in support to the right to food: the obligation to respect, the obligation to protect and the obligation to fulfill.¹³⁵ While the obligation to respect and the obligation to protect were unambiguous, the third obligation to fulfill, was subject to further clarification:

The obligation to *fulfil (facilitate)* means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly.¹³⁶

This extended explanation of the third obligation has definitional elements that are important for this discussion. It speaks of access to and utilization of resources. It also speaks of access to and utilization of the means to ensure peoples livelihood including food security. The best definition component included is the concept that the right to food means states must provide adequate food directly when individuals have no access nor means to ensure their own food security.

In 2000, the UN Commission on Human Rights¹³⁷ (replaced by the Human Rights Council in 2006) appointed a Special Rapporteur on the Right to Food¹³⁸ with the mandate:

-to collect and analyze information on all aspects of the realization of the right to food,

¹³⁵ General Comment 12, *supra* note 73 at para 15.

¹³⁶ General Comment 12, *supra* note 73 at para 15 [emphasis added].

¹³⁷ Replaced by the Human Rights Council in 2006.

¹³⁸ Since 1980, the UN Human Rights Council, formerly the UN Commission on Human Rights, has established several working groups and appointed expert individuals, assigning them various thematic mandates to report on the status of human rights. Among them, the right to food has benefitted. Those human rights protection mechanisms are known under the common title "Special Procedures". Details of the role and activities of Special Procedures of the Human Rights Council", online: OHCHR : www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx.

- to cooperate with governments, NGOs, and international organizations on the promotion and effective implementation of the right to food, and to make appropriate recommendations on the realization thereof, and
- to identify emerging issues related to the right to food worldwide.¹³⁹

The first Special Rapporteur on the Right to Food was Jean Ziegler from Switzerland.¹⁴⁰ He served in this role from 2000-2008. Olivier De Schutter from Belgium served as Special Rapporteur on the Right to Food from 2008-2014.¹⁴¹ Hilal Elver, from Turkey, was appointed a Special Rapporteur on the Right to Food in June 2014 and currently holds this position.¹⁴²

Within two months of his appointment, the first Special Rapporteur (Ziegler) set out a definition of the right to food, which was based on the explanation in General Comment 12. Inspired by this General Comment, the Special Rapporteur provided a definition:

The right to food is the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively **adequate and sufficient food** corresponding to the cultural traditions of the

¹³⁹ Special Rapporteur on the Right to Food, mandate and role described online: OHCHR <www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx>.

¹⁴⁰ Jean Ziegler, sociology professor from Switzerland, author, and the UN advisor, was the first appointed Special Rapporteur on the Right to Food, although his appointment received serious criticism. See for example postings on the UN Watch website, online: UNWATCH <<http://www.unwatch.org/swiss-nominate-rapists-apologist-un-human-rights-expert/>> containing several appeals and requests for removal of Jean Ziegler from the UN appointments predominantly because of his tight connections with Libya's dictator Muammar El Gaddafi, and for putting his personal career preferences above the UN appointment. Jean Ziegler was also criticized by his University colleagues. See for example E.S. et al, "Switzerland: The University of Geneva: A Controversy about M. Jean Ziegler." *Minerva* 14, no. 4 (1976): 530-569, online: <<https://www.jstor.org/stable/i40085788>>.

Jean Ziegler's mandate spanned from 2000 to 2008. In his report submitted to UN Economic and Social Council – Commission on Human Rights on January 10, 2002, Ziegler supported the Norwegian concept of the right to food as a public good. This concept may be observed as a special definition of the right to food.

¹⁴¹ Olivier De Schutter, a legal scholar from Belgium, served as Special Rapporteur on the Right to Food from 2008-2014. The details about his mandate are available, online: <www.srfood.org/>.

¹⁴² Hilal Elver, a research professor from Turkey, was appointed Special Rapporteur on the Right to Food as of June 2014. Her appointment was surrounded by some controversies. See for example the UN Watch, online: UNWATCH <<http://www.unwatch.org/u-s-blasts-un-appointment-of-richard-falks-wife-hilal-elver-citing-biased-and-inflammatory-statements/>>.

The details about Hilal Elver's mandate are available, online: OHCHR <www.ohchr.org/EN/Issues/Food/Pages/HilalElver.aspx>.

people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.¹⁴³

As can be seen from the foregoing discussion, the above quote from Ziegler's Report provided the first definition of the right to food in the UN arena.

The second Special Rapporteur (De Schutter) focused on food security and the legal policy framework.¹⁴⁴ He did not advance his own definition of the right to food or discuss the question of definition. However, his final report submitted to the General Assembly of the UN at the end of his mandate in 2014 evinced a different approach to the right to food than that pursued by the first Special Rapporteur Ziegler.

In his final report, De Schutter said that “[a]ctions should be launched at three levels to democratize food security policies, thus weakening existing lock-ins and allowing these policies to shape the new model [called] for.”¹⁴⁵ De Schutter referred to the rebuilding of local food systems that should be supported on local, national and international levels, emphasizing that **the right to food** is central to the success of these efforts.¹⁴⁶

During the mandate of the second Special Rapporteur on the Right to Food, Olivier De Schutter, the UN General Assembly adopted the first UN General Assembly Resolution

¹⁴³ *The Right to Food. Report by the Special Rapporteur on the Right to Food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10.* ESCCHR, 57th Sess., U.N. Doc. 2000/10. E/CN.4/2001/53 [emphasis added].

¹⁴⁴ Olivier De Schutter's reports considered relevant to the topic of the right to adequate food include: *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development.* Report of the Special Rapporteur on the right to food, Olivier De Schutter* Building resilience: a human rights framework for world food and nutrition security (2008), “Seed Policies and the Right to Food: Enhancing Agrobiodiversity, Encouraging Innovation” (2009), Annual Report to the Human Rights Council” (2010). However, the final report marking the end of his mandate (2014), Report of the Special Rapporteur on the right to food, summarizes De Schutter's approach to the transformative potential of the right to food.

¹⁴⁵ *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Final Report: The Transformative Potential of the Right to Food.* submitted to the Human Rights Council, A/HRC/25/57, 24 January 2014 at 14.

¹⁴⁶ De Schutter, *supra* note 145, *ibid* at 16.

on the right to food.¹⁴⁷ The Resolution was certainly a significant addition to UN human rights mechanisms established to protect the right to food, although UN General Assembly Resolutions are non-binding. The Resolution reaffirms “the right of everyone to have access to safe, sufficient and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger.”¹⁴⁸ This text in the Resolution, which aligns with Article 11 of the ICESCR, may be observed as a valuable addition to the content of the definition of the right to food with a focus on the right of everyone to have access to safe, sufficient and nutritious food. In a certain way, it blends the definition provided by the Special Rapporteur on the Right to Food with the text of the UDHR and ICESCR.

With respect to the definition of the right to food, both De Schutter, and his successor Hilal Elver, in reports, accepted Ziegler’s definition of the right to food quoted above. Elver, the third Special Rapporteur on the Right to Food, in her address to Human Rights Council in Geneva in 2015 says that that “the right to food is enshrined in international human rights law with States obliged to ensure its progressive realization, through the development of supportive domestic and national legislation.”¹⁴⁹ She reminds her readers that the Optional Protocol to the ICESCR,¹⁵⁰ reaffirms the right to food.¹⁵¹

¹⁴⁷ General Assembly the Right to Food Resolution 2009, *supra* note 75.

¹⁴⁸ General Assembly the Right to Food Resolution 2009, *supra* note 75 at para 2.

¹⁴⁹ Hilal Elver, *Special Rapporteur on the Right to Food* [Report], Human Rights Council 28th Session Geneva, 9 March 2015 at 2. [Elver].

¹⁵⁰ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UN A/RES/63/117, 10 December 2008 (entered into force 5 May 2013). (Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is an international treaty establishing complaint and inquiry mechanisms for the *International Covenant on Economic, Social and Cultural Rights*. It allows individuals to submit complaints once all domestic remedies have been exhausted).

¹⁵¹ Elver, *supra* note 149, *ibid*.

The 2015 Human Rights Council resolution on the Right to Food,¹⁵² though similar in concept to the definition of the right to food defined by the Special Rapporteur on the Right to Food, adds new elements such as “preserving access to food for future generations.”¹⁵³ In addition, it “[r]ecognizes the importance of smallholders and subsistence farmers in developing countries, including women and local indigenous communities, in ensuring food security, reducing poverty and preserving ecosystems, and the need to assist their development.”¹⁵⁴ It also “[r]eaffirms the need to ensure that programmes delivering safe, sufficient, nutritious and culturally accepted food are inclusive and accessible to persons with disabilities.”¹⁵⁵ It also “[c]alls for the early conclusion to and a successful, development-oriented outcome of the Doha Round of trade negotiations of the World Trade Organization as a contribution to creating international conditions permitting the full realization of the right to food.”

The evolution in the definition of the right to food in the years after the UDHR is shown in Appendix C.

2.5 UN Specialized Agencies and the Right to Food

The UN system includes a number of Specialized Agencies.¹⁵⁶ These are legally independent international organizations, operating within their own regulations, (i.e. many have their own constitutions) and financial resources. Their relationship with the

¹⁵² Human Rights Council the Right to Food Resolution 2015, *supra* note 76.

¹⁵³ Human Rights Council the Right to Food Resolution 2015, *supra* note 76 (“*Acknowledging* that the right to food is the right of every individual, alone or in community with others, to have physical and economic access at all times to sufficient, adequate and culturally acceptable food that is produced and consumed sustainably, preserving access to food for future generations.”).

¹⁵⁴ Human Rights Council the Right to Food Resolution 2015, *supra* note 76, art 8.

¹⁵⁵ Human Rights Council the Right to Food Resolution 2015, *supra* note 76, art 10.

¹⁵⁶ For the position of Specialized Agencies in the UN system see the Directory of United Nations System Organization, online: < <http://www.unsystem.org/members/specialized-agencies>>.

UN has been established through negotiated agreements. Some of the agencies have a long history, as they were established long before the UN, others were created almost at the same time as the United Nations, and yet others were created by the United Nations itself to meet the UN's emerging needs.¹⁵⁷

A special UN agency engaged in activities linked to food is the Food and Agriculture Organization (FAO). Another UN special agency whose activities, to some extent, relate to the FAO is the World Health Organization (WHO). These two agencies will be discussed solely in conjunction with the definition of the right to food.¹⁵⁸

The FAO is a major UN agency established immediately following the establishment of the UN. The FAO's mandate is to look after the food-related issues around the globe.¹⁵⁹ The FAO is directly concerned with "achieving food security" aiming "to make sure people have regular access to enough high-quality food."¹⁶⁰ On the other hand, the WHO is concerned about food safety, focusing on quality and nutritional values.¹⁶¹

The FAO was founded when 45 states gathered on 16 October 1945 in Quebec City to sign the Constitution establishing the Food and Agriculture Organization.¹⁶²

¹⁵⁷ For full listing and the history of UN specialized agencies see the Directory of United Nations System Organization, *supra* note 156.

¹⁵⁸ Recall that the right to food in the UDHR appears together with the right to health. See UDHR, *supra* note 9, art 25(1).

¹⁵⁹ See "About FAO" online: FAO <<http://www.fao.org/about/en>>.

¹⁶⁰ See "About FAO" online: FAO <<http://www.fao.org/about/en/>>.

¹⁶¹ See "About WHO" online: WHO <<http://www.who.int/about/en/>>.

¹⁶² *Basic Texts of the Food and Agriculture Organization of the United Nations*, vols 1 & 2 (Rome: FAO, 2015) at 3. Constitution, art 1. "The Organization shall collect, analyze, interpret and disseminate information relating to nutrition, food and agriculture".

The FAO reiterates all definitions of the right to food specified in the UDHR, ICESCR, General Comment 12 of the Committee on Economic, Social and Cultural Rights, and the Special Rapporteur on the Right to Food.¹⁶³

The FAO also produced *Voluntary Guidelines to the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*,¹⁶⁴ which were adopted in 2004. The document is reaffirmed in the 2009 UN General Assembly resolution on the right to food,¹⁶⁵ and referenced in the 2015 report of Special Rapporteur on the Right to Food, Hilal Elver.¹⁶⁶ With regard to the definition of the right to food, the *Voluntary Guidelines* repeated the provisions from the UDHR and the ICESCR and then continue to focus on the obligations of states towards the realization of the right to adequate food.¹⁶⁷

However, several years later, in addition to more detailed explanation about expectations from individuals as well as States with respect to the right to food, the FAO has also added a statement about what the right to food is not:

The right to food is not a right to be fed, but primarily the right to feed oneself in dignity. Individuals are expected to meet their own needs, through their own

¹⁶³ Basic Texts of the FAO, *supra* note 162.

¹⁶⁴ Food and Agriculture Organization [FAO], *Voluntary Guidelines to the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, Adopted by the 127th Session of the FAO Council, November 2004. In the Foreword of the document it says that "[t]he Voluntary Guidelines represent a step forward integrating human rights into the work of agencies dealing with food and agriculture, such as FAO, as called by the United Nations Secretary-General within his UN reforms." [*FAO Voluntary Guidelines*].

¹⁶⁵ General Assembly the Right to Food Resolution 2009, *supra* note 75 at para 34. ("Reaffirms that the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, adopted by the Council of the Food and Agriculture Organization of the United Nations in November 2004, represent a practical tool to promote the realization of the right to food for all, contribute to the achievement of food security and thus provide an additional instrument in the attainment of internationally agreed development goals, including those contained in the Millennium Declaration;").

¹⁶⁶ Elver, *supra* note 149 at 3 ("Similarly the Right to Food Guidelines have been instrumental in promoting the importance of recognizing the right to food in national legal frameworks. States should refer to the Guidelines when developing constitutional principles and framework laws to ensure the progressive realisation of the right to food at the domestic level.").

¹⁶⁷ *FAO Voluntary Guidelines*, *supra* note 164 at paras 11-19.

efforts and using their own resources. To be able to do this, a person must live in conditions that allow him or her either to produce food or to buy it. To produce his or her own food, a person needs land, seeds, water and other resources, and to buy it, one needs money and access to the market. The right to food requires States to provide an enabling environment in which people can use their full potential to produce or procure adequate food for themselves and their families. However, when people are not able to feed themselves with their own means, for instance because of an armed conflict, natural disaster or because they are in detention, the State must provide food directly.¹⁶⁸

Although the statement aligned itself with the orthodox international human rights law provisions on food, this statement broadens the concept of the right to food, that the right to food includes the right to locally-produced food. The FAO's definition of the right to food, however, includes the obligation of the State to its citizens. Nevertheless, while the FAO includes obligations on states, it also makes clear that, in the first instance, individuals have the obligation to "meet their own needs, through their own efforts."

While the FAO agency was established at the same time as the UN in 1945, the WHO emerged later, in 1948, the same year the UDHR was adopted.¹⁶⁹ The WHO does not define the right to food though its Constitution includes a commitment "to develop, establish and promote international standards with respect to food."¹⁷⁰ In 1950, a joint FAO/WHO committee of experts on nutrition noticed "that the conflicting nature of food regulations may be an obstacle to trade and may therefore affect the distribution of

¹⁶⁸ Food and Agriculture Organization [FAO], "The Right to Adequate Food" (2010) Fact Sheet No.34 at 3.

¹⁶⁹ In Quebec City, on 16 October 1945 the FAO was established by the adoption of the Constitution. The Constitution of the World Health Organization came into force in 1948, although it had been signed by 61 countries on 22 July 1946, in Geneva.

¹⁷⁰ *Constitution of the World Health Organization* (1946), art 2(u).

nutritionally valuable food” and suggested that FAO and WHO study these problems more closely.¹⁷¹

The FAO and WHO were united in their growing concern about food security and held their first conference together in Rome in 1963.¹⁷² Ever since, those two UN agencies have worked together and developed a collection of internationally recognized standards relating to food (referred to as *Codex Alimentarius*). These standards are mentioned as a result of joint efforts of two UN special agencies working together, though the standards themselves are not directly contributing to a definition of the right to food. “When formulating national policies and plans with regard to food, Governments should take into account the need of all consumers for food security and should support and, as far as possible, adopt standards from the Codex Alimentarius or, in their absence, other generally accepted international food standards.”¹⁷³

Not directly a definitional aspect of the right to food, food sovereignty is yet another expression of the right to food discourse developed on the basis of “food security”. The term was coined at the World Food Summit in 1996 (in Rome, at the FAO Headquarters) by members of the Via Campesina movement who believed that people who produce and distribute food should also control the policies and other instruments that are governing the food production and distribution, rather than control being held by large corporations and international trade monopolists.

¹⁷¹ The first session of the Joint FAO/WHO Expert Committee on Nutrition (1950) (online: Codex Alimentarius: International Food Standards <<http://www.fao.org/fao-who-codexalimentarius/about-codex/codex-timeline/en/>>).

