Protection of intellectual property rights as human rights in international law

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1 Introduction

This article analyses specific international human rights instruments that may be useful in the interpretation of section 25 (the property clause) of the Constitution of the Republic of South Africa, 1996, (the Constitution) as regards the constitutional recognition and protection of intellectual property (IP) rights. It does not deal with intellectual property treaties in any detail, but only human rights instruments, and addresses only those IP rights generally recognised and protected as property in private law. The following definition of IP suffices:

> The term intellectual property encompasses the right to control the use of the fruits of intellectual endeavour, that is, the products of the mind. Intellectual property takes the form of inventions which are protected as patents, designs of articles which are registered as designs, literary, artistic and other works which are protected by copyright and product brands which are protected by registration as trademarks or under the common law remedy of passing off.[1]

Section 39(1)(b) of the Constitution compels courts to consider international law in the interpretation of the Bill of Rights.[2] In the area of human rights law,

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[1]Dean 'The case for the recognition of intellectual property in the Bill of Rights' (1997) 60 *THRHR* 105.

[2]Hopkins 'Can customary international law play a meaningful role in our domestic legal order: A short case study to consider' (2005) 30 *SAYIL* 278.

courts are required to consult applicable international law instruments, even where South Africa is not a party to the agreement.[3] This means that all applicable international law instruments must be considered in determining whether IP rights and other intangible interests may be included under the constitutional property concept; and also to resolve possible conflicts between the rights granted in the Bill of Rights.

In international law, the right to property and the right to IP are treated differently. While both are protected under the Universal Declaration of Human Rights[4] (UDHR), only the right to IP has subsequently been entrenched in the International Covenant on Economic, Social and Cultural Rights[5] (CESCR). The right to property has not been made binding in any further covenants. The right to property is not mentioned in the CESCR[6] or in the International Covenant on Civil and Political Rights[7] (ICCPR) – the treaties that convert the human rights in the UDHR[8] into legally binding commitments.[9] This omission may be attributed to 'cold-war politics and concerns raised by Socialist countries'.[10] Article 17 of the UDHR protects property rights in the following terms:

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[3]*S v Makwanyane* 1995 3 SA 391 (CC) pars 12-17, 34-36, 39; *Government of the RSA v Grootboom* 2000 1 SA 46 (CC); Hopkins n 2 above; Botha and Olivier 'Ten years of international law in the South African courts: Reviewing the past and assessing the future' (2004) 29 *SAYIL* 44-47, especially 44 n 12: 'It should be noted that s 35 contains the somewhat unfortunate phrase "where applicable" which allowed courts an "out" simply by finding that international law was not applicable. This phrase was fortunately omitted from s 39 of the 1996 Constitution.' It is worth noting that there has been some debate on what international law courts are permitted to consider under s 39(b) of the Constitution of the Republic of South Africa, but there is more or less agreement now that at least international human rights law, but probably also international law in general would be included; see Botha and Olivier above 45 n 21; Dugard 'International law and the Final Constitution' (1995) 11 *SAJHR* 243: 'If South African courts are permitted to have regard to all these sources of international law (art 38 of the ICJ Statute), including international human rights treaties to which South Africa is not a party, they will be able to draw on the whole field of international human rights law').

[4]United Nations Universal Declaration of Human Rights GA res 217 A (III), UN Doc A/810 at 71 (1948) – (UDHR).

[5]United Nations International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3 (1976) – (CESCR).

[6]*Ibid.*

[7]United Nations International Covenant on Civil and Political Rights 999 UNTS 171 (1976), entered into force 23 March 1976 – (ICCPR).

[8]UDHR n 4 above.

[9]Grgić, Mataga, Longar and Vilfan *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols* (2007) 5.

[10]Yu 'Ten common questions about intellectual property and human rights' (2007) 23 *Ga St ULR* 733. Also see Yu 'International rights approaches to intellectual property: Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis LR* 1029-1149, 1086-1088.