¹⁷² In May of 1963, the Sixteenth World Health Assembly approved the establishment of the Joint FAO/WHO Food Standards Programme with the Codex Alimentarius Commission as its principal organ. The Commission held its first session in Rome in October 1963. Some 120 participants from 30 countries and 16 international organizations attended.

¹⁷³ The most recent 4th edition of the *Understanding Codex* was released in July 2016. The cited text comes from the website *Codex Alimentarius: International Food Standards* (online: <<http://www.fao.org/fao-who-codexalimentarius/about-codex/understanding-codex/en/>>)

An Intergovernmental panel project (2004-2007) sponsored, among others, by the UN, FAO, WHO, and World Bank, developed the following definition of food sovereignty: "Food sovereignty is defined as the right of peoples and sovereign states to democratically determine their own agricultural and food policies."¹⁷⁴

2.6 Conclusion

Since WWII, the right to food has not been clearly or consistently defined. Its first articulation in international human rights law came relatively recently,¹⁷⁵ in 1948, with the adoption of the UN UDHR. Although the right to food was a new introduction to the process of human rights codification, it did not secure the provision as a right in itself. Rather, in the final version of the UDHR (Article 25(1)) the right to food remained an included element in the concept of "adequate standard of living".

The question that stems out of the development chronicled in this chapter is whether the ambiguous definition of the right to food, or the lack of instruments for its implementation have contributed to development of tension between international human rights law and other international legal concepts, particularly intellectual property and especially since IP joined the World Trade Organization in 1994, shifting its focus from international human rights (soft law) to private economy driven agreements.¹⁷⁶

¹⁷⁴ Beverly McIntyre, *International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD): Global Report* (Washington, DC: Island Press, 2009) at 563.

¹⁷⁵ See e.g. Olivier De Schutter, *International Human Rights Law*, 2nd ed (Cambridge, UK: Cambridge University Press, 2014) at 3. (Human rights themselves have been part of international humanitarian law since the late eighteenth century, although they emerged as a part of public international law after the WWII).

¹⁷⁶ TRIPS, *supra* note 1. More will be discussed about this theme in the following chapters.

Chapter 3

- 3 Finding a Role and Definition for the Right to Intellectual Property
 - 3.1 Introduction
 - 3.2 Historical Understanding of the Definition of Intellectual Property Prior to the Universal Declaration of Human Rights
 - 3.3 Intellectual Property Emerges as a Human Right in the Universal Declaration of Human Rights
 - 3.4 Intellectual Property in the Transition to International Trade
 - 3.5 The Current Position of the Right to Intellectual Property in International Law
 - 3.6 Conclusion

3 Finding a Role and Definition for the Right to Intellectual Property

3.1 Introduction

The first known published appearance of the term ‘intellectual property’ was in an 18th-century British periodical.¹⁷⁷ The sources also point to inclusion of the term in the heading of an essay in a collection of New England Association medical essays published at the beginning of the 19th century.¹⁷⁸ This medical essay sparked a discussion about the importance of the medical association in protecting innovators’ rights.¹⁷⁹

Although the development of IP in the form of patent and copyright monopolies as a concept parallels the industrial revolution, the normative establishment of intellectual property rights on a larger international scale came much later, at the end of the 19th century. This chapter begins its search for the ‘definition’ of IP in the inaugural treaties regulating intellectual property rights from the late 19th century: the *Paris Convention*¹⁸⁰ and the *Berne Convention*.¹⁸¹

From its origins in several European states including France and England, IP rights protection achieved global scope and reach as soon as the *Paris* and *Berne* Conventions were signed. Under the *Paris* and *Berne Conventions* the member states formed themselves into the Paris Union and Berne Union respectfully. The Paris Union and the

¹⁷⁷ “Conclusion of the Account of Dr. Smith’s *New and General Systems of Phisic*, from the last Review, page 194” (1769) 41 *The Monthly Review* at 290. (The title page of the British periodical reads: “Monthly Review; or, Literary Journal: by Several Hands, Volume XLI. (London, UK: Printed for R. Griffiths: And Sold by T. Becket and P. A. De Hondt, in the Strand. M,DCC,LXIX) (October, 1769).”).

¹⁷⁸ “New-England Association in favour of Inventors and Discoverers for the Protection of **Intellectual Property**.” (1808) 11 *The Medical Repository of Original Essays and Intelligence* at 303 [emphasis added].

¹⁷⁹ *Ibid*, at 304-306.

¹⁸⁰ *Paris Convention*, *supra* note 20.

¹⁸¹ *Berne Convention*, *supra* note 21.

Berne Union created a common administrative office, the Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (BIRPI) to administer the fledgling international processes created after the *Paris* and the *Berne* Conventions were adopted.¹⁸²

Seven decades later, the BIRPI office and the entire governance of the *Paris* and *Berne* conventions were transferred to the newly formed World Intellectual Property Organization (WIPO)¹⁸³ – becoming an intellectual property global stronghold with all aspects of intellectual property rights worldwide.¹⁸⁴ The current mandate of the WIPO is “global intellectual property services, policy-making, capacity building, and technical infrastructure.”¹⁸⁵

An explicit connection between intellectual property and human rights was made only after the end of World War II when the UDHR declared intellectual property a human right in art. 27(2): “[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

¹⁸² BIRPI was established in 1893. (“The two secretariats set up to administer the Paris and Berne Conventions combine to form WIPO’s immediate predecessor, the United International Bureaux for the Protection of Intellectual Property – best known by its French acronym, BIRPI. The organization, with a staff of seven, is based in Berne, Switzerland.”) online: WIPO <<http://www.wipo.int/about-wipo/en/history.html>>.

¹⁸³ WIPO (“The WIPO Convention, the constituent instrument of the World Intellectual Property Organization (WIPO), was signed at Stockholm on July 14, 1967, entered into force in 1970 and was amended in 1979. WIPO is an intergovernmental organization which later in 1974 became one of the specialized agencies of the United Nations system.”) online: WIPO <<http://www.wipo.int/treaties/en/convention/>>. The WIPO became the UN specialized agency under the following: *Agreement between the United Nations and the World Intellectual Property Organization* (entered into effect 17 December 1974); <http://www.wipo.int/treaties/en/text.jsp?file_id=305623>.

¹⁸⁴ Formed in 1970, “WIPO is the global forum for intellectual property services, policy, information and cooperation; ... a self-funding agency of the United Nations, with 189 member states.” Online: WIPO <http://www.wipo.int/about-wipo/en/>

¹⁸⁵ Francis Gurry, Director General of WIPO, in his opening remarks outlines the 2nd mandate (Geneva, 22 September 2015).

author.”¹⁸⁶ This recognition of IP as human right occurred well before the Paris and Berne Unions became part of WIPO in 1974.

This focus on international human rights law is necessary because the examination of the primary instruments of IP in the WIPO context reveal no definition of the concept of the IP. Rather they focus on definition (if at all) and operationalization of the IP devices, for example copyright, trademark and patent. The law of IP is not human rights law.¹⁸⁷ As Brian Burdekin pointed “[i]nternational human rights instruments in fact complement intellectual property law”¹⁸⁸

Indeed, from the perspective of the UDHR drafters in 1948 that intellectual property is a human right, the move by the UN and WIPO to bring WIPO into the UN as a specialized agency, one of the group of seventeen UN independent agencies, would seem logical and justifiable.¹⁸⁹

¹⁸⁶ *Universal Declaration of Human Rights*, 10 December 1948, General Assembly Resolution 217 A (III) (entered into force 16 December 1949) [UDHR], art 27(2).

¹⁸⁷ E.g. Audrey R. Chapman, “A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science” in *Intellectual Property and Human Rights: A Panel Discussion to Commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, November 9, 1988* (Geneva: World Intellectual Property Organization, 1999) at 128 (“Intellectual property lawyers tend to have little involvement with human rights law, and few human rights specialists deal with science and technology or intellectual property issues. In addition, although many members of the scientific community have become human rights advocates, particularly in societies that do not respect human rights norms, their activities have generally been practical rather than theoretical.”).

¹⁸⁸ Brian Burdekin (on behalf of Mrs. Mary Robinson, United Nations High Commissioner for Human Rights), “Opening Address” in *Intellectual Property and Human Rights: A Panel Discussion to Commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, November 9, 1988* (Geneva: World Intellectual Property Organization, 1999) at 5.

¹⁸⁹ For the history of WIPO see online: WIPO <<http://www.wipo.int/about-wipo/en/history.html>>. Since the right to IP was already included in the UDHR, it made sense for the Berne and Paris Unions, as WIPO, to join the UN in 1974. This was only one factor related to this joining; there have been other organizations not explicitly connected to human rights that have joined the UN. The UN has been interested in international regulation of areas of common state interest. This latter interest rather than any connection with human rights, is why the World Meteorological Organization, which was created in 1873, joined the UN as a specialized agency in 1950.

This chapter begins by examining the development of history of IP in the 19th century and then turns to a description of the definition of the right to IP in international human rights law, particularly in the UDHR, the *International Covenant on Economic, Social and Cultural Rights* [ICESCR],¹⁹⁰ UN Sub-Commission on Human Rights Resolution 2000/7,¹⁹¹ and General Comment 17 of the Committee on Economic, Social and Cultural Rights.¹⁹² It will be noted that, while the term ‘intellectual property’ itself does not appear explicitly in either the UDHR or the subsequent ICESCR, it does appear in Resolution 2000/7 and General Comment 17. Lastly, this chapter looks to international trade which now includes IP (in the *TRIPS Agreement*) for developments in the definition of IP. Before concluding, this chapter provides insight into the definition of the right to IP in comparison to the definition of the right to food.

3.2 Historical Understanding of the Definition of Intellectual Property Prior to the *Universal Declaration of Human Rights*

This section will discuss the evolution of the concept of IP prior to its appearance in the UDHR.

¹⁹⁰ ICESCR, *supra* note 68.

¹⁹¹ Sub-Commission on Human Rights Resolution 2000/7, *supra* note 5.

¹⁹² *General Comment No. 17, (2005): The Right of Everyone to Benefit from the Protection of the Moral and Material interests resulting from Any Scientific, Literary or Artistic Production of Which He or She is the Author (article 15, paragraph 1(c), of the Covenant)*, UN Doc E/C.12/GC/17 (12 January 2006) [General Comment 17].

Table 5: IP Prior to Being Declared a Human Right

Date	Source	Reference to IP	Comment
1769	Monthly Review	First mention of the term IP	UK
1808	Medical Journal	First heading with the term IP	USA
1883	Paris Convention	No IP term; terms “industrial property”, “patents” are described	First international treaty - specific to Patents
1886	Berne Convention	No IP term; term such as “literary and artistic works” is described	First international treaty-specific to Copyright
1897	BIRPI	IP appears in the name of the Office	First united Patent and Copyright Office
1928	Berne Convention - Revision	Inclusion of moral rights -No IP term	Moral rights considered human rights
1948	UDHR	No IP term	[IP] declared human right

The term “intellectual property” carries a special meaning at law, though that meaning is not always explicitly articulated. For example, according to the *Oxford English Dictionary* [OED], **intellectual property** is defined as “chiefly *Law* property (such as patents, trademarks, and copyright material) which is the product of invention or creativity, and does not exist in a tangible, physical form.”¹⁹³ The OED lists it under the “special uses” of the term “intellectual”. However, the definition is not directly associated with the *right* to intellectual property which, being “a right” will certainly be intangible. On the other hand, the OED definition connects intellectual property to “law property” without explaining why it “does not exist in a tangible, physical form.” For example, in copyright law, to exercise that protection, and enjoy the benefits of an IP monopoly, the law requires, as is often said, that the product of invention or creativity (intangible) be ‘fixed’ in a material (tangible) form.¹⁹⁴

¹⁹³ *The Oxford English Dictionary*, 3rd ed, *sub verbo* “intellectual property”.

¹⁹⁴ Vaver, *supra* note 50 at 107. See the text under the heading “Fixation.”

Classically, the benefits of IP rights are derived from limited monopolies granted to rights holders. This makes the enjoyment of IP rights temporary in nature, although the material manifestation of intellectual creativity may continue to exist indefinitely.

In the *Stanford Encyclopedia of Philosophy*, the authors define ‘intellectual property’ as “generally characterized as non-physical property that is the product of original thought.”¹⁹⁵ Further, the authors say that “[i]ntellectual property law protects a content-creator's interest in her ideas by assigning and enforcing legal rights to produce and control physical instantiations of those ideas.”¹⁹⁶ Although more specific, this definition of intellectual property is very similar to the definition found in the OED.

Considered one of the most authoritative reference tools in law, *Black's Law Dictionary* defines intellectual property as “a category of intangible rights protecting commercially valuable products of the human intellect”, which, beside patent, copyright and trademark rights also “includes trade-secret rights, publicity rights, moral rights, and rights against unfair competition.”¹⁹⁷ In addition, *Black's Law Dictionary* offers a further division of intellectual property into “hard intellectual property” and “soft intellectual property”.¹⁹⁸

¹⁹⁵ Adam Moore & Kem Himma, “Intellectual Property” in *The Stanford Encyclopedia of Philosophy*, Winter 2014 ed by Edward N Zalta (Stanford: Metaphysics Research Lab, Stanford University, 2014).

¹⁹⁶ Moore & Himma, *supra* note 195. In this chapter, the focus is on finding the definition of intellectual property term, and for that reason the philosophical discussion about intellectual property as portrayed further in the *Stanford Encyclopedia of Philosophy* article has been excluded.

¹⁹⁷ *Black's Law Dictionary*, 10th ed, sub verbo “intellectual property”.

¹⁹⁸ *Black's Law Dictionary*, *supra* note 197 (“[H]ard intellectual property. Intellectual property, such as a patent, that excludes others from using the invention without the holder’s consent even if others find the innovation independently.”) (“[S]oft intellectual property. Intellectual property, such as copyright, that does not preclude independent creation by third parties.”)

The term “intellectual property”, as per *Black’s Dictionary*, first appeared in 1808 - the same year that the American Medical Association Repository of essays published the essay with the term “intellectual property” in the heading as mentioned above.¹⁹⁹

There is a use of “intellectual property” that predates the earlier reference in *Black’s Law Dictionary*. The *Monthly Review*, an early English periodical published in London, UK, from 1749-1845, is the first periodical known to have published literary and book reviews. In volume 41 of the *Monthly Review*, in 1769, the term “intellectual property” appeared in the review of the book titled “Smith’s New and General System of Phisic”. A fierce critique of the reviewed item states: “What a niggard this Doctor is of his own, and how profuse he is of other people’s **intellectual property!**”²⁰⁰ That first known published appearance of the term “intellectual property” came half a century after the first British copyright act, the Statute of Anne²⁰¹ was enacted. The provisions of the Statute do not contain either the term “copyright” or “intellectual property”.

While the term “intellectual property” does not appear in the original texts of the 19th century *Paris* or *Berne* conventions, the protocol to the *Paris Convention* contained explanations of terms specific to domain of IP.²⁰² For example, the Final Protocol of the *Paris Convention*, ratified at the same time as the main *Convention* document on 20 March 1883, carried explanations of several major terms used in the *Convention*. The term “industrial property” was explained as follows:

1. The words "Industrial Property" are to be understood in their broadest sense; they are not to apply simply to industrial products properly so called, but also to

¹⁹⁹ See *supra* note 19.

²⁰⁰ *Monthly Review*, *supra* note 19.

²⁰¹ *Statute of Anne*, 8 Anne, c 19 (1710).

²⁰² *Final Protocol* [of the *Paris Convention*] of 20th March 1883.

agricultural products (wines, corn, fruits, cattle, &c.), and to mineral products employed in commerce (mineral waters, &c.).²⁰³

The explanation of the term “patents” reads:

2. Under the word "patents" are comprised the various kinds of industrial patents recognized by the legislation of each of the Contracting States, such as importation patents, improvement patents, &c.²⁰⁴

Similarly, the 1886 *Berne Convention* did not contain any reference to “intellectual property”, although the *Berne Convention* specifically focused on “literary and artistic works”:

Article 4.

The expression “literary and artistic works” shall include books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of drawing, painting, sculpture and engraving; lithographs, illustrations, maps; plans, sketches, and three-dimensional works relative to geography, topography, architecture, or science in general; in fact, every production whatsoever in any literary, scientific, or artistic domain which can be published by any mode of printing or reproduction.²⁰⁵

²⁰³ Cited from the translation in English of the original Paris Convention and the Final Protocol, published in Edward Hertslet, ed. *A Complete Collection of the Treaties and Conventions and Reciprocal Regulations at Present Subsisting Between Great Britain and Foreign Powers: And of the Laws, Decrees, Orders in Council, etc. Concerning the Same; So Far as They Relate to Commerce and Navigation, the Slave Trade, Post-Office Communications, Copyright, &c; and to the Privileges and Interests of the Subjects of the High Contracting Parties. Vol. 17* (London: Butterworths, 1890) para 1 at 405.

²⁰⁴ Cited from the translation in English of the original Paris Convention and the Final Protocol, published in Edward Hertslet, ed. *A Complete Collection of the Treaties and Conventions and Reciprocal Regulations at Present Subsisting Between Great Britain and Foreign Powers: And of the Laws, Decrees, Orders in Council, etc. Concerning the Same; So Far as They Relate to Commerce and Navigation, the Slave Trade, Post-Office Communications, Copyright, &c; and to the Privileges and Interests of the Subjects of the High Contracting Parties. Vol. 17* (London: Butterworths, 1890) para 2 at 405.

²⁰⁵ Cited from the translation in English of the original Berne Convention, published in Edward Hertslet, ed. *A Complete Collection of the Treaties and Conventions and Reciprocal Regulations at Present Subsisting Between Great Britain and Foreign Powers: And of the Laws, Decrees, Orders in Council, etc. Concerning the Same; So Far as They Relate to Commerce and Navigation, the Slave Trade, Post-Office Communications, Copyright, &c; and to the Privileges and Interests of the Subjects of the High Contracting Parties. Vol. 17* (London: Butterworths, 1890) at 571.

New elements were introduced into the *Berne Convention*, particularly the inclusion of moral rights, in the 1928 revision of the *Berne Convention*²⁰⁶ making it probably a contributing aspect of future inclusion of IP into human rights law.²⁰⁷

3.3 Intellectual Property Emerges as a Human Right in the *Universal Declaration of Human Rights*

As described in chapter 2, the right to food did not have a presence in any constitutions known to the UN Human Rights Drafting Committee.²⁰⁸ In contrast, the right to intellectual property had roots in the US Constitution,²⁰⁹ one of many legal documents consulted by the members of the *Universal Declaration of Human Rights* Drafting Committee.²¹⁰ Certainly, the Inter-American Juridical Committee draft, presented initially to the inaugural UN meeting in San Francisco by the delegation from Chile, played a role in the drafting of the right to IP.²¹¹ It is worth noting that there was not mention of the right to intellectual property in the proposals from Cuba and Panama, drafts of which were also presented at the San Francisco UN inaugural meeting (as discussed in chapter 2). On the other hand, the Inter-American draft (submitted by the

²⁰⁶ The inclusion of moral rights in the *Berne Convention* is discussed in detail in Margaret Ann Wilkinson, "The Public Interest in Moral Rights Protection" (2006) Mich St L Rev 193.

²⁰⁷ See Margaret Ann Wilkinson & Natasha Gerolami, Wilkinson, Margaret Ann & Natasha Gerolami. "The Information Context of Moral Rights under the Copyright Regime" (2004) Law Publications Paper 78, online: Western Libraries <<http://ir.lib.uwo.ca/lawpub/78/>> [Wilkinson & Gerolami].

²⁰⁸ Morsink, *supra* note 56, 193.

²⁰⁹ US Const art I, § 8, cl 8. - Patent and Copyright Clause of the Constitution. [The Congress shall have power] "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

²¹⁰ Humphrey, *supra* note 72.

²¹¹ *Inter-American Juridical Committee, Draft Declaration of the International Rights and Duties of Man and Accompanying Report* (1946) 40:3 AJIL/Am J Intl L Supplement: Official Documents 93-116.

delegation of Chile) did not mention the right to food, but did mention the right to IP (see Appendix E: The Right to Intellectual Property – Development Stages from UDHR to ICESCR).

The Inter-American Juridical Committee draft contained a detailed provision on intellectual property rights:

Article XV
RIGHT TO SHARE IN BENEFITS OF SCIENCE

Every person has the right to share in the benefits accruing from the discoveries and inventions of science, under conditions which permit a fair return to the industry and skill of those responsible for the discovery or invention.

The state has the duty to encourage the development of the arts and sciences, but it must see to it that the laws for the protection of trademarks, patents and copyrights are not used for the establishment of monopolies which might prevent all persons from sharing in the benefits of science. It is the duty of the state to protect the citizen against the use of scientific discoveries in a manner to create fear and unrest among the people.²¹²

However, John P. Humphrey incorporated into his draft only the phrase ‘the right to share in benefits of science.’ The focus in Humphrey’s draft was on the right to participate in cultural life. The full text of that provision appears as follows:

Article 44

Every one has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science.²¹³

In revising Humphrey’s draft, Rene Cassin, a French delegate, created two separate provisions, expanding on Humphrey’s Article 44. These are known as Article 42 and Article 43 of the “Cassin Draft”, and they read as follows:

Article 42

Every person has the right to a fair share of rest and leisure and to a knowledge of the outside world.

Every person has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science.

²¹² Inter-American Juridical Committee, *Ibid*, art 15 at 10.

²¹³ The “Humphrey Draft”. Available in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 274.

Article 43

The authors of all artistic, literary and scientific works and inventors shall retain, in addition to the just remuneration of their labour, a moral right to their work or discovery which shall not disappear even after such work or discovery has become the common property of mankind.²¹⁴

Adhering to the pressure to keep the Declaration short, and after the “Cassin Draft” was the subject of numerous discussions, the following three distinctive drafts of the UDHR (“The June 1947 Human Rights Commission Draft”, “The Geneva Draft” and “The Lake Success Draft”) backed Humphrey’s initial text, referring to the right to participate in cultural life with no reference to authors’ moral rights. In those drafts, the implied reference to the intellectual property rights appeared as follows:

“The Human Rights Commission Draft “:

Article 35

Every one has the right to participate in the cultural life of the community, to enjoy the arts, and to share in the benefits that result from scientific discoveries.²¹⁵

“The Geneva Draft”:

Article 30

Every one has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits that result from scientific discoveries.²¹⁶

“The Lake Success Draft”:

Article 25

Everyone has the right to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement.²¹⁷

²¹⁴ The “Cassin Draft”. Available in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 279.

²¹⁵ “The June 1947 Human Rights Commission Draft”. Available in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 268.

²¹⁶ “The Geneva Draft”. Available in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 292.

²¹⁷ “The Lake Success Draft”. Available in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 298.

However, due to the delegations of Cuba and Mexico, which supported a French Proposal,²¹⁸ it was “The Third Committee Draft” that ‘saved’ both the moral and material interests of authors who created artistic, literary, scientific works or made inventions.

This provision appeared as follows:

Article 25

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.²¹⁹

The above provision from the Third Committee Draft – unchanged – became Article 27 of the final version of the UDHR establishing the IP as a human right.

None of Latin American countries were members of the Berne Union in 1948,²²⁰ although the delegates from those countries supported the inclusion of moral (i.e. authors’) rights into the final version of the UDHR.²²¹ Apart from delegates from the countries where the tradition of respecting the intellectual property rights was historically well established, (e.g. countries in Europe and their colonies), the drafters of the *Universal Declaration of Human Rights* were also confronted by delegates who asked whether the right to intellectual property was a human right at all, and, if so, whether it

²¹⁸ Morsink, *supra* note 56, at 221.

²¹⁹ “The Third Committee Draft”. Available in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 308.

²²⁰ *The Berne Convention for the Protection of Literary and Artistic Works, from 1886 to 1986* (Geneva: WIPO, 1986). This volume includes the year when each country became a member of the Berne Union. Argentina, Mexico and Uruguay were first Latin American countries that joined the Berne Union in 1967.

²²¹ Morsink, *supra* note 56 at 221 (“The Latin American delegations sponsored the second paragraph because they saw it more as a step toward the internationalization of copyright law. They had no special interest in the more technical Berne Convention language about rights in intellectual property.”).

should be included in the Declaration.²²² Some delegates believed that intellectual property rights were already protected under property rights,²²³ and that it was unnecessary to include intellectual property rights in the Declaration. That position further fueled the discussion of whether intellectual property rights ‘belonged’ to economic, social or cultural rights in the Universal Declaration.²²⁴

After long discussions and multiple revisions (see again Appendix E), IP rights were declared in the UDHR as follows:

Article 27

(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.²²⁵

The polarization in those two paragraphs (the first being about sharing and participating and the second about protecting of interests), still sparks interest in legal scholars who continue to analyze Article 27 of the UDHR.²²⁶

Protection of moral rights, in addition to the material interests of authors and inventors, was a significant accomplishment that anchors IP in international human rights law. It may be recalled that the protection of authors’ moral rights was not included in the

²²² Morsink, *supra* note 56 at 221 (“While the Ecuador and United States delegations made the point that the right to intellectual property was already dealt with by the article on property rights, other opponents argued that the right to intellectual property was not a human right at all.”).

²²³ UDHR, *supra* note 9, art 17.

²²⁴ Morsink, *supra* note 56 at 221.

²²⁵ UDHR, *supra* note 9, art 27; Available in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) Glendon, *supra* note 18, at 313.

²²⁶ See Aurora Plomer, “The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science” (2013) 35 Hum Rts Q 143.

original *Berne Convention* of 1886. It was only in the Rome revision of the *Berne Convention* in 1928 that two moral rights (the right to paternity and the right to integrity) were integrated as Article 6bis of the *Berne Convention*.²²⁷ This was not long before the UDHR was drafted.

As discussed, it was recognized that the implementation of the rights declared in the UDHR required further international action. This led to the creation of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²²⁸

These instruments institutionalized the division of human rights into two larger categories, civil and political (ICCPR), versus economic, social, and cultural (ICESCR) rights.²²⁹ At this point, the right to IP and the right to food were included together with other economic, social and cultural rights. See Table 6. Developed to tighten the position of rights and make them obligatory rather than just a set of broad, universal [human rights] standards, the ICESCR identified the right to IP as follows:

Article 15

1. The States 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.²³⁰

²²⁷ E.g. Wilkinson & Gerolami, *supra* note 207.

²²⁸ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) (ICCPR); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR).

²²⁹ For the history of the development of both Covenants see e.g. “The 1966 Covenants” in Stephen James, *Universal Human Rights: Origins and Development*, ch 4 (New York: LFB Scholarly Publishing LLC, 2007) at 175-250.

²³⁰ ICESCR, *supra* note 68, art 15.

Article 15 of the ICESCR contains all elements of IP rights as stated in Article 27 of the UDHR, but the adoption of Article 15 of the ICESCR was debated over considerable time.²³¹ Many scholars have discussed the significance of the ICESCR for IP rights, among them Peter Yu, who explains the background history and details of that process.²³² Many agree that the language of Article 15 was carefully drafted because the ICESCR was imposing obligations on those member states which ratified it. As Peter Yu writes: “By clarifying the meaning of the ambiguous words used in the provisions, such as ‘moral interests’ and ‘material interests’, the drafting history also helps us better understand the nature and scope of the right at issue in this Article.”²³³

Table 6: IP in the Human Rights Era

Date	Source	Reference to Intellectual Property	Comment
1948	UDHR	No IP term	[IP] declared human right
1966, in force 1976	ICESCR	No IP term	[IP] reiterated as human right
1967, in force 1970	WIPO	IP appeared in the WIPO name; IP in the Convention	WIPO established by the Convention – succeeded BIRPI
1974	WIPO	IP in the name	Joined the UN

The *WIPO Convention*, was concluded in 1967 – a year after the ICESCR was adopted. It does not define “intellectual property” in a lengthy descriptive manner. Instead it lists the rights of which intellectual property is comprised. Under the Definitions section, Article 2 reads:

(viii) “intellectual property” shall include the rights relating to:

²³¹ Peter K. Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40:3 UC Davis L Rev 1039.

²³² Peter K. Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40:3 UC Davis L Rev 1039; Also in Laurence R. Helfer, ed. *Intellectual Property and Human Rights* (Cheltenham, UK: Edward Elgar Publishing Limited, 2013) at 3-113.

²³³ Peter K. Yu, “Intellectual Property and Human Rights in the Nonmultilateral Era (2012) 64:4 Fla L Rev 1045 at 1048.

- 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.²³⁴

Although the quoted provision is just a comprehensive list of intellectual property components (without explaining the meaning of the term “intellectual property”), the *Convention Establishing the World Intellectual Property Organization* is the first international treaty to define intellectual property rights by listing those component rights.

Like most recent UN resolutions, the *Sub-Commission on Human Rights Resolution 2000/7* was adopted without a vote as per the consensus practice that has become favourable and accepted among Member States.²³⁵ Sub-Commission resolutions are non-binding documents although they can send a strong message to governments. For example, *Resolution 2000/7* impressed upon all governments “the primacy of human rights obligations over economic policies and agreements”²³⁶ and imposed the request “to integrate into their national and local legislations and policies, provisions, in accordance

²³⁴ WIPO, *Convention Establishing the World Intellectual Property Organization* (Signed at Stockholm on July 14, 1967 and as amended on September 28, 1979), art 2 (viii).

²³⁵ General Assembly of the United Nations, *The Search for Consensus* (“Each of the 193 Member States in the Assembly has one vote. Votes taken on designated important issues – such as recommendations on peace and security, the election of Security Council and Economic and Social Council members, and budgetary questions – require a two-thirds majority of Member States, but other questions are decided by a simple majority. In recent years, an effort has been made to achieve consensus on issues, rather than deciding by a formal vote, thus strengthening support for the Assembly’s decisions. The President, after having consulted and reached agreement with delegations, can propose that a resolution be adopted without a vote.”) (UN, 2016) online: <<http://www.un.org/en/ga/about/background.shtml>>.

²³⁶ Sub-Commission on Human Rights Resolution 2000/7, *supra* note 5, art 3.

with international human rights obligations and principles, that protect the social function of intellectual property.”²³⁷ With respect to intellectual property, Resolution 2000/7, in its opening article:

1. Affirms that “the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27, 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;”²³⁸

In the above quoted Article, the term “intellectual property” has no presence, although the term appears in several subsequent Resolution articles,²³⁹ mostly in regard to intellectual property rights regimes, relationships between intellectual property and human rights, and with reference to the *TRIPS Agreement*. However, Article 1 “[e]ncourages the Committee on Economic, Social and Cultural Rights to clarify the relationship between intellectual property rights and human rights, including through the drafting of a general comment on this subject,”²⁴⁰ which resulted in the production of General Comment 17.

The importance of clear definition for ‘intellectual property’ rights is supported in General Comment 17 issued by the Committee on Economic, Social and Cultural Rights in 2005. General Comment 17 explains and interprets the provision on the right to IP as it appears in Article 15(1)(c) in the ICESCR. Under section II, Normative Content of Article 15, Paragraph 1(c), the General Comment states:

6. Article 15, paragraph 1, enumerates, in three paragraphs, three rights covering different aspect of cultural participation, including the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific,

²³⁷ Sub-Commission on Human Rights Resolution 2000/7, *supra* note 5, art 5.

²³⁸ Sub-Commission on Human Rights Resolution 2000/7, *supra* note 5, art 1.

²³⁹ Sub-Commission on Human Rights Resolution 2000/7, *supra* note 5, arts 2; 5-7; 11; 13.

²⁴⁰ Sub-Commission on Human Rights Resolution 2000/7, *supra* note 5, art 11.

literary or artistic production of which he or she is the author (art. 15, para. 1(c)), without explicitly defining the content and scope of this right. **Therefore, each of the elements of article 15, paragraph 1(c), requires interpretation.**²⁴¹

General Comment 17 highlights the fact that article 15(1)(c) of the ICESCR does not provide any clear definition of IP rights. The term “intellectual property” itself is not employed in the ICESCR just as it was not employed in the UDHR. In the ICESCR, the term “intellectual property” is not used as it is not used in the UDHR. However, paragraphs 2 and 3 of General Comment 17 provide interpretation of two aspects of intellectual property associated with human rights and may be treated as definitions. Paragraph 2 and 3 read:

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

3. It is therefore important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c). The human right to benefit from the protection of the moral and material interests of the author is recognized in a number of international instruments. In identical language, article 27, paragraph 2, of the *Universal Declaration of Human Rights* provides: “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.” Similarly, this right is recognized in regional human rights instruments, such as article 13, paragraph 2, of the American Declaration of the Rights and Duties of Man of

²⁴¹ General Comment 17, *supra* note 192 at para 6 [emphasis added].

1948, article 14, paragraph 1 (c), of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (“Protocol of San Salvador”) and, albeit not explicitly, in article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1952 (European Convention on Human Rights).²⁴²

Paragraph 2 says that “intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else”, in contrast to timeless human rights. Further, it explains the difference between intellectual property regimes and intellectual property rights. Only moral interests of authors and creators can coincide with the timeless nature of human rights. Because of this partition of intellectual property rights, paragraph 3 of General Comment 17 states that “it is important not to equate intellectual property rights with the human right recognized in Article 15, paragraph 1(c)” of the ICESCR. However, it certainly does not negate the human rights aspect of intellectual property, although the most recent presentations by the Special Rapporteur in the Field of Cultural Rights show the opposite tendency.²⁴³ This thesis strongly supports the human rights aspect of intellectual property.