(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall arbitrarily be deprived of his property.[11]

As regards intangible property interests not regarded as IP, a measure of guidance may be found for the construction of the right to property in the European Convention on Human Rights[12] (ECHR). These intangible property interests include commercial information, confidential information, trade secrets, and digital copyright.[13] Further, biotechnological products, traditional knowledge, commercial property, the so-called 'new property' or participatory-claim rights, and non-proprietary rights, are examples of intangible property interests that do not necessarily fall under the recognised IP categories. There are also non-proprietary rights such as contractual claims that are not accepted as property in private law, but which may possibly enjoy constitutional protection because they are recognised and protected under other areas of private law and arguably involve property-like patrimonial interests. Domain names,[14] plant breeders' rights,[15] geographical indications,[16] and virtual property[17] are further examples of intangible property that do not necessarily form part of the recognised categories of IP. However, for purposes of this article the focus will fall only on IP rights.

In interpreting section 25 of the Constitution to determine which aspects of intellectual property are deserving of constitutional protection, it is useful to discuss the emerging human rights framework being developed for IP rights in international law. Suggestions for such a framework include different approaches to resolving conflicts between IP rights and fundamental human

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[11]UDHR n 4 above.
[12]Council of Europe The European Convention on Human Rights 213 UNTS 221 Protocol 1 (signed at Paris 20 March 1952). Article 1 provides: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The proceeding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'
[13]Ciro 'The scarcity of intellectual property' (2005) 1 *JILT* 7.
[14]See Hurter 'The international domain name classification debate: are domain names "virtual property", intellectual property, property, or not property at all?' (2009) 42/3 *CILSA* 287-308.
[15]See Collier 'Access to and control over plant genetic resources for food and agriculture in South and Southern Africa: How many wrongs before a right?' (2006) 7 *Minn J L Sci and Tech* 529-564.
[16]See Hughes J (moderator) and Beresford, Kur, Plevan and Scafidi (panellists) 'Symposium: Panel II: That's a fine Chablis you're not drinking: The proper place for geographical indications in trademark law' (2007) 17 *Fordham Intell Prop Media and Ent LJ* 933-692.
[17]See Erlank 'Acquisition of ownership inside virtual worlds' (2013) 46/3 *De Jure* 770-782.

rights; resolving such conflicts is essential to ensure that IP rights develop in a way that will promote other human rights. However, before discussing this framework and its implications for South Africa, a brief overview of the application of international law in South African law is necessary.

2 The role of international human rights law in South African constitutional law

Before South Africa's constitutional reform, international law was largely irrelevant in South African courts' development of human rights law.[18] While South Africa signed and ratified the United Nations Charter in 1945, the Charter and its principles requiring universal respect for and observance of fundamental human rights for all persons (arts 55 and 56) were not incorporated into South African law. The National Party government subsequently refused to become party to any human rights treaty,[19] and apartheid legislation violated many rights recognised under the UDHR.[20] The human rights clauses in the Charter could not be directly invoked by South African courts.[21] Although South African courts could still use customary international law where it did not conflict with legislation, the common law or precedent, this was seldom done.[22] Some reasons for this may be that the courts were unfamiliar with international law, unaware of the importance of human rights norms, and negative towards the international human rights movement due to the isolation it created for South Africa.[23]

The Constitution of the Republic of South Africa, 1996, assigns a more

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[18]Botha and Olivier n 3 above 42.

[19]Dugard 'The role of the international law in interpreting the bill of rights' (1994) 10 *SAJHR* 208 mentions the following as examples: ICCPR n 7 above; United Nations International Convention on the Elimination of all Forms of Racial Discrimination 660 UNTS 195 (1969); United Nations International Covenant on the Elimination of Discrimination against Women 1249 UNTS 13 (1981); United Nations Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment 1468 UNTS 85 (1984).

[20]UDHR n 4 above.

[21]Dugard n 19 above 209. See *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 3 SA 150 (A) 161B-D, where the court stated that 'it is common cause, and trite law I think, that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process'. See also Dugard *International Law: A South African perspective* 4 ed (2011).

[22]Dugard n 19 above 208-209 mentions the following as examples where the courts held that the UDHR did not form part of customary international law: *S v Petane* 1988 3 SA 51 (C) 58G-J; *S v Rudman* 1989 3 SA 368 (E) 376A-B.

[23]Dugard n 19 above 210.

important role to international law,[24] particularly in the area of human rights law.