3.4 Intellectual Property in the Transition to International Trade

The World Trade Organization²⁴⁴ was established as an intergovernmental organization in 1994, signed by 123 nations. The WTO had 164 nations on 29 July 2016. It augments the earlier GATT.²⁴⁵ All major WTO decisions are made by the whole membership,

²⁴² General Comment 17, *supra* note 192 at paras 2, 3.

²⁴³ See e.g. *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, Copyright policy and the right to science and culture A/HRC/28/57* 24 December 2014 at para 6.

²⁴⁴ Marrakesh Agreement Establishing the WTO, *supra* note 46.

²⁴⁵ The General Agreement on Tariffs and Trade (GATT) 1947 signed by 23 nations and applied through a Protocol of Provisional Applications as of 1 January 1948 was an international treaty predating the *WTO Agreement*. The GATT was revised several times. The GATT 1994 is included as *Annex IA* of the *WTO Agreement*. The original text of GATT contained neither reference to human rights nor reference to IP.

either by Ministers (who meet at least once every two years) or by their ambassadors or delegates (who meet regularly in Geneva). Decisions are normally taken by consensus.

The highest authority in the WTO is the Ministerial Conference. The second level makes the General Council that operates in three guises: The General Council, The Dispute Settlement Body and the Trade Policy Review Board mechanism. The third level of authority makes councils for each broad area of trade, and more. These are the Council for Trade in Goods (Goods Council), the Council for Trade in Services (Services Council) and the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council).²⁴⁶

In his article published in 2008, Chios Carmody stated that although years passed since the WTO came into force “we continue to lack a *legal* theory of the WTO Agreement.”²⁴⁷ Further in that article, Carmody points “that the overarching nature of WTO obligations restricts the ambit of rights.”²⁴⁸ Those points made an introduction to “the idea of WTO law as a regime of *lex specialis*.”²⁴⁹ What makes the WTO law special is the integration of various ‘new’ commodity items, like intellectual property, to the classic list of trading goods, adding interdependence as a new function. Carmody goes further, introducing the term - “a law of interdependence”.²⁵⁰ However, the term ‘interdependence’ had been associated with the creation of the *Universal Declaration of Human Rights*, about half a century earlier (see Chapter 1).²⁵¹

²⁴⁶ Details about WTO organization, structure and operation available online: https://www.wto.org/english/thewto_e/thewto_e.htm

²⁴⁷ Chios Carmody, “A Theory of WTO Law” (2008) 11:3 J Intl Econ L527 at 528.

²⁴⁸ Carmody, *supra* note 247 at 531.

²⁴⁹ Carmody, *supra* note 247 at 549.

²⁵⁰ Chios Carmody, “Interdependence and WTO Law” in Antonio Segura Serrano ed. *The Reform of International Economic Governance* (New York: Routledge, 2016).

²⁵¹ Craig Scott, “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights,” (1989) 27 Osgoode Hall LJ 769

IP protection was embodied into the trade regime by the *WTO Agreement*, whose Annex 1C contains the *TRIPS Agreement*.²⁵² At the same time, IP remained in the environment of the UN both in international human rights law and under the auspices of WIPO. As Margaret Ann Wilkinson states, “[a]lthough inclusion of copyright into the modern international trade environment has been historic, there hasn’t been a “shift” because the newly created global international trade environment for intellectual property did not replace the older public international legal environment for intellectual property.”²⁵³

As noted above, the term IP does not appear in the international human rights law but the concept of protection of IP in human rights has been explicit since the 1948 UDHR. On the other hand, within WIPO - now a specialized agency of the UN - there is no explicit reference to IP rights being administered there as having a human rights component. The instruments providing IP protection in WIPO such as the *Paris Convention* (patent), the *Berne Convention* (copyright and moral rights) and other conventions related to IP such as the *Rome Convention*.²⁵⁴ However, as Helfer and Austin note, “[n]o reference to human rights appear in the Paris, Berne and Rome Conventions, or in the more recently adopted *TRIPS Agreement*.”²⁵⁵

Intellectual property has received considerable attention since IP protection became subject to trade disciplines under the World Trade Organization through the *TRIPS Agreement*. With respect to the definition of IP, the *TRIPS Agreement* declares IP rights to be ‘private’ rights. The TRIPS preamble reads:

²⁵² Marrakesh Agreement Establishing the WTO, *supra* note 46.

²⁵³ Wilkinson, *supra* note 26 at 111.

²⁵⁴ International Convention for the *Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (Rome, 26 October 1961) [*Rome Convention*].

²⁵⁵ Laurence R. Helfer & Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge, UK: Cambridge University Press, 2011) at 32-33.

Recognizing that intellectual property rights are private rights.²⁵⁶

That appears to have added complexity not only in the interpretation but also to the legal implications of dealing with intellectual property: the right to IP is recognized as a human rights in international human rights law (UDHR, ICESCR), and IP rights exist as sui generis monopoly rights within the WIPO administered treaties, and have been characterized as private rights in international trade law.

Commentators have noted that, once IP “crossed over” to international trade, intellectual property rights appeared to conflict with human rights.²⁵⁷ As noted above, the Sub-Commission on Human Rights Resolution 2000/7 alludes to the “apparent conflicts between the intellectual property rights regime embodied in the *TRIPS Agreement*, [...], and international human rights law.”²⁵⁸

However, the monopolies created under treaties such as *Berne* and *Paris*, are economic in nature, a quality that likely contributed to the adoption of IP by the WTO.²⁵⁹ See Figures 2, 3 and 4 below:

²⁵⁶ *TRIPS Agreement*, *supra* note 1, preamble.

²⁵⁷ E.g. Laurence R. Helfer, “Human Rights and Intellectual Property: Conflict or Coexistence?” (2003) 5:1 *Minnesota Intellectual Property Rev* 47.

²⁵⁸ Sub-Commission on Human Rights Resolution 2000/7, *supra* note 5. See David Weissbrodt and Kell Schoff, “Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7” (2003) 5:1 *Minn Intell Prop Rev* 1.

²⁵⁹ Marrakesh Agreement Establishing the WTO, *supra* note 46.

Figure 2: The Evolution of Intellectual Property

Did not Exist Until the Industrial Revolution
19th century agreements to harmonize economic monopolies for inventions (Paris Convention, 1883) and Literary and Artistic Works (Berne Convention, 1886)
Recognized as human right in the UDHR, 1948
Included in WTO Agreement, 1994 as tradable monopoly

Figure 3: IP “crosses’ the line”

Intellectual property not only crossed the line from the UN into international trade in 1994 but also remained strong in the UN

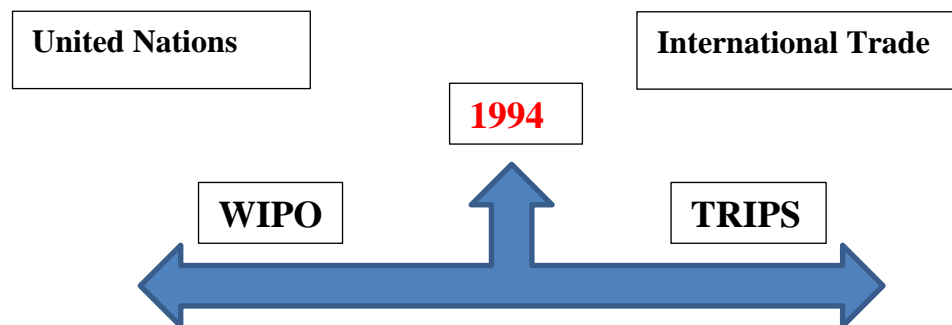


Figure 4: The Turning Point for Intellectual Property

WIPO in 1995 and beyond	World Trade Organization – Annex 1C <i>The Agreement on Trade -Related Aspects of Intellectual Property [TRIPS]</i> since inception in 1994 , in force 1 January 1995
Paris Convention, Berne Convention, Rome convention, Treaty on Intellectual Property in Respect of Integrated Circuits	Article 2 on Intellectual Property Conventions - Incorporates countries' obligations under various WIPO treaties up to 1995 and gives countries the power of trade law in addition to their participation in international human rights law
In 1996 the WIPO Copyright Treaty (WCT) and WIPO Performances & Phonograms Treaty (WPPT) were passed creating new IP rights	Further TRIPS articles create different IP international trade obligations "TRIPS-Plus"

It is not the case that the entire focus of international activity involving IP has moved to the international trade environment. Since 1966, the ICESCR came into force in 1976 and there has been formal recognition of IP as a human right in international human rights law. The UN specialized agency devoted to IP (WIPO) has remained extremely active in the arena of IP rights. When IP protection became part of the *WTO Agreement*, the WTO adopted the text that forms the basis for TRIPS from the substantive IP treaties that existed in WIPO. The term “adopted” is used advisedly because the basis of the *TRIPS Agreement* is incorporation by reference of major substantive IP treaties that exist and continue to exist in WIPO in the UN environment. Since the substance of major provisions of both the UN based and WTO agreements on IP arise from identical text, there is no difficulty of fragmentation.²⁶⁰

²⁶⁰ *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006 (adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10, para. 251).

Indeed, in the very year following the conclusion of the *TRIPS Agreement*, that is in 1996, two treaties²⁶¹ were concluded in the copyright arena by the members of WIPO.

As shown in Table 7, IP falls into three “special regimes”²⁶² of international law: human rights, intellectual property and international trade.

Table 7: IP in the UN and WTO

Dates	International Law	IP Presence	IP Characterization
1948 to present	International Human Rights	UDHR, ICESCR	As human rights
1974 to present	WIPO	Substantively chiefly in pre-WIPO <i>Paris, Berne, Madrid Treaties</i> – also 1996 Copyright Treaty (WCT) and Performances & Phonograms Treaty (WPPT)	As limited term monopolies
1994 to present	WTO	TRIPS	As private rights

3.5 The Current Position of the Right to Intellectual Property in International Law

In comparison to the right to food, the right to IP has been declared in a more distinctive way, having been included (although not labeled “intellectual property”) in both the UDHR and the ICESCR. As observed in Chapter 2 of this thesis, the right to food, on the other hand, in the UDHR, was not declared a right in itself, rather it was included as an element of the right to an adequate standard of living. Unlike the right to food, which was

²⁶¹ Those treaties were *WIPO Copyright Treaty* (WCT), 20 December 1996, 2186 UNTS 121 (entered into force 06 March 2002); *WIPO Performances and Phonograms Treaty* (WPPT), 20 December 1996, 2186 UNTS 203 (entered into force 20 May 2002).

²⁶² Conclusions of the Work of the Study Group on the Fragmentation of International Law, *supra* note 260 at para 13.

declared a fundamental right in the ICESCR, the right to IP has not received this distinction (if we accept the categorization of human rights).²⁶³ Although the UDHR does not rank or divide rights, the only right of all rights in the ICESCR that was declared “fundamental” was the right to food.²⁶⁴

The challenge in defining the right to IP as part of human rights lies in the specific nature of IP rights. While the main point of creating the UDHR was to protect the dignity of each individual human being, the right to IP can have a non-human dimension. IP rights can be ‘detached’ from the author or inventor (individuals) and traded as commodities. Peter Yu takes a step towards resolving conflicting IP and human rights saying: “Thus, instead of inquiring whether intellectual property and human rights conflict or coexist with each other, it is important to distinguish the human rights attributes of intellectual property rights from the non-human rights aspects of intellectual property protection.”²⁶⁵

Laurence Helfer wrote about this ‘conflict’, identifying two different approaches:

The first approach views human rights and intellectual property as being in fundamental conflict. This framing sees strong intellectual property protection as undermining—and therefore as 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.

The second approach to the intersection of human rights and intellectual property sees both areas of law as concerned with the same fundamental question: defining the appropriate scope of private monopoly power that gives 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. This school views human rights law and intellectual property law as essentially compatible, although often

²⁶³ E.g. Willem Grosheide, ed. *Intellectual Property and Human Rights: A Paradox* (Cheltenham, UK: Edward Edgar Publishing, 2010) at 20.

²⁶⁴ ICESCR, *supra* note 68, art 11(2).

²⁶⁵ Peter K. Yu, “Intellectual Property and Human Rights in the Nonmultilateral Era” (2012) 64:4 Fla L Rev 1045 at 1062.

disagreeing over where to strike the balance between incentives on the one hand and access on the other.²⁶⁶

In the scholarly literature, Helfer identifies two common approaches about the intersection between human rights and intellectual property laws. In the first approach, the intersection between human rights and intellectual property laws is viewed as being in “fundamental conflict”. This position is not accepted in this thesis. As this thesis has demonstrated IP is a human right declared in the UDHR. Indeed, this rejection of the first position is ultimately supported by Helfer himself.

Helfer also contrasts the first approach with the second school of views which sees the intersection of human rights and intellectual property as being compatible. Helfer does acknowledge that though compatible there remains concern over balancing between “incentives on the one hand and access on the other.”²⁶⁷

Helfer himself is the proponent of the second approach. He acknowledges that the place of the IP in international law is complex and multifaceted. He recognizes that it has a position in international human rights law and within the scope of both the UN’s WIPO and the international trade environment of WTO. He, nonetheless, believes that it is possible to strike appropriate balances in intellectual property using the mechanisms of both the UN and WTO. This second approach is also arguable because the discussion about “human rights law and intellectual property law” requires explaining the context in which the intersection between human rights and IP rights occurs. In his concluding arguments, Helfer supports the institutional role of the WTO and WIPO in defining the human rights–intellectual property interface. The linkage of IP protection within international trade through the *TRIPS Agreement* allowed IP to gain strength and forced the WTO to adjust the enforcement of obligations against (a majority of) its member

²⁶⁶ Helfer, *supra* note 3 at 48.

²⁶⁷ Helfer, *supra* note 3 at 49 [reference omitted].

states belonging to less and least developed countries.²⁶⁸ The analysis provided in this thesis supports this second approach.

3.6 Conclusion

This chapter explored whether, in the human rights law arena, the right to intellectual property was better articulated than the right to food. It certainly was. A partial reason for this outcome is that the right to intellectual property does not appear as a term in any of the classic human rights law documents. The first appearance of the term is in a regulatory document, occurring in 1967 in the Convention establishing the WIPO.

It seems intellectual property has been better defined in international trade than in international human rights arena. However, the statement in the trade context that “intellectual property rights are private rights” does not extend clarity in definition. On the other hand, it gives the IP the institutional power of the WTO.

Empowered by two institutions –WIPO in the UN and the World Trade Organization in the international trade sphere, IP has gained a greater articulation than the right to food, which remains solely in the UN.

²⁶⁸ See Laurence R. Helfer, “Regime Shifting in the International Intellectual Property System” (2009) 7:1 *Perspectives on Politics* 39.

Chapter 4

- 4 Attempts to Legally Bridge Differences Between Competing Rights
 - 4.1 Introduction
 - 4.2 Right to Health in International Human Rights Law
 - 4.3 Rights of Persons with Disabilities
 - 4.4. Right to Freedom of Expression in the Context of the Rights of Persons with Disabilities
 - 4.5 The Doha Declaration and the Marrakesh Treaty
 - 4.6 Conclusion

4 Attempts to Legally Bridge Differences Between Competing Rights

4.1 Introduction

In this thesis, Hypothesis 2²⁶⁹ posits that the right to IP, as well as the right to health and the rights of persons with disabilities (and freedom of expression in the context of rights of persons with disabilities), have all been better articulated in international law than the right to food.

The final hypothesis, Hypothesis 4,²⁷⁰ in this thesis posits that the right to health has found a better balance with the right to IP through the international trade mechanisms of the *Doha Declaration* than the rights of persons with disabilities (and freedom of expression in the context of the rights of persons with disabilities) have found through their balance with the right to IP in the *Marrakesh Treaty* in the UN's WIPO.

This Chapter has two major parts. The first part comprises sections 4.2 on the right to health in international human rights law, 4.3 on the rights of persons with disabilities and 4.4 on the right to freedom of expression in the context of the rights of persons with disabilities. In this context, it is important to recall, as stated in Chapter 1, that the discussion of freedom of expression will be very limited as it is only being undertaken to contrast this right with the other four rights examined in this thesis (that is, the rights to food, IP, health, and the rights of persons with disabilities). The second part of this chapter is presented in section 4.5 on the *Doha Declaration* and the *Marrakesh Treaty*. It is in the context of the *Marrakesh Treaty* that the right to freedom of expression becomes involved in this thesis.

²⁶⁹ See Chapter 1, Hypothesis 2 (H2).

²⁷⁰ See Chapter 1, Hypothesis 4 (H4).

This thesis examined Hypothesis 2 in Chapter 3 with respect to IP. It will be recalled that this Hypothesis is:

H2. that the right to IP, as well as the right to health and the rights of persons with disabilities (and freedom of expression in the context of rights of persons with disabilities), have all been better articulated in international law than the right to food.

The first part of this chapter will explore Hypothesis 2 with respect to three other rights under examination in this thesis: the right to health, of persons with disabilities and, in context, of freedom of expression.

In this chapter, the exploration of the right to health and the rights of persons with disabilities will be explored in the context of primary instruments of international law. With regard to the concept of freedom of expression, it is understood that the concept of freedom of expression is a very complex and well-studied concept in international law. In this thesis, it is not the intention to add to this body of scholarship directly but rather to touch on aspects of this area in the very limited context of its involvement in the origins of the *Marrakesh Treaty*.

The second part of this chapter focuses on analysis of the *Doha Declaration* and the *Marrakesh Treaty* in relation to Hypothesis 4:

That the right to health has found a better balance with the right to IP through the international trade mechanisms of the Doha Declaration than the rights of persons with disabilities (and freedom of expression in the context of the rights of persons with disabilities) have found through their balance with the right to IP in the *Marrakesh Treaty* in the UN's WIPO.

Indeed, the *Marrakesh Treaty*, emanating from the environment of the World Intellectual Property Organization (WIPO)²⁷¹ will be a focus of the second part of this Chapter. The

²⁷¹ *Convention Establishing the World Intellectual Property Organization* (signed at Stockholm, 14 July 1967, entered into force 26 April 1970, as amended on 29 September 1979) [WIPO].

other focus of the second part of this Chapter will be the *Doha Declaration* emanating from the World Trade Organization (WTO)²⁷² environment.

4.2 Right to Health in International Human Rights Law

The right to health will be explored historically in the international human rights arena just as the right to food was in Chapter 2 and the right to IP was in Chapter 3, looking first at the documents pre-dating the *Universal Declaration of Human Rights* (UDHR).²⁷³

In the Draft Declaration to the UDHR submitted by the Delegation of Chile²⁷⁴ the right to health was included under the right to social security as a state measure for promoting public health. It includes reference to “an adequate standard of living” that needs to be protected against contingencies like “disability” and “ill-health”.²⁷⁵

Similarly, the Panamanian proposal included the right to health in the social security provision:

The state has a duty to maintain or insure that there are maintained comprehensive arrangements for the promotion of health, for the prevention of sickness and accident, and for the provision of medical care and of compensation for loss of livelihood.²⁷⁶

²⁷² Marrakesh Agreement Establishing the WTO, *supra* note 46.

²⁷³ UDHR, *supra* note 9.

²⁷⁴ Inter-American Juridical Committee, Draft Declaration of the International Rights and Duties of Man and Accompanying Report (1946) 40: Presented by the Delegation of Panama, UN Economic and Social Council E/HR/3 (26 April 1946); UN General Assembly A/148 (24 October 1946), art 15.3 AJIL/Am J Intl L Supplement: Official Documents 93-116.

²⁷⁵ *Ibid*, art XVI.

²⁷⁶ *Supra* note 274, *Statement of Essential Human Rights*.

In another approach, the Cuban proposal contained two provisions associated with health without explicitly declaring a right to health: rather, the proposal used the concepts of “the right to live in surroundings free from avoidable disease” and “the right to adequate medical assistance.”²⁷⁷ There is also a provision that links “the right to receive adequate maintenance in the event of ...sickness or chronic illness.”²⁷⁸ This latter formulation appears to resonate with a right described in Chapter 2, above, the right to “[an adequate] standard of living” in the UDHR that already included the case of disability.

The right to health in John P. Humphrey’s first draft of the UDHR appears in Article 35:

Every one has the right to medical care. The State shall promote public health and safety.²⁷⁹

Although Humphrey drafted his right to health as a separate provision, in the final version of the UDHR the right to health appeared under the right to an adequate standard of living for health, including medical care, and, among other rights, the right to security in the event of sickness and disability. It reads as follows:

Article 25(1)

Everyone has the right to **a standard of living adequate for the health** and well-being of himself and of his family, including food, clothing, housing and **medical care** and necessary social services, and the right to security in the event of unemployment, **sickness, disability**, widowhood, old age or other lack of livelihood in circumstances beyond his control.²⁸⁰

In 1966, the right to health was ‘isolated’ from the rest of the rights in the conglomerate provision in the UDHR and was proclaimed as a separate provision of the ICESCR:

²⁷⁷ *The Cuban Delegation to the General Assembly of the United Nations Draft Declaration on Human Rights* (1946) London 12 February 1946, UN ECOSOC E/HR/1, 22 April 1946, arts 13-14.

²⁷⁸ *Ibid*, art 10.

²⁷⁹ Draft Outline of an International Bill of Human Rights (Prepared by the Division of Human Rights of the Secretariat), UN Doc E/CN.4/AC.1/3/; published as Annex in the *U.N. Human Rights Yearbook for 1947* at 484-487 [Humphrey’s Draft], art 35.

²⁸⁰ UDHR, *supra* note 9, art 25(1) [emphasis added].

Article 12(1)

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of **the highest attainable standard of physical and mental health.**²⁸¹

Further, Article 12(2) listed four specific steps needed to be taken to fully realize the right to health, including ensuring “prevention, treatment and control of epidemic, endemic, occupational and other diseases.”²⁸² In the ICESCR, the right to health is separated from the right to food – the right to food remained one amongst a set of rights, whereas the right to health gained its own provision.

See the following two tables for comparison of the right to health as it appears in the UDHR and ICESCR.

Table 8: UDHR: The Right to Health Included in the Right to an Adequate Standard of Living

UDHR
Art 25(1) Right to a standard of living adequate for the health and well-being of himself and of his family, including:
-Food
-Clothing
-Housing
-Medical care
-Necessary social services
-Right to security in the event of
-unemployment
-sickness
-disability
-widowhood
-old age or other lack of livelihood in circumstances beyond his control

Table 9: ICESCR: The Right to Health in a Separate Provision

ICESCR
Art 12(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

²⁸¹ ICESCR, *supra* note 68, art 12(1).

²⁸² ICESCR, *supra* note 68, art 12(2).

Similar tables regarding the right to food appear above in Chapter 2. The right to health was tied in with the right to food in the UDHR. Being separated into its own provision in the ICESCR was a significant definitional advancement for the right to health. This separation brought clarity in articulation of the right to health.

4.3 Rights of Persons with Disabilities

Examination of the rights of persons with disabilities in this thesis will show that there is no real definition of the rights of persons with disabilities except insofar as their meaning can be deduced in light of their relationship to other rights. Therefore, the analysis of the rights of persons with disabilities will be explored in relation to other rights being examined – the rights to food, IP, health and freedom of expression. Taking a historical approach, documents predating the UDHR will be also explored.

In the proposal for the future UDHR submitted by the delegation of Chile, disability was mentioned under the right to social security, in the same provision as the right to health.²⁸³ In the submission by the delegation of Cuba, there is no direct mention of disability. Article 10 in the Cuban Draft refers to “the event of unemployment, sickness or chronic illness” as a condition for social security maintenance.²⁸⁴ There is no mention of disability in any form in the draft by the delegation of Panama.

Similar to the proposals submitted by the delegations of Chile and Cuba, the later Humphrey’s Draft mentioned disability in connection to the right to social security. It reads as follows:

²⁸³ Chilean Submission, *supra* note 8.

²⁸⁴ *The Cuban Delegation to the General Assembly of the United Nations Draft Declaration on Human Rights* (1946) London 12 February 1946, UN ECOSOC E/HR/1, 22 April 1946, art 10.

Article 41

...

The State shall maintain effective arrangements for the prevention of unemployment and for insurance against the risks of unemployment, accident, **disability**, sickness, old age and other involuntary or undeserved loss of livelihood.²⁸⁵

In the final version of the UDHR, disability is embedded in Article 25(1) as one of many elements of “the right to a standard of living adequate for the health and well-being”.²⁸⁶

The right to health advanced most with the adoption of the 1966 ICESCR. It received its own provision. (See again Table 9). The right to freedom of expression, discussed below, found its place in the *International Covenant on Civil and Political Rights* (ICCPR).

There is, however, no mention of the rights of persons with disabilities in either of those Covenants. See Figure 5 below.

²⁸⁵ Humphrey’s Draft, *supra* note 83, art 41.

²⁸⁶ UDHR, *supra* note 9, art 25(1).

Figure 5: Relevant Elements of the 1966 UN Covenants

International Covenant on Civil and Political Rights	International Covenant on Economic, Social and Cultural Rights		
Freedom of Expression	The Right to Health	The Right to Food	The Right to IP
Art 19 2. Everyone 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.	Art 12 1. The States Parties to the present covenant recognize the right to everyone to the enjoyment of the highest attainable standard of physical and mental health	Art 11 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food , clothing and housing, ... 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger , ...	Art 15 1. The States Parties to the present Covenant recognize the right to everyone:.... (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
Note: The right to health received separate provision in the ICESCR while there is no mention of the rights of persons with disabilities			

Thus, after appearing in the UDHR²⁸⁷, rights of persons with disabilities vanished from the 1966 UN human rights covenants,²⁸⁸ but several decades later, the rights of persons with disabilities reappeared in the UN *Convention on the Rights of Persons with Disabilities*.²⁸⁹ The magnitude of the importance of this latter document with respect to human rights has been summarized by the UN itself:

²⁸⁷ UDHR, *supra* note 9, art 25(1).

²⁸⁸ The right of persons with disabilities was only mentioned in the UDHR in Article 25(1) and then it was omitted from both Covenant: the International Covenant on Civil and Political Rights [ICCPR] and the International Covenant on Economic, Social and Cultural Rights [ICESCR].

²⁸⁹ *Convention on the Rights of Persons with Disabilities and Optional Protocol*, 13 December 2006, A/RES/61/106, Annex 1 (entered into force 3 May 2008) [CRPD].

The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007. There were 82 signatories to the Convention, 44 signatories to the Optional Protocol, and 1 ratification of the Convention. This is the highest number of signatories in history to a UN Convention on its opening day. It is the first comprehensive human rights treaty of the 21st century and is the first human rights convention to be open for signature by regional integration organizations. The Convention entered into force on 3 May 2008.²⁹⁰

This document changed “attitudes and approaches to persons with disabilities” making them no longer “objects” of social assistance but “subjects’ with the rights equivalent to the rights established in the international human rights arena. The Convention also reaffirms that “all persons with all types of disabilities must enjoy all human rights and fundamental freedoms.”²⁹¹

Those human rights selected for discussion in this thesis – the right to food, the right to IP, the rights of persons with disabilities (and freedom of expression in the context of the rights of persons with disabilities) – are all re-declared in the *Convention on the Rights of Persons with Disabilities* (CRPD).²⁹² There is nothing significantly different in the texts of these articles from how these rights were articulated in the 1966 Covenants. The rights are expressed in similar, if not the same wording, as in the 1966 Covenants, with emphasis on the need to accommodate specific needs of persons with disabilities. For example, freedom of expression in the CRPD includes access to information “on an equal

²⁹⁰ UN Division for Social Policy and Development: Disability, *Convention on the Rights of Persons with Disabilities* (CRPD), A/RES/61/106 (adopted 3 December 2006, entered into force 3 May 2008) [CRPD]

²⁹¹ UN Division for Social Policy and Development: Disability, *Convention on the Rights of Persons with Disabilities* (CRPD), A/RES/61/106 (adopted 3 December 2006, entered into force 3 May 2008) [CRPD] online:
<<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>>

²⁹² CRPD, *supra* note 289. (Freedom of Expression and Opinion, and Access to Information, art 21; Health, art 25, Adequate Standard of Living and Social Protection (including adequate food), art 28; Participation in Cultural Life, Recreation, Leisure and Sport (protecting intellectual property rights), art 30).

basis with others and through all forms of communication of their choice.”²⁹³ The right to health has the same wording in the CRPD as in the ICESCR (enjoyment of the highest attainable standard of health).²⁹⁴ The right to food in the CRPD, though, has been included in the format that refers to the right to adequate food, similar to Article 11(1) of the ICESCR, while there is no reference to the right to be free from hunger that is stated in Article 11(2) in the ICESCR.²⁹⁵

Amongst the rights explored in this thesis, only the right to IP changes in the CRPD significantly from the way it has previously been expressed in international human rights instruments. First, the term “intellectual property rights” is used in the CRPD which is a new usage in documents in the international human rights arena: previously intellectual property rights were expressed in terms of the rights of authors and inventors.²⁹⁶ Second, the focus in the CRPD is not on the protection of the monopolies granted to inventors or creators or other IP rights holders, but “to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”²⁹⁷ This instance constitutes a profound change, articulating a balancing toward the rights of persons of disabilities and away from the rights of intellectual property rights holders. This focus on access to cultural materials for persons with disabilities as users was an enormous accomplishment toward exercise of users’ rights. The 2006 CRPD forms the basis on which the subsequent *Marrakesh Treaty* was created. The *Marrakesh Treaty* will be discussed in the second part of this chapter.

²⁹³ CRPD, *supra* note 289, art 21.

²⁹⁴ CRPD, *supra* note 289, art 25.

²⁹⁵ CRPD, *supra* note 289, art 28.

²⁹⁶ UDHR, *supra* note 9, art 27(2).

²⁹⁷ CRPD, *supra* note 289, art 30.

With regard to definition of the rights to health, disability and IP, the analysis to this point in this chapter shows that the right to IP has gained the most definitional strength.

4.4 Right to Freedom of Expression in the Context of the Rights of Persons with Disabilities

As was mentioned in Chapter 1, and again in this chapter, the right to freedom of expression will be briefly introduced historically, looking at its development in international human rights law. It is understood that types of expression covered by the right to freedom of expression are wide and significant, as are the many forms of expression that this right protects.²⁹⁸ This introduction will be limited to the context of interaction of the right of freedom of expression with the rights of persons with disabilities and only mentioned in connection with the rights of persons with disabilities with regard to the *Marrakesh Treaty*.

As mentioned in earlier chapters, in 1948, the Commission drafting the *Universal Declaration of Human Rights* had in front of it the *Draft Declaration of the International Rights and Duties of Man* submitted by the delegation from Chile. In that Draft, the right to freedom of expression appears as follows:

Article III

Right to Freedom of Speech and of Expression

Every person has the right to freedom of speech and of expression. This right includes freedom to form and to hold opinions and to give expression to them in private and in public, and to publish them in written or printed form.

...

The right to freedom of speech and of expression includes freedom of access to the sources of information, both domestic and foreign.²⁹⁹

²⁹⁸ See Human Rights Committee, *General Comment No. 34: Article 19: Freedom of Opinion and Expression*, CCPR/C/GC/34 (12 September 2011) [General Comment 34].

²⁹⁹ Inter-American Juridical Committee, *Draft Declaration of the International Rights and Duties of Man and Accompanying Report* (1946) 40:3 AJIL/Am J Intl L Supplement: Official Documents 93-116.

In the proposal from the delegation from Cuba, a source also available to the Commission, the right to freedom of expression was formulated as follows:

Article 3.

The Right to free investigation to enable him to form his opinions, and to express these opinions freely, subject to his being held responsible for his actions.³⁰⁰

The right to freedom of expression was also included in the Statement of Essential Human Rights, a document presented by the delegation of Panama, which John P.

Humphrey, the author of the first UDHR draft, said he referred to the most.³⁰¹ It reads:

Article 3

Freedom of Speech

Freedom of Expression is the right of every one.

The State has a duty to refrain from arbitrary limitation of this freedom and to prevent denial of reasonable access to channels of communication.³⁰²

In an explanation that accompanied this (and every other) article in the Statement “[t]he term “expression” is used in the context of wider coverage than “speech”.³⁰³ It covers freedom of the press and restrains the state from the use of arbitrary censorship.

The first draft of the UDHR created by Humphrey, included the ideas reflected in the Panamanian Statement on freedom of expression:

³⁰⁰ *The Cuban Delegation to the General Assembly of the United Nations Draft Declaration on Human Rights* (1946) London 12 February 1946, UN ECOSOC E/HR/1, 22 April 1946.

³⁰¹ John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (New York: Transnational Publishers, 1984) at 32 (“The best of the texts from which I worked was the one prepared by the American Law Institute, and I borrowed freely from it. This was the text that had been unsuccessfully sponsored by Panama at the San Francisco Conference and later in the General Assembly.”).

³⁰² *Statement of Essential Human Rights Presented by the Delegation of Panama*, UN Economic and Social Council E/HR/3 (26 April 1946); UN General Assembly A/148 (24 October 1946), art 3.