> There are a number of provisions in our Constitution which deal with international law. These provisions are essentially divided into two broad categories; on the one hand there are provisions in the Constitution which allow our domestic courts to make use of international law for the purposes of interpreting existing domestic legal provisions, whilst on the other hand, there are provisions which directly incorporate certain rules of international law into our own body of domestic law.[25]

The incorporating provisions are the following: Section 232 proclaims that 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. Section 231(2) provides that an international agreement 'binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)' which provides that '[a]n international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.' Subsection (4) further states: 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.[26]

In *Claassen v Minister of Justice and Constitutional Development* 2010 6 SA 399 (WCC), a decision on unlawful incarceration, the court referred to section 9 of the ICCPR,[27] section 5 of the ECHR,[28] and article 12 of the South African Bill of Rights.[29] Binns-Ward J stated that the ICCPR is not a self-executing legal instrument in that its provisions do not form part of domestic law without having been incorporated into the municipal law.[30] Presumably, this would be

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[24]Botha and Olivier n 3 above 42; Scholtz 'A few thoughts on section 231 of the South African Constitution, Act 108 of 1996' (2004) 29 *SAYIL* 202-203; Hopkins n 2 above 278.
[25]Hopkins n 2 above 278.
[26]On the issue of self-executing provisions, see Ngolele 'The content of the doctrine of self-execution and its limited effect in South African law' (2006) 31 *SAYIL* 141-172.
[27]ICCPR n 7 above.
[28]The European Convention on Human Rights n 12 above.
[29]Constitution of the Republic of South Africa, 1996.
[30]*Claassen v Minister of Justice and Constitutional Development* 2010 6 SA 399 (WCC) par 36. See Botha 'The broader influence of the International Covenant for the Protection of Civil and Political Rights in South African municipal law: Do we need incorporation?' (2010) 35 *SAYIL*

true of the CESCR as well. South Africa ratified the CESCR on 12 February 2015 and the Depository Notification[31] reads:

> The Covenant will enter into force for South Africa on 12 April 2015 in accordance with its article 27(2) which reads as follows: 'For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession'.

However, for purposes of this article, the interpreting provisions are more important. Section 39 of the Constitution makes it clear that international law has an important role to play in the interpretation of the Bill of Rights by providing: '39(1) When interpreting the Bill of Rights, a court, tribunal or forum – (b) must consider international law …'. Section 233 of the Constitution gives constitutional form to the common-law presumption that legislation must be interpreted in line with international law: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. This indicates that the South African intellectual property statutes[32] must also be interpreted in line with international law, which strengthens South Africa's obligation to ensure that intellectual property rights comply with the international human rights framework.

Since 1994, South African courts have considered decisions of the European Commission and the Court of Human Rights, as well as views of the United Nations Human Rights Committee and United Nations reports on issues of human rights.[33] Courts must also consider treaties to which South Africa is not

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270-277 on the implications of this case for international law, especially at 274 n 27: 'Clearly the ICCPR does not fall within the ambit of s 231(3) of the Constitution in that it required (at least in South Africa's case) both accession and ratification, while s 231(3) pertinently applies to treaties which do *not* require accession or ratification.'

[31] United Nations C.N.23.2015.TREATIES-IV.3 (Depositary Notification) available at http://www.seri-sa.org/images/ICESR_CN_23_2015-Eng.pdf.

[32] The Copyright Act 98 of 1978 (and statutes dealing with related rights), the Patents Act 57 of 1978, the Trade Marks Act 194 of 1993, the Industrial Designs Act 195 of 1993, and the Plant Breeders' Rights Act 15 of 1976.

[33] See Botha and Olivier n 3 above 43-54 for examples and discussions of human rights-related cases which mention the applicability of international law: *S v Makwanyane* 1995 3 SA 391 (CC); *S v Williams* 1995 7 BCLR 861 (CC); *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 (CC); *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC); *Bernstein v Bester NNO* 1996 2 SA 751 (CC); *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC); *Ex Parte Gauteng Legislature: In Re Gauteng School Education Bill* 1996 3 SA 165 (CC); *Azanian Peoples Organization (AZAPO) v President of the Republic of*

a party in cases where the interpretation of the Bill of Rights is in issue.[34] The decision of Yacoob J in *Government of the RSA v Grootboom* 2000 1 SA 46 (CC) is particularly enlightening as regards the role of international law:

> The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it will be directly applicable.[35]

This particular dicta is viewed as providing an important qualification to the decision of Chaskalson P in *S v Makwanyane* 1995 3 SA 391 (CC), which set out the basic approach that courts should follow regarding international law when interpreting provisions in the Bill of Rights.[36] One opinion as to the importance of this basic approach is the following:

> [T]he obligation to consider international law when interpreting the Bill of Rights includes … both binding and non-binding international law. … [T]here is an obligation to consider international law but the courts are not bound to apply it once they have considered it.[37]

Whether intellectual property and other forms of intangible property may be included under the South African constitutional property clause and its interpretation where other fundamental rights may come into conflict with the property rights, clearly involves the interpretation of the Bill of Rights. Courts must therefore automatically refer to international human rights instruments, even those to which South Africa is not a party.

In what follows, the international human rights instruments of particular relevance to intellectual property rights are outlined in an attempt to determine how these instruments may assist South African courts in interpreting the constitutional property clause, especially where intellectual property rights come into conflict with other human rights.

South Africa 1996 8 BCLR 1015 (CC); *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC). While the applicability of international law to South African jurisprudence is obviously not confined to human rights issues, the scope of this article is confined to the applicability of international law to the interpretation of s 25 (the property clause) of the Constitution of the Republic of South Africa, 1996.

[34] Dugard (2011) n 21 above.

[35] *Government of the RSA v Grootboom* 2000 1 SA 46 (CC) 131 par 26 at 63. See Botha and Olivier n 3 above 66-67 on the importance of this dictum.

[36] *Id* 66.

[37] Hopkins n 2 above 278.

3 Intellectual property rights: Article 27(2) of the UDHR and article 15(1)(c) of the CESCR

Article 27(2) of the UDHR[38] and article 15(1)(c) of the CESCR[39] are generally identified as the 'internationally recognized basis of the right to the protection of interests in intellectual creations'.[40] They constitute the point of departure when considering the international acceptance of the right to hold IP as a fundamental human right.[41] These rights are supported in the CESCR[42] in virtually identical language. This Convention (adopted twenty years after the UDHR)[43] 'makes the UDHR's[44] economic and social guarantees binding as a matter of treaty law' (it creates binding obligations for state parties).[45] Article 27(2) of the UDHR[46] states that '[e]veryone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author'.[47] This declaration sets a universal standard for all nations to observe in realising fundamental rights, including the right to hold IP.[48] Article 15(1)(c) of the CESCR[49] provides, in turn, that everyone has the right 'to benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author'.[50]

Although at least certain aspects of IP rights appear to be protected as a human right in international law, how IP law and human rights law should interact needs to be clearly established. The implications of such protection must be analysed and a human rights framework for IP developed which could serve as a guide to South African courts called upon to determine the interaction between IP and human rights.

The drafting history of article 27(2) of the UDHR[51] and article 15(1)(c) of the

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[38]UDHR n 4 above art 27(2).
[39]CESCR n 5 above art 15(1)(c).
[40]Yu (*UC Davis LR*) n 10 above 1044. Coombe 'Intellectual property, human rights and sovereignty: New dilemmas in international law posed by the recognition of indigenous knowledge and the conservation of biodiversity' (1998-1999) 6 *Ind J Global LS* 59 agrees.
[41]Dean n 1 above 108-109.
[42]ECSCR n 5 above.
[43]UDHR n 4 above.
[44]*Ibid*.
[45]Helfer 'International rights approaches to intellectual property: Towards a human rights framework for intellectual property' (2007) 40 *UC Davis LR* 979.
[46]UDHR n 4 above.
[47]*Id* art 27(2).
[48]Dean n 1 above 109.
[49]CESCR n 5 above art 15(1)(c).
[50]*Ibid*.
[51]UDHR n 4 above art 27(2).

CESCR[52] can inform the development of an human rights framework for IP.[53] The UDHR[54] was adopted in 1948 and 'created against the backdrop of aggression and atrocities committed during World War II',[55] which motivated the framers of the Declaration to protect specific human rights. Possible reasons why article 27(2) was eventually agreed upon may be that states sought protection for moral rights, wished to internationalise copyright law, or promote freedom of expression.[56] There was also some debate around the adoption of article 15(1)(c) of the CESCR.[57] The right in article 15(1)(c) of the CESCR[58] was eventually included when the Universal Copyright Convention was concluded.[59] The instruments fail to demarcate the scope of the right to the protection of interests in intellectual property; or to endorse any particular method of protection; or to specify the purpose of the protection. Because the parties spent so long debating whether IP should be protected as a fundamental right, there was simply not enough time left to find an adequate balance between public and private rights. The relationship between human rights and IP rights had already been explored during the drafting process and questions raised then regarding a human rights basis for IP rights, and the economic, social and cultural implications this would hold for IP rights, remain valid.[60]

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[52]CESCR n 5 above art 15(1)(c).