³⁰³ *Statement of Essential Human Rights Presented by the Delegation of Panama*, UN Economic and Social Council E/HR/3 (26 April 1946); UN General Assembly A/148 (24 October 1946), art 3 Comment.

Article 17

Subject only to the laws governing slander and libel, there shall be freedom of speech and of expression by any means whatsoever, and there shall be reasonable access to all channels of communication. Censorship shall not be permitted.³⁰⁴

The last draft of the UDHR altered the provision, such that the final article reads:

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.³⁰⁵

The right to freedom of expression was later included in the International Covenant on Civil and Political Rights (ICCPR). It was expressed as follows:

Article 19(2)

2. Everyone 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.³⁰⁶

Note that the right to freedom of expression was classified as a civil and political right and appears in the ICCPR, while the rights discussed in earlier chapters here – the right to food and the right to IP – were classified as economic or social and included in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

In this thesis, the right to freedom of expression has been observed in its engagement with the first copyright users' treaty – one that is limited to the rights of persons with disabilities: the *Marrakesh Treaty*.

³⁰⁴ [John P. Humphrey], A Draft Outline of an International Bill of Human Rights (Prepared by the Division of Human Rights Secretariat) E/CN.4/AC.1.3/ 4 June 1947 [Humphrey's Draft].

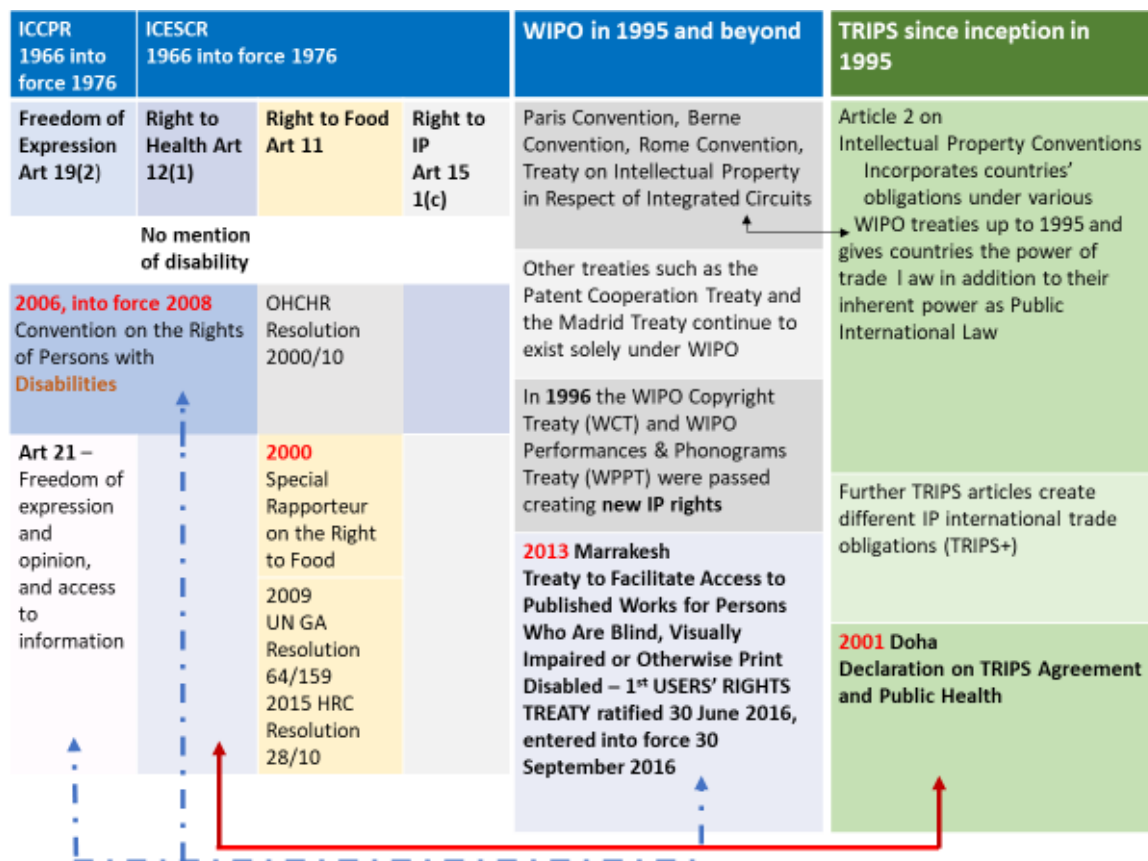
³⁰⁵ UDHR, *supra* note 9, art 19.

³⁰⁶ ICCPR, *supra* note 228, art 19(2).

4.5 The Doha Declaration and the Marrakesh Treaty

In this second half of the chapter, two major instruments that have been created since IP entered trade in 1994 – the 2001 *Doha Declaration* and 2013 *Marrakesh Treaty* -- will be discussed. Figure 6 below restates the relationships between the rights discussed in this thesis and international legal instruments linked to them. Figure 6 presents the position of each of five rights discussed in this thesis in three different legal environments – the 1966 UN Conventions (ICCPR and ICESCR), WIPO, and TRIPS. The Figure illustrates the connection that the *Doha Declaration* and the *Marrakesh Treaty* each make with the rights under study in this thesis. The red arrows represent the connection between TRIPS and the right to health that has been made in the *Doha Declaration*, which links the right to IP in the trade environment with the right to health thus bringing the right to health also with the trade environment. The dotted blue arrows show the links between the *Marrakesh Treaty*, in the UN environment of WIPO (thus involving the right to IP), with the rights of persons with disabilities and freedom of expression.

Figure 6: International Connections Highlighted in the Doha Declaration and the Marrakesh Treaty



The Doha Declaration

At the Fourth WTO Ministerial Conference,³⁰⁷ held at Doha, Qatar, from 9 to 14 November 2001, the *Declaration on the TRIPS Agreement and Public Health*³⁰⁸ was adopted.

³⁰⁷ *The Fourth WTO Ministerial Conference*, online: https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

³⁰⁸ *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, adopted on 14 November 2001 [*Doha Declaration*].

In the Declaration, member states stressed the importance of implementing and interpreting the *TRIPS Agreement* to support public health – by promoting both access to existing medicines and the creation of new medicines.

The *Doha Declaration on TRIPS and Public Health* is designed to respond to the concerns about possible implications of the *TRIPS Agreement* for access to medicines. It emphasizes that the *TRIPS Agreement* does not and should not prevent member governments from acting to protect public health.³⁰⁹ The decisions adopted at the ministerial level regarding the implementation of the *Doha Declaration* clarify some of the forms of flexibility available to states to respond to serious public health issues, including such forms of flexibility as compulsory licensing and parallel importing.³¹⁰

Although the *Doha Declaration* was successfully adopted at the Fourth WTO Ministerial Conference, it could not be implemented immediately. There was a concern that Article 31(f) in the *TRIPS Agreement* might be a barrier to getting drugs into the hands of least-developed countries in accordance with paragraph 6 of the *Doha Declaration*.³¹¹ Article 31(f) addresses the use without authorization of the rights holder, in the patents environment, “predominantly for the supply of the domestic market of the Member authorizing such use”. The 2003 WTO Decision on the Implementation of Paragraph 6 of the *Doha Declaration*³¹² solved this perceived barrier to exporting compulsorily licensed pharmaceuticals to countries with “insufficient or no manufacturing capacities in the pharmaceutical sector” as permitted under the *Doha Agreement* by creating a waiver

³⁰⁹ *Doha Declaration*, *supra* note 12 at para 4.

³¹⁰ *The Doha Declaration Explained*, online:
[<https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm>](https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm) .

³¹¹ *Doha Declaration*, *supra* note 12 at para 6. (“We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the *TRIPS Agreement*. We instruct the Council fo TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.”)

³¹² *Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540/ and Corr. 1, 1 September 2003.

of the Article 31(f) provision on domestic purposes. This Decision has been praised as a form of “transformative justice” because it invokes obligations that “are fundamentally about the way in which countries *will work together in future.*”³¹³

Canada was the first country to actually apply the 2003 WTO waiver on patents and medicine and to put the *Doha Declaration* to the test. It did so when it amended its *Patent Act* in 2004³¹⁴ – a move that was recognized as a historic step by Richard Elliot, Director of Legal Research and Policy of the Canadian HIV/AIDS Legal Network.³¹⁵

After the 2004 Canadian *Patent Act* amendments, Rwanda notified the WTO’s TRIPS Council about its intention to import the HIV/AIDS antiretroviral drug TriAvir from the Canadian company Apotex in 2007. However, the process required both countries, Canada and Rwanda, to make various adjustments in their IP laws before the first shipment of 260,000 packs of Apotex’s TriAvir from Canada reached Rwanda. It took about two years to realize that goal – a time delay that is well illustrated in legal literature.³¹⁶

It should be noted that this Canadian-Rwandan experience illustrates practical engagement of a formal international balancing of fundamental rights: in this case, the right to health and the right to IP. It represents the only such practical application of a formal balancing of competing rights amongst all the rights discussed in this thesis. Thus, there is, in the sole case of the *Doha Declaration*, practical evidence of balancing the other rights with the right to IP.

³¹³ Chios Carmody, “A Theory of WTO Law” (2008) 11:3 J Intl Econ L 527 at 554.

³¹⁴ *Patent Act*, RSC 1985, c P-4.

³¹⁵ Canadian HIV/AIDS Legal Network, “Canada Can Set Global Precedent with Patent Act Changes, but Flaws in Legislation Could Undermine Potential Benefit.” (Toronto, 6 November 2003).

³¹⁶ See Holger P. Hestermeyer, “Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines” (2007) 11:28 Insights, online: ASIL < <https://www.asil.org> >.

The Marrakesh Treaty

The *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled*³¹⁷ has been classified by WIPO as the latest addition to the IP Protection group of treaties.³¹⁸ In fact, it is the first ever users' rights treaty in the world. As Professor Margaret Ann Wilkinson has noted, “*Marrakesh* is historic, because it is the first international treaty focused on users' rights in copyright.”³¹⁹ As such, it represents a significant achievement for balance between competing rights. It invokes a freedom of expression emulating access of users' rights. The *Marrakesh Treaty* balances the rights of users' - persons with disabilities with rights holders' rights. The *Marrakesh Treaty* was adopted in 2013 and entered into force in 2016, although the negotiations started years earlier.³²⁰

The problem addressed by the *Marrakesh Treaty* is put succinctly as follows:

The availability of books in formats that are available to print-disabled persons is estimated between 7% and 20% out of an estimated 2.2. millions of books published per country per year, leaving the more than 314 million blind and visually impaired people in the world in a state of ‘book famine’.³²¹

³¹⁷ *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled*, signed 27 June 2013 (entered into force 30 September 2016, accession by Canada 30 June 2016) [*Marrakesh Treaty*].

³¹⁸ WIPO Administered-Treaties, online: < <http://www.wipo.int/treaties/en/>>.

³¹⁹ Margaret Ann Wilkinson, “International Copyright: Marrakesh and the Future of Users' Rights Exceptions”, in Mark Perry (ed), *Global Governance of Intellectual Property in the 21st Century: Reflecting Policy Through Change*, (Springer, 2016) 107 at 118.

³²⁰ César J Ramirez-Montes, *The Marrakesh Treaty* (EU, 2016) at 11, online: <<http://www.europarl.europa.eu/supporting-analyses/>>.

³²¹ *Ibid*, at 9.

Countries which are now parties to the *Marrakesh Treaty* (including Canada) are required to amend their laws to satisfy the requirements to make published works available in accessible formats to those having a perceptual disability.³²²

Implementation of the *Marrakesh Treaty* is proceeding slowly. Not all those countries that have ratified or acceded to the *Marrakesh Treaty* have amended their domestic laws to reflect their obligations under the *Marrakesh Treaty*. Canada is an example of a state that has done the required implementation into its domestic law.³²³

International treaties do not directly become law within Canada.³²⁴ In anticipation of acceding to the *Marrakesh Treaty*, the Canadian government passed Bill C-11, which received Royal Assent on 22 June 2016 as the *Act to Amend the Copyright Act*.³²⁵

This legislation brought Canada into compliance with its obligations under the *Marrakesh Treaty*. These 2016 amendments have modified various parts of s 32 and s 41.16 of the Canadian *Copyright Act*,³²⁶ the provisions dealing with providing service to those with perceptual disabilities, allowing those persons to exercise the right to

³²² The term “perceptual disability” appeared in the Canadian *Act to Amend the Copyright Act*, 2016.

³²³ See Victoria Owen, Margaret Ann Wilkinson & Margaret Williams, “Managing in Light of *Marrakesh*: Making Materials Available to Canadians with Print Disabilities” (Presentation delivered at the OLA Superconference, 2 February 2017) [unpublished] (In Canada, “the federal government is responsible for treaties (*Constitution Act, 1867*, s 132), but implementation, in areas of exclusive provincial constitutional jurisdiction (See *Constitution Act, 1867*, s 92), cannot be accomplished by the federal government and so signing a treaty, constitutionally, cannot mean that international law is received directly into the law of the provinces...and therefore international law cannot be received directly into Canadian law at all...”).

³²⁴ In Canada, “the federal government is responsible for treaties (*Constitution Act, 1867*, s 132), but implementation, in areas of exclusive provincial constitutional jurisdiction (See *Constitution Act, 1867*, s 92), cannot be accomplished by the federal government and so signing a treaty, constitutionally, cannot mean that international law is received directly into the law of the provinces...and therefore international law cannot be received directly into Canadian law at all...” *Supra* note 321.

See also Laura Barnett, *Canada’s Approach to the Treaty-Making Process* (Ottawa: Library of Parliament, Publication NO. 2008-45-E, 2012).

³²⁵ *An Act to amend the Copyright Act* (access to copyrighted works or other subject-matter for persons with perceptual disabilities) SC 2016, c 4.

³²⁶ *Copyright Act*, RSC 1985, c C-42.

“freedom of expression,” which includes access to information, by receiving published material in a format acceptable for them based on their specific needs. Equally important, the amendments a) clarify and simplify export³²⁷ to other countries of versions of works produced in Canada that now meet the needs of the perceptually disabled in other countries and b) permit Canadian institutions to import,³²⁸ from other countries, versions of works produced elsewhere to meet the needs of the perceptually disabled in Canada.

The passage of the *Marrakesh Treaty* is a demonstration that the linkage between IP protection and international trade law did not eliminate the ability to create new IP treaties.³²⁹ The *Marrakesh Treaty* requires countries to respect the “three step test” which “demonstrates the ubiquity the test has achieved in both public international law and trade law”.³³⁰ The “three step test” is expressed as requiring that each state³³¹

shall confine limitations or exceptions to the rights provided for [in copyright]

- to certain special cases
- that do not conflict with a normal exploitation of the work
- and do not unreasonably prejudice the legitimate interests of the right holder.

³²⁷ *An Act to Amend the Copyright Act*, SC 2016, c4, amending Subsections 32(2) and (3) of the Act.

³²⁸ *Ibid*, amending Section 41.16 of the Act.

³²⁹ *WIPO Copyright Treaty* (WCT), 20 December 1996, 2186 UNTS 121 (entered into force 06 March 2002); *WIPO Performances and Phonograms Treaty* (WPPT), 20 December 1996, 2186 UNTS 203 (entered into force 20 May 2002).

³³⁰ The “three step test” is thoroughly explained in the work of Margaret Ann Wilkinson, “International Copyright: Marrakesh and the Future of Users’ Rights Exceptions”, in Mark Perry (ed), *Global Governance of Intellectual Property in the 21st Century: Reflecting Policy Through Change*, (Springer, 2016) 107-127 at 120.

³³¹ *North American Free Trade Agreement* between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS No 27,32 I.L.M. 289, 605 (entered into force 1 January 1994) (NAFTA), art 1705(5) [*NAFTA Agreement*]; see also *TRIPS Agreement*, *supra* note 1, arts 1,13.

The three step test was included in both the UN³³² and international trade³³³ spaces before it was included in the 2013 *Marrakesh Treaty*.³³⁴ Therefore, the three step test represents an important regulatory requirement that has created a link between the different international legal environments in which the right to IP is given expression: WIPO and the WTO.

4.6 Conclusion

The first part of this thesis focuses on the right to food and the right to IP. As described in Chapter 2, the right to food arose post-WWII in international human rights law and remains there. The right to IP, on the other hand, while expressed in international human rights law post-WWII, had no real presence in the international human rights environment until 1974, much later than the right to food. This is so even though it was the subject of strong multilateral treaties as early as 1883. However, IP rights did not remain solely the subject international human rights law and its instantiation is administered by WIPO.

In 1994, IP made a major entry in the international trade arena through the *TRIPS Agreement* of the WTO, as described in Chapter 3. Here in Chapter 4, three other rights that were given expression post-WWII in international human rights law have been briefly chronicled: the right to health, the rights of persons with disabilities, and the right to freedom of expression in the context of the rights of persons with disabilities.