[53]Yu (*UC Davis LR*) n 10 above 1044. See also the views at 1050: 'A purely textual analysis does not reveal the controversy that surrounded the protection of moral and material interests in intellectual creations. However, a consideration of the drafting history shows the intentions and challenges faced by the drafters. The United States of America opposed the right to moral and material interests during the drafting of both the UDHR and the CESCR. The drafting history also highlights possible challenges to the development of a human rights framework for IP and the potential conflicts between human rights and IP property rights.'

[54]UDHR n 4 above.

[55]Yu (*UC Davis LR*) n 10 above 1050. Also see Coombe n 40 above 60-62.

[56]*Id* 1050-1058 for a more comprehensive discussion of the drafting history of art 27(2) of the UDHR. See also Torremans 'Symposium: The international intellectual property regime complex: Is copyright a human right?' (2007) 2007 *Mich St LR* 275-281, where he examines the origins of the UDHR (specifically art 27(2)) and the history of the CESCR's drafting. Only once the World Intellectual Property Organisation's Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) was introduced, was the art protecting the moral and material interests of intellectual property reintroduced successfully.

[57]See Yu (*UC Davis* LR) n 10 above 1059-1069 for a fuller discussion of the drafting history of art 15(1)(c). There are views that human rights protection for IP rights was always controversial – *id* 1070. Torremans n 56 above 280 agrees that the inclusion of copyright in the international human rights instruments is controversial. During the drafting process, arguments against human rights protection for IP stated that intellectual property is already adequately protected by the rights to remuneration and property ownership. Further, *realpolitik* of international negotiations is present even in the protection of fundamental rights – human rights are not unchanging and universal, but differ according to specific economic, social or political circumstances.

[58]CESCR n 5 above art 15(1)(c).

[59]United Nations Universal Copyright Convention (6 September 1952).

[60]Yu (*UC Davis LR*) n 10 above 1070.

The rights of authors and creators should be understood as a precondition for the existence of cultural freedom and participation in and access to scientific progress. The rights of authors and creators should facilitate other rights – such as the rights to cultural participation and access to the products of scientific progress. International human rights instruments do not specify how IP rights should be addressed, but instead leave this determination to national legislatures.[61] This highlights the need to consider the balance between public and private rights.

In South African law, courts and the legislature need to establish a balance between IP protection and human rights where these come into conflict, and also develop IP law to accord with the Constitution (and international law). Although questions remain as to why IP rights should be equated with fundamental human rights and there are concerns that their inclusion may undermine the importance of human rights,[62] the right to the protection of interests in intellectual creations is explicitly recognised as a fundamental human right in international law through the UDHR[63] and the CESCR.[64] This points clearly to the need for a human rights framework within which IP rights can operate.

4 A human rights framework for intellectual property

Policymakers, international bureaucrats, scholars, intergovernmental organisations, and non-governmental organisations rely on two approaches in their examination of the interaction between human rights and IP. These are the 'conflict approach' which views the two sets of rights as fundamentally in conflict; and the 'coexistence approach', which holds that the two sets of rights are in essence compatible.[65] These approaches offer different ways 'to structure the rights and obligations of nation states and private parties'.[66]

In terms of the conflict approach, strong IP rights undermine states' human rights obligations, especially in the context of economic, social and cultural rights. Where there is a conflict of rights, the normative primacy of human rights over IP law offers the solution.[67] Under the coexistence approach, on the

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[61]Torremans n 56 above 280.
[62]Yu (*Ga St ULR*) n 10 above 713.
[63]UDHR n 4 above.
[64]CESCR n 5 above.
[65]Helfer 'Human rights and intellectual property: Conflict or coexistence?' (2003) 5 *Minn Intell Prop R* 47-61 first identified these approaches. See also Yu (*Ga St ULR*) n 10 above 709.
[66]Helfer n 65 above 48.
[67]Yu (*Ga St ULR*) n 10 above 709. See Helfer n 65 above 47-61 who first identified these approaches.

other hand, IP law and human rights law both determine the balance between private monopoly rights which serve as an incentive, and public rights in access to creative works. The two are in essence compatible, although there is not always agreement on the tipping point between access and incentive.[68]

The consequences[69] of the continued debate between the two approaches are: a raised incentive to develop soft law human rights norms;, treating IP product consumers as the holders of internationally guaranteed rights with a status equal to owners in terms of a human rights approach to IP; and using 'maximum standards' of IP protection in a human rights approach to IP instead of the 'minimum standards' of protection (that do not prevent state parties from enacting more stringent IP protection measures) used in treaties such as the Berne Convention,[70] the Paris Convention,[71] and the TRIPS Agreement.[72] Crucial, however, is that neither the conflict – nor the coexistence-approach resolves the question of which attributes of IP have a human rights basis and which do not, and this distinction is of the utmost importance.[73]

Yu distinguishes between 'intellectual property rights' and the human rights aspects of intellectual property in the human rights context, by terming the latter 'the right to the protection of interests in intellectual creations'.[74] As the UDHR[75] and the CESCR[76] expressly include the protection of interests in intellectual creations, human rights attributes overlap, and these rights coexist and conflict. The tension between the human rights aspects and non-human rights aspects of IP must be resolved if one is to develop a viable IP human rights framework.[77]

The human rights primacy approach can resolve these conflicts by protecting

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[68] Helfer n 65 above 48-49. See also Torremans n 56 above 272-274, where he explains the conflict- and coexistence approach in the context of copyright law; and agrees (281-282) that there is a need to balance public and private interests in the context of intellectual property rights.
[69] Helfer n 65 above 57-61.
[70] World Intellectual Property Organisation Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) – (Berne Convention).
[71] World Intellectual Property Organisation Paris Convention for the Protection of Industrial Property (10 March 1883) – (Paris Convention).
[72] World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) – (TRIPS Agreement).
[73] Yu (*Ga St ULR*) n 10 above 710-711. Also see Yu (*UC Davis LR*) n 10 above 1077-1078.
[74] Yu (*Ga St ULR*) n 10 above 711. Helfer n 45 above 971-1020 refers to these human rights aspects of intellectual property as authors' rights.
[75] UDHR n 4 above.
[76] CESCR n 5 above.
[77] Yu (*Ga St ULR*) n 10 above 711. See also Yu (*UC Davis LR*) n 10 above 1077-1078.

human rights attributes in preference to rights that lack a human rights basis.[78] The protection of the human rights attributes must take precedence over the protection offered under the IP system (the protection of the non-human-rights attributes of IP rights, and the categories of IP rights not underpinned by a human rights basis).[79] This leads to an examination of the built-in flexibilities of the IP system to establish whether or not they allow states to balance their human rights obligations against the protection of the non-human rights attributes of IP, and whether the human rights attributes of IP are adequately protected.[80] Where the human right in question is not precisely defined, the principle of human rights primacy should not be abused to argue against intellectual property rights in their current form.[81]

Where the conflicting rights both have a human rights basis, the principle of human rights primacy provides no assistance.[82] Other approaches such as the just remuneration approach, the core minimum approach, and the progressive realisation approach must be invoked to provide guidance. In terms of the just remuneration approach, authors and inventors hold a right to remuneration but not a right to exclusive control. This means that individuals who wish to use the intellectual work could obtain a human rights-based compulsory licence – not a free licence.[83] The core minimum approach identifies minimum essential levels of protection that a state must provide in order to comply with its human rights obligations. It entails a balance between the state's obligations, and constraints imposed by scarce economic and natural resources.[84] The progressive realisation approach focuses on the empowerment aspect of certain human rights – in other words the realisation of the right provides a gateway for individuals to access other important rights.[85]