³³² *WIPO Copyright Treaty* (WCT), 20 December 1996, 2186 UNTS 121 (entered into force 06 March 2002); *WIPO Performances and Phonograms Treaty* (WPPT), 20 December 1996, 2186 UNTS 203 (entered into force 20 May 2002).

³³³ *North American Free Trade Agreement* between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS No 27,32 I.L.M. 289, 605 (entered into force 1 January 1994) (NAFTA), art 1705(5) [*NAFTA Agreement*]; see also *TRIPS Agreement*, *supra* note 1, arts 1,13.

³³⁴ *Marrakesh Treaty*, *supra* note 13, art 11.

As described in the second half of this chapter, states have used two different approaches to address aspects of this international fora.

The first, the *Doha Declaration* represents one way of easing tension in this case between the right to IP and the right to health. The *Doha Declaration* introduced the right to health in trade dialog for the first time and by joining IP in the trade environment created the balance between the right to health and IP that has the power of trade environment behind them.

The second, the 2013 *Marrakesh Treaty* grew out of the tension between IP rights and the rights of persons with disabilities including their rights to access information, which was part of freedom of expression. The *Marrakesh Treaty* stems from WIPO and balances interests in that environment. However, practical implementation of the *Marrakesh Treaty* is yet to come. The fastest signed treaty in the UN, it has not yet gained the traction than the enthusiasm for signing it suggested.³³⁵ Even a country like Canada, that has amended its legislation,³³⁶ is not able to exchange materials internationally to benefit persons with disabilities because no other countries can do this exchange yet.³³⁷

Both the *Doha Declaration* and the *Marrakesh Treaty* are relatively recent instruments. Only the *Doha Declaration* has been put into use, and only once to date.

³³⁵ See Margaret Ann Wilkinson, “International Copyright: Marrakesh and the Future of Users’ Rights Exceptions”, in Mark Perry (ed), *Global Governance of Intellectual Property in the 21st Century: Reflecting Policy Through Change* (Springer, 2016).

³³⁶ *An Act to amend the Copyright Act* (access to copyrighted works or other subject-matter for persons with perceptual disabilities) SC 2016, c 4.

³³⁷ Victoria Owen, Margaret Ann Wilkinson & Margaret Williams, “Managing in Light of Marrakesh: Making Materials Available to Canadians with Print Disabilities” (Presentation delivered at the OLA Super Conference, 2 February 2017). Victoria Owen, Chief Librarian, University of Toronto Scarborough, is also on the Board of the International Federation of Library Associations (IFLA) and is in that context has been appointed (May 17, 2017) to the newly formed WIPO Accessible Book Consortium Board.

Chapter 5

5 Conclusion

This thesis has asked whether a better future balance between competing human rights such as the right to food and the right to intellectual property (IP) may be achieved utilizing international trade mechanisms or by focusing exclusively on the mechanisms available in the UN environment. Ultimately, through exploration of the four hypotheses that guided the research, this study has demonstrated that improved balance between the right to food and the right to IP will be better achieved in the international trade environment than through reliance on the mechanisms available through the UN.

This analysis began by demonstrating the relationships between the right to food and the right to IP as human rights. While food itself is a tangible good and has been traded since the beginning of time, the right to food (an intangible) has been recognized as a human right only relatively recently, with its inclusion in the *Universal Declaration of Human Rights* (UDHR) in 1948. IP, on the other hand, is not a tangible good like food. It has been defined as a product of original human thought and, as such, is intangible. It requires manifestation of that original thought in the material form of a legal monopoly (tangible because it is able to be commoditized, traded and exchanged). It is only through the limited tradable legal monopoly granted to the inventor or the creator or other right holder of the IP that IP becomes tangible. The key similarity with the situation of food, however, as this thesis chronicles, is that the right to IP, like the right to food, an intangible, was like the right to food also first recognized in the international human rights environment of the 1948 UDHR.

As demonstrated in Chapters 2 and 3, definition becomes key to realizing human rights in intangible concepts such as the right to food and the right to IP. The similarities and differences between the concepts of food and IP and the rights to food and to IP, as well as the measure of importance of clearly defining each of these four concepts, are

juxtaposed in Table 10³³⁸ (below). This table draws attention to the fact that the concept of food has had a tangible existence since prehistory and the concept of IP is a much later addition to history and a concept that only becomes tangible through the creation of legally binding monopolies (though typically limited term). It is the right to the tangible food or IP that has been declared an intangible human right since 1948. The table also points to the conclusions from this thesis that recognizing the importance of defining the rights to food and to IP is precursor to achieving balance between these rights in the international law space.

Table 10: Characteristics of Food and IP and Their Associated Rights

Food	Tangible	Tradable since prehistory	Definition not required	IP	Tangible (tradable) legal monopoly	Did not exist until the Industrial Revolution	Definition required
The Right to Food	Intangible	Recognized as part of human rights, in 1948	Definition required	The Right to IP	Intangible	Recognized as human right in 1948	Definition required

Food requires no definition to be recognized since it is inherently tradable. Positioning the IP monopoly rights as tangible requires definition: positioning their normative corollary, the human right to IP, also requires definition. While “food” requires no definition and IP does, just as the right to IP requires definition to be recognized, so too does the right to food: both are inherently intangible (see again Table 10).

As recounted in chapters 1 to 3, the rights both to food and to IP were originally only articulated in the international human rights law space and given form within the UN (within the office of the Special Rapporteur and WIPO, respectively) as opposed to

³³⁸ This new table combines Table 1 and Table 2 from Chapter 1.

within the international trade law space. As is demonstrated in this thesis, of all the rights discussed (the rights to food, IP, health, the rights of persons with disabilities (and freedom of expression limited to the rights of persons with disabilities)), only the right to IP has been received and specifically protected as part of the international trade regime. Specifically, IP, while still remaining part of the UN environment “crossed over” into international trade through the 1994 *TRIPS Agreement*. This linkage with trade law was only made possible for IP by the (tangible) manifestation of IP in declared, tradable legal monopolies. Indeed, in this respect, as discussed in Chapter 3, in TRIPS, IP rights were declared “private rights.” This thesis, again, highlights the importance of definition as a key analytic concept in assessing the relative effectiveness of international law, in the context of international human rights law in the UN generally, and in the context of international trade.

This thesis also focuses on the fact that ever since IP “crossed over” to international trade (while still remaining in UN-based law, including international human rights law), it has benefitted from the power of trade disciplines in addition to its human rights status and expression in WIPO treaties. It is this difference in power – between power created through trade disciplines and power accruing as declared and implemented in international law in the UN – that is a key focus of this thesis. As discussed in this thesis, all of the rights analyzed here, except the right to IP, have solely remained operationalized in the UN, with no corresponding linkage with international trade treaties.³³⁹ This creates the imbalance between the right to IP and the other rights that is a key focus of this thesis. This imbalance, as demonstrated in this thesis, has caused academic concerns. Two approaches to resolving this imbalance have occurred in the international law space and each has been explored in the thesis (see Chapter 4). One is through creation of the *Doha Declaration*, balancing the right to health and the right to IP in the international trade sphere, and the other is through the *Marrakesh Treaty*,

³³⁹ In this thesis, it has been noted that the right to health has a presence through the *Doha Declaration* in an international trade text, but it is only the right to IP that is linked directly in international trade.

balancing the rights of persons with disabilities, and freedom of expression in the context of the rights of persons with disabilities, with the right to IP in the UN sphere.

The first hypothesis set out in this research was that the definition of the right to food lacks clarity. This hypothesis was proven. The in-depth analysis of the right to food provision as it appears in all drafting stages of the *Universal Declaration of Human Rights*, from preliminary sources that were available to the Drafting Committee, to the final version of the UDHR (discussed in Chapter 2 and presented in Appendix B) shows ambiguity in the articulation of the right to food over time. Further testing of the hypothesis in the UN documents subsequent to the UDHR - from the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) to the UN Human Rights Council Resolution 2015 (all described and discussed in Chapter 2 and presented in Appendix C) has also proven the hypothesis that the right to food lacks clarity.

As the thesis describes, the first appearance of the “right to food” in 1948 was its appearance as an included element of the right to an adequate standard of living. In the ICESCR, in addition to the right to adequate food, a new right – the right to be free from hunger – was introduced and qualified as a fundamental right (ICESCR, Article 11(2)). However, this “new” right, the right to be free from hunger, contributed to further diffusion of the definition of the “right to food” (see Appendix C for details). As Chapter 2 establishes, the “right to adequate food” and the “right to be free from hunger” are satisfied differently. The consequence of the division of the right to food into the right to adequate food and the right to be free from hunger has been evident in the two UN resolutions adopted relatively recently: the first was adopted by the UN General Assembly on 18 December 2009,³⁴⁰ and the second Resolution was more recently adopted by the Human Rights Council on 2 April 2015³⁴¹ (see again Appendix C). Both

³⁴⁰ *Resolution Adopted by the General Assembly on 18 December 2009: 64/159. The Right to Food*, A/RES/64/159, 10 March 2010.

³⁴¹ *Resolution Adopted by the Human Rights Council [2015]: 28/10. The Right to Food*. A/HRC/RES/28/10, 2 April 2015.

resolutions have, in their texts, pointed to the UDHR's Article 25(1) on the right to food, and to the right to adequate food and the right to be free from hunger in Article 11 of the ICESCR. The 2009 Resolution strongly supports the right to food as a human right. It also makes a textual connection to international trade by particularly addressing TRIPS and the WTO.³⁴² On the other hand, while repeating the 2009 Resolution statements, the focus of the 2015 Resolution emphasizes the ICESCR's Article 11(2), the right to be free from hunger.

The 2009 Resolution and the 2015 Resolution take different functional approaches. While the 2009 Resolution focuses on the role of the Special Rapporteur on the Right to Food, the 2015 Resolution includes that aspect but the focus of its recommendations is shifted to the work of various organizations, especially the UN's Food and Agricultural Organization (FAO) as a leader in the eradication of hunger.

The division of the right to food into the right to adequate food and the right to be free from hunger, begun in 1966 in the ICESCR, has, by 2015, only created a broader diffusion of the definition of the right to food. Indeed, the thesis demonstrates that the language used to define the right to food in the post-UDHR documents diffused the concept of the right to food even further from the concept of the right to food as it appears in the UDHR. This thesis recommends that the right to food "cross over" into international trade because it will, through the necessities of the drafting environments of international trade treaties, thereby acquire greater and more precise definition.

This thesis also demonstrates that the definition of the right to food currently used in the UN sphere was created by the first Special Rapporteur on the Right to Food and finalized at the end of his mandate (2008). This definition remains the only definition of the "right to food" declared anywhere in international law to this day. Both UN Resolutions on the

³⁴² General Assembly the Right to Food Resolution 2009, *supra* note 75 at para 26 ("Also stresses that States parties to the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights should consider implementing that agreement in a manner supportive of food security, while mindful of the obligation of Member States to promote and protect the right to food." [reference omitted]).

right to food, (the 2009 by reaffirming), and (2015 by acknowledging), accept the concept of the “right to food” in language similar to that found in the definition created by the first Special Rapporteur, but neither contributes to making the definition of the right to food any stronger. However, both resolutions reaffirm the need to make food accessible to persons with disabilities (see Appendix C). The non-binding nature of the UN resolutions has also not enhanced the power of the right to food.

The second hypothesis in this thesis is that the right to IP, as well as the right to health, the rights of persons with disabilities, and the right to freedom of expression, all have been better articulated in international law than the right to food. This hypothesis has also been confirmed.

The right to food is the only right examined that still does not have a clear articulation in the current international human rights law environment. However, because not all of those rights compared with the right to food have the same strength in international law, even those with greater clarity than the right to food do not necessarily thereby appear to have achieved better strength through that definition and recognition. The rights of persons with disabilities, for instance, though better defined than the right to food, are not present in all of the international documents examined in this thesis. The rights of persons with disabilities do not appear in either of the 1966 UN Covenant (the ICCPR or ICESCR).

The right to IP, on the other hand, is the only right in this study that has consistently been portrayed explicitly as a right in itself (although not under the term “intellectual property,” which came into normative documents only relatively recently, as discussed in Chapter 3).

The third hypothesis of this study, that inclusion of IP in international trade law has given the right to IP greater definition as a concept than has occurred for the concepts of other rights under investigation, has been proven. As this thesis has demonstrated, the right to IP is different from other human rights discussed in this thesis because instantiation of the right to IP is positioned not only within UN but, as of 1994, in international trade. This thesis describes the move of IP into the international trade environment and notes that

this extension of IP into the international trade environment did not go unnoticed in the UN environment. The UN Sub-Commission on Human Rights has declared that “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” and it “[r]eminds all Governments of the primacy of human rights obligations over economic policies and agreements.”³⁴³ Also, as noted above in this chapter, in the move into international trade itself, the private rights aspects of IP were emphasized in the text of TRIPS. This emphasis helped justify the legal monopolies of IP as tradable tangibles that could be included in international trade (discussed in Chapter 3). As described in Chapter 3, this declaration is paralleled by literature describing a conflict between intellectual property rights and human rights. It is apparent that there has been a tension between intellectual property rights and other human rights that has become increasingly apparent since the right to IP “crossed over” into international trade, but the research in this thesis demonstrates that this is more a question of the appropriate mechanisms for achieving balance between and among various human rights where they conflict than it is a question of the status of the right to IP as included amongst recognized human rights in international law.

Support for the position taken in this thesis can be found, for instance, in the work of Laurence Helfer, who questions the status of intellectual property as a human right. As noted in Chapter 3, he discusses the complexity of the intellectual property regime that is manifested in the multifaceted nature of the international IP system.³⁴⁴ He describes how this complexity allowed IP to obtain greater power through the move to international trade made in the *TRIPS Agreement*. He notes that, though IP rights gained strength in trade, they also faced the pressure of various NGOs and social groups that ultimately

³⁴³ *Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7*, UNESCOR, 52nd Sess, UN Doc E/CN.4/Sub.2/RES/2000/7, (2000) at paras 2, 3.

³⁴⁴ See Laurence R. Helfer, “Regime Shifting in the International Intellectual Property System” (2009) 7:1 *Perspectives on Politics* 39.

forced the WTO to adjust the enforcement of the IP obligations as against its member states, the majority of which belong to the less and least developed countries (this adjustment is the *Doha Declaration*). This discussion by Helfer, actually, reinforces the thesis of this study, showing that the specific position of the right to IP (supported by both WIPO and the WTO) has given greater power to the right to IP than to other rights (that have remained solely in the UN sphere). His evidence supports the position taken here that the right to IP's dual position in both the UN and international trade raises questions, not about the status of the right to IP as a human right, but about the appropriate mechanisms for achieving balance between and among various human rights where they conflict.

The fourth and final hypothesis shaping this thesis is that the right to health has found a better balance with the right to IP through the international trade mechanism of the *Doha Declaration* than the rights of persons with disabilities (and freedom of expression in the context of the rights of persons with disabilities) have found through their balance with the right to IP in the *Marrakesh Treaty* in the UN's WIPO.

This hypothesis has been tested by analyzing the elements of both the *Doha Declaration* and the *Marrakesh Treaty* (in Chapter 4). This hypothesis has been proven.

The texts of both the *Doha Declaration* and the *Marrakesh Treaty* have been analyzed as potential 'model' international agreements to see whether either can serve as an example for how to achieve future balance between the currently less prominent right to food and other more prominent rights such as the right to IP. The analysis in this thesis has demonstrated that both agreements, although generated in legally different environments (the *Doha Declaration* in international trade and the *Marrakesh Treaty* in the UN-based environment of WIPO) have the same flaws. The *Doha Declaration*, despite its immediate uptake and the power of the WTO mechanisms of enforcement and sanctions, took many years to achieve, even though, as Chios Carmody has noted: "A new 'balance' embodying the emerging global consensus about intellectual property protection was

ready to be struck.”³⁴⁵ The *Doha Declaration* was the first ‘explanatory’ declaration about TRIPS and the first publicly acknowledged derogation from TRIPS by the WTO. The Canada-Rwanda case (described in Chapter 4) remains the only case of the *Doha Declaration* in practice. The adjustments required to be made in domestic law by the two countries putting the *Doha Declaration* to the test in this case took enormous amounts of time, energy and effort. Nonetheless, despite the time taken, the *Doha Declaration*, as Carmody observes, is a “notable example of transformation.”³⁴⁶

The *Marrakesh Treaty*, on the other hand, was generated through the UN’s WIPO. Its creation is also important to this analysis of approaches to re-balancing competing human rights where one of the rights is the right to IP. As detailed in Chapter 4, the *Marrakesh Treaty* has not yet been really proven in practice because it came into force only recently, on 30 September 2016. One of many benefits that are expected of the *Marrakesh Treaty* is that it will open up “free” exchange of published materials for users with perceptual disabilities internationally. Though it is an example of the fastest ever signed treaty – signed by 51 countries by the end of the day it was introduced (27 June 2013)³⁴⁷-- indications are that implementation is proceeding slowly.

The analysis of the *Doha Declaration* and the *Marrakesh Treaty* in this thesis shows that that creating global change in the area of human rights can be accomplished either under the auspices of the UN or through international trade mechanisms. These two international agreements show that efforts by states to create balances between competing rights are possible in both the UN and international trade spaces - when a right is expressed in both spaces. The only example currently of such a right is the right to IP. The balancing of rights of unequal prominence and power is also possible. However, this

³⁴⁵ Chios Carmody, “A Theory of WTO Law” (2008) 11:3 J Intl Econ L 527 at 552.

³⁴⁶ Carmody, *supra* note 250 at 551.

³⁴⁷ Margaret Ann Wilkinson, “International Copyright: Marrakesh and the Future of Users’ Rights Exceptions”, in Mark Perry (ed), *Global Governance of Intellectual Property in the 21st Century: Reflecting Policy Through Change*, (Springer, 2016) at 118.

thesis has highlighted the relationship between a clear definition of a right and and increased prominence on the international stage. The analyses in Chapters 2 and 3 demonstrate that the right to IP, by linking with trade disciplines through the *TRIPS Agreement*, acquired a stronger definition and, later, the right to health, in also entering into the trade space through the text of the *Doha Declaration*, also gained definitional clarity.

Although the question of food as a tangible, tradable commodity has been dealt with in the GATT and the WTO, the intangible right to food has not. This thesis demonstrates that if the right to food becomes included in the international trade space, it too (like the right to IP and the right to health) will necessarily acquire clearer definition than it now has.

Although the right to food remains poorly articulated in international human rights law, because its current definition embraces at least two different and competing articulations (the right to adequate food and the right to be free from hunger), given the example of the newly articulated presence of the right to health in international trade (through the *Doha Declaration*), it may not be long before the right to food gains clarity of articulation if its current absence from the international trade environment is ended through international negotiation and then agreement such as led to the *Doha Declaration*.

To answer the question from the beginning of this thesis about whether future balancing between the competing human rights of the right to food and the right to intellectual property may be achieved better by utilizing international trade mechanisms (as proven possible through the *Doha Declaration* currently involved in the balance between the rights to health and to IP) or by focusing exclusively on the mechanisms of the UN such as WIPO (as also proven possible, through the *Marrakesh Treaty* currently involved in the balancing of the rights of persons with disabilities (and of freedom of expression) with the right to IP)), this thesis concludes that future balancing between the right to food and the right to intellectual property will occur most effectively in the international trade environment.

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Appendix A: Provisions with Reference to Human Rights in the UN Charter

Preamble

We the people 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.

...

Article 1

The Purposes of the United Nations are:

- ... (3) 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.

...

Article 13

(1) The General Assembly shall initiate studies and make recommendations for the purpose of:

- ... (b) promoting international co-operation in the economic, social, cultural, educational, and **health fields**, and assisting in the realization of **human rights and fundamental freedoms for all** without distinction as to race, sex, language, or religion”

...

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:

- ... (c) universal respect for, and observance of, **human rights and fundamental freedoms for all without distinction** as to race, sex, language, or religion

...

Article 62

- ... (2) It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all”);

...

Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions

...

Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

- ... (c) to encourage respect for **human rights and for fundamental freedoms for all** without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world;

Appendix B: Development Stages of the *Universal Declaration of Human Rights* and the Right to Food

The Right to Food		
Source Instruments	Preliminary Stage: Provisions	Mention of the Right to Food
<p>“Draft Declaration of the International Rights and Duties of Man” Inter- American Juridical Committee - Chilean proposal</p>	<p>Article XVI RIGHT TO SOCIAL SECURITY Every person has the right to social security. The state has the duty to assist all persons to attain social security. To this end the state must promote measures of public health and safety and must establish systems of social insurance and agencies of social cooperation in accordance with which all persons may be assured an adequate standard of living and be protected against the contingencies of unemployment, accident, disability and ill-health and the eventuality of old age.</p>	<p>No mention of the right to food; mention of adequate standard of living</p>
<p>“Draft Declaration on Human Rights” Cuban proposal to ECOSOC to serve as a “working document” for the Human Rights Commission, dated 12 February 1946 E/HR/1 22 April 1946</p>	<p>Every human being shall have the following rights: ... Clause 10 The right to receive adequate maintenance in the event of unemployment, sickness or chronic illness, to meet his own and his family's material and spiritual needs. Clause 11 The right to adequate food. Clause 12 The right to hygienic living conditions and to clothing suitable for the climate in which he lives. Clause 13 The right to live in surroundings free from avoidable diseases. Clause 14 The right to adequate medical assistance</p>	<p>Explicit – the right to adequate food – separate clause</p>
<p>“Statement of Essential Human Rights” The American Law Institute (ALI) - Delegation of Panama proposal to ECOSOC 24 April 1946 E/HR/3 and to the UN GA 24 October 1946 A/148</p>	<p>Article 14. FOOD AND HOUSING Every one has the right to adequate food and housing. The state has a duty to take such measures as may be necessary to insure that all its residents have an opportunity to obtain these essentials. Article 15. SOCIAL SECURITY Every one has the right to social security. ate has a duty to maintain or insure that there are maintained comprehensive arrangements for the promotion of health, for the prevention of sickness and accident, and for the provision of medical care and of compensation for loss of livelihood.</p>	<p>Explicit -the right to adequate food (and housing)</p>

Source Instruments	Drafting Stage: Provisions	Mention of the Right to Food
The “Humphrey Draft” A Draft Outline of International Bill of Human Rights – John Humphrey E/CN.4/AC.1/3/4 June 1947	<p>Article 35. Every one has the right to medical care. The State shall promote public health and safety.</p> <p>Article 41. Every one has the right to social security. The State shall maintain effective arrangements for the prevention of unemployment and for insurance against the risks of unemployment, accident, disability, sickness, old age and other involuntary or undeserved loss of livelihood.</p> <p>Article 42 Every one has the right to good food and housing and to live in surroundings that are pleasant and healthy.</p>	Explicit
“The Cassin Draft” Revised June 1947	<p>Art. 37. Human labour is not a chattel. It must be performed in suitable conditions. It must yield a decent standard of living to the worker and his family.</p> <p>Art. 39. Every human being has the right to assistance from the community to protect his health. General measures should, in addition, be taken to promote public hygiene and the betterment of housing conditions and nutrition.</p> <p>Art. 40. Every person has the right to social security. The community should take steps to prevent unemployment and to organize with contributions from those concerned insurance against disability, illness, old age and all other involuntary and undeserved loss of work or livelihood.</p>	Omitted Instead -mention of a decent standard of living; the betterment of housing condition and nutrition
“The June 1947 Human Rights Commission Draft” Revised by the Full Commission	<p>Article 30 Human labour is not a merchandise. It shall be performed in good conditions and shall secure a decent standard of living to the worker and his family.</p> <p>Article 33 Every one, without distinction as to economic or social conditions, has a right to the highest attainable standard of health. The responsibility of the State and community for the health and safety of its people can be fulfilled only by provision of adequate health and social measures. [The drafting committee suggested that each article referring to economic and social rights should be referred to the appropriate specialized agencies for their consideration and comment.]</p> <p>Article 34 Every one has the right to social security. To the utmost of its possibilities, the State shall undertake measures for the promotion of full employment and for the security of the individual against unemployment, disability, old age and all other loss of livelihood for reasons beyond his control. Mothers and children have the right to special regard, care and resources.</p>	Omitted Instead -mention of a decent standard of living; provision of adequate health

<p>“The Geneva Draft” December 1947</p>	<p>Article 24(1) Every one has the right to receive pay commensurate with his ability and skill, to work under just and favourable conditions and to join trade unions for the protection of his interests in securing a decent standard of living for himself and his family.</p> <p>Article 25 Every one without distinction as to economic and social conditions has the right to the preservation of his health through the highest standard of food, clothing, housing and medical care which the resources of the State or community can provide. The responsibility of the State and community for the health and safety of its people can be fulfilled only by provision of adequate health and social measures.</p> <p>Article 26(1) Every one has the right to social security. The State has a duty to maintain or ensure the maintenance of comprehensive measures for the security of the individual against the consequences of unemployment, disability, old age and all other loss of livelihood for reasons beyond his control.</p>	<p>Implied -mention of a decent standard of living; -the right to the preservation of health through the highest standard of food</p>
<p>“The Lake Success Draft” June 1948</p>	<p>Article 22(1) Everyone has the right to a standard of living, including food, clothing, housing, and medical care, and to social services, adequate for the health and well-being of himself and his family and to security in the event of unemployment, sickness, disability, old age, or other lack of livelihood in circumstances beyond his control.</p>	<p>Implied</p>
<p>“The Third Committee Draft” -Text of the Third Committee</p>	<p>Article 22(1) Everyone has the right to a standard of living adequate for the health and well-being of his family and himself, including food, clothing, housing and medical care and necessary social services and to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.</p>	<p>Implied</p>
<p>- Text of the Subcommittee December 1948</p>	<p>Subcommittee: Article 22(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.</p>	<p>Implied</p>
<p>Source Instrument</p>	<p>Final Stage: Provisions</p>	<p>Mention of the Right to Food</p>
<p>Universal Declaration of Human Rights adopted 10 December 1948</p>	<p>Article 25(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.</p>	<p>Implied</p>

Appendix C: The Right to Food in UN Sources Post *Universal Declaration of Human Rights*

The Right to Food		
Source Instruments	Provisions	Mention of the Right to Food
International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966, entered into force in 1976	<p>Article 11</p> <p>1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.</p> <p>2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:</p> <p>(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;</p> <p>(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.</p>	<p>New attribute in comparison to UDHR:</p> <p>-adequate food</p> <p>Introducing new fundamental right: free from hunger</p> <p>Implementation: methods</p>
Committee on Economic, Social and Cultural Rights General Comment No. 12 (1999)	<p>6. The right to adequate food 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. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters. Adequacy and sustainability of food availability and access.</p>	<p>The right to adequate food realization</p> <p>What the right to adequate food is not</p>
Special Rapporteur on the Right to Food – Jean Ziegler, Commission on Human Rights Economic, Social and Cultural Rights E/CN.4/2001/53 7 February 2001	<p>The right to food is the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear</p>	<p>First definition of the right to food – named ‘definition’</p>

<p>Jean Ziegler, Final Report</p> <p>A/HRC/7/5 10. January 2008</p>	<p>The right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.</p>	<p>Minor changes in wording: --unrestricted access instead of --free access</p>
<p>Special Rapporteur on the Right to Food – Olivier De Schutter</p> <p>A/HRC/25/57 24 January 2014</p>	<p>The right to food is the right of every individual, alone or in community with others, to have physical and economic access at all times to sufficient, adequate and culturally acceptable food that is produced and consumed sustainably, preserving access to food for future generation.</p>	<p>This is the reiteration of the right to food as explained in General Comment No. 12</p>
<p>Special Rapporteur on the Right to Food – Hilal Elver</p> <p>Human Rights Council 28th Sess. Geneva, 9 March 2015</p>	<p>The right to food is enshrined in international human rights law with States obliged to ensure its progressive realization, through the development of supportive domestic and national legislation. States are responsible for respecting, protecting and fulfilling the right to adequate food for its citizens.</p>	<p>This resonates the States obligations as in ICESCR and General Comment No. 12</p>
<p>Resolution adopted by the UN General Assembly on 18 December 2009</p> <p>A/RES/64/159</p>	<p>2. Also reaffirms the right of everyone to have access to safe, sufficient and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger, so as to be able to fully develop and maintain his or her physical and mental capacities.</p> <p>7. Reaffirms the need to ensure that programmes delivering safe and nutritious food are inclusive of and accessible to persons with disabilities.</p>	<p>First time mention: access to safe, sufficient and nutritious food – resonates the definition created by the Special Rapporteur</p> <p>First time combined rights - the right to adequate food and -the fundamental right to be free from hunger</p> <p>First time reaffirms the rights of persons with disabilities</p>
<p>Resolution adopted by the Human Rights Council</p> <p>2 April 2015 A/HRC/RES/28/10</p>	<p><i>Acknowledging</i> that the right to food is the right of every individual, alone or in community with others, to have physical and economic access at all times to sufficient, adequate and culturally acceptable food that is produced and consumed sustainably preserving access to food for future generations.</p> <p>2. Also reaffirms the right of everyone to have access to safe, sufficient and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger, so as to be able to fully develop and maintain his or her physical and mental capacities.</p> <p>10. Reaffirms the need to ensure that programmes delivering safe, sufficient, nutritious and culturally accepted food are inclusive and accessible to persons with disabilities.</p>	<p>Resonates the definition created by the First Special Rapporteur on the Right to Food</p> <p>Reaffirms the rights of persons with disabilities</p>

Appendix D: Relevant Provisions of the *Universal Declaration of Human Rights* (1948)

Preamble

Whereas 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,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and **freedom from fear and want** has been proclaimed as the highest aspiration of the common people,

...

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

...

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that **every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms** and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

...

Article 3.

Everyone has the right to life, liberty and security of person.

...

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

...

Article 22.

Everyone, as a member of society, has **the right to social security** and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, **of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.**

...

Article 25.

(1) Everyone has **the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security** in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

...

Article 27.

(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.**

Appendix E: The Right to Intellectual Property – Development Stages from UDHR to ICESCR

The Right to Intellectual Property (IP)		
Source Instruments	Preliminary Stage: UDHR	Mention of the Right to IP
<p>“Draft Declaration of the International Rights and Duties of Man” Inter- American Juridical Committee - Chilean proposal</p>	<p>Article XV</p> <p>RIGHT TO SHARE IN BENEFITS OF SCIENCE</p> <p>Every person has the right to share in the benefits accruing from the discoveries and inventions of science, under conditions which permit a fair return to the industry and skill of those responsible for the discovery or invention.</p> <p>The state has the duty to encourage the development of the arts and sciences, but it must see to it that the laws for the protection of trademarks, patents and copyrights are not used for the establishment of monopolies which might prevent all persons from sharing in the benefits of science. It is the duty of the state to protect the citizen against the use of scientific discoveries in a manner to create fear and unrest among the people.</p>	<p>- the right to share in benefits of science</p>
Source Instruments	Drafting Stage: UDHR	Mention of the Right to IP
<p>The “Humphrey Draft” A Draft Outline of International Bill of Human Rights – John Humphrey E/CN.4/AC.1/3/4 June 1947</p>	<p>Article 44</p> <p>Every one has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science</p>	<p>- the right to share in benefits of science</p>
<p>“The Cassin Draft” Revised June 1947</p>	<p>Article 42</p> <p>Every person has the right to a fair share of rest and leisure and to a knowledge of the outside world.</p> <p>Every person has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science.</p> <p>Article 43</p> <p>The authors of all artistic, literary and scientific works and inventors shall retain, in addition to the just remuneration of their labour, a moral right to their work or discovery which shall not disappear even after such work or discovery has become the common property of mankind.</p>	<p>-the right to share in benefits of science</p> <p>-first time introduced a moral right the right without term limitation</p>
<p>“The June 1947 Human Rights Commission Draft” Revised by the Full Commission</p>	<p>Article 35</p> <p>Every one has the right to participate in the cultural life of the community, to enjoy the arts, and to share in the benefits that result from scientific discoveries</p>	<p>the right to share in benefits from scientific discoveries</p>

<p>“The Geneva Draft” December 1947</p>	<p>Article 30 Every one has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits that result from scientific discoveries</p>	<p>the right to share in the benefits from scientific discoveries</p>
<p>“The Lake Success Draft” June 1948</p>	<p>Article 25 Everyone has the right to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement</p>	<p>the right to share in scientific advancement</p>
<p>“The Third Committee Draft” -Text of the Third Committee December 1948</p>	<p>Article 25 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.</p>	<p>-the right to share in scientific advancement -protection of moral and material interests</p>
<p>Source Instrument</p>	<p>Final Stage: UDHR</p>	<p>Mention of the Right to IP</p>
<p><i>Universal Declaration of Human Rights adopted 10 December 1948</i></p>	<p>Article 27 (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.</p>	<p>-the right to share in scientific advancement and its benefits -the right to the protection of the moral and material interests</p>
<p>Source Instrument</p>	<p>ICESCR: Provision</p>	<p>Mention of the Right to IP</p>
<p>International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, in force 1976</p>	<p>Article 15 The States 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. 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.</p>	<p>-the same wording as in the UDHR -the right to benefit from the protection of the moral and material interests</p>

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