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[78] Yu (*Ga St ULR*) n 10 above 710-711. Also see Yu (*UC Davis LR*) n 10 above 1092.
[79] Yu (*UC Davis LR*) n 10 above 1092.
[80] *Id* 1093-1094.
[81] Yu (*Ga St ULR*) n 10 above 710-712.
[82] See also Torremans n 56 above 287-289, where he explores the relationship between the human rights aspects of copyright and other human rights, noting that the aim of balancing the different rights should be to respect both rights. He submits that the human rights protection for copyright should be more stringent in cases where the input level of creativity was higher.
[83] See Yu (*UC Davis LR*) n 10 above 1095-1105 on the just remuneration approach. The German Federal Constitutional Court has used the just remuneration approach – the exclusivity of copyright may be removed where there is a compelling reason so long as authors receive adequate remuneration for the exempted use. See *BVerfG*E 31, 248 [1971] (*Broadcast Lending* case); *BVerfGE* 31, 270 [1971] (*School Broadcast* case); *BVerfGE* 31, 255 [1971] (*Tape Recording I* case); *BVerfGE* 31, 275 [1971] (*Phonograph Record* case); *BVerfGE* 49, 415 [1978] (*Church Music* case). They also developed a balancing test, outside of intellectual property law, that reflects a distinction between human and economic interests and between conflicting rights, see Van der Walt *Constitutional Property Clauses* (1999) 158-163.
[84] See Yu (*UC Davis LR*) n 10 above 1106-1113 on the core minimum approach.
[85] *Id* 1113-1123 on the progressive realisation approach.

The just remuneration approach may still leave IP material inaccessible where the remuneration level is too high, with the result that human rights-based compulsory licences must be underpinned by legislation facilitating reasonable pricing.[86] This approach provides no protection for moral interests or traditional knowledge-based IP.[87]

The core minimum approach was created specifically for the CESCR[88] as a means of determining whether a state has, as far as its resources allow, fulfilled its obligations relating to economic, social and cultural rights. States would still comply with the CESCR[89] if they modified or removed protection provided by international treaties such as the TRIPS Agreement[90] where such protection is in excess of the protection of moral and material interests required by the CESCR,[91] and the removal is compelled by competing demands of other human rights.[92] This provides authors with a minimum level of protection even when other human rights demand a state's resources. This approach is silent on how much protection would satisfy the core minimum requirement. It also fails to offer guidance on how rights could be progressively realised as resources become available, or on how to determine what the maximum protection for intellectual property creations would be where their protection infringes on other human rights. Core minimum rights may also be seen as the ceiling for protection instead of the lowest level of protection permissible, and the core minimum rights approach is intended to indicate the lowest level of protection that states are obliged to provide to a particular fundamental right.[93]

The *Grootboom* decision[94] referred to use of the minimum core rights approach in South African law. The Constitutional Court was called upon to interpret section 26 of the Constitution (the right to adequate housing).

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[86] *Id* 1100-1101.
[87] *Id* 1102-1104.
[88] CESCR n 5 above.
[89] *Ibid*.
[90] TRIPS Agreement n 72 above.
[91] CESCR n 5 above.
[92] Yu (*UC Davis LR*) n 10 above 1106.
[93] *Id* 1107-1113.
[94] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC). This case concerned the eviction of people from vacant, but privately owned land. On this decision, see Bilchitz *Poverty and Fundamental Rights – The Justification and Enforcement of Socio-Economic Rights* (2007) 139-141.

Reference was made to the CESCR[95] and General Comments 3[96] and 4[97] of the United Nations Economic and Social Council which notes that

> a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. … In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[98]

The *Grootboom* court[99] levelled several criticisms against the core minimum approach, questioning (without deciding) whether it would be 'appropriate for a court to determine in the first instance the minimum core of a right'.[100] Instead it asked whether the state's steps to realise the fundamental right in issue are reasonable. This calls into question whether the core minimum approach would be endorsed in resolving a clash between human rights aspects of IP and a socio-economic right.[101]

The progressive realisation approach was designed on the basis of the UDHR[102] and CESCR.[103] Here the focus falls on realising economic, social and cultural rights systematically as resources become available. This approach, however, fails to answer how resources should be allocated. It is also not

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[95]CESCR n 5 bove.
[96]United Nations Economic and Social Council 'Comment on Economic, Social and Cultural Rights [CESCR], General Comment no 3: The Nature of States Parties Obligations Article 2(1)' (14 December 1990) – (General Comment no 3).
[97]United Nations Economic and Social Council 'Comment on Economic, Social and Cultural Rights [CESCR], General Comment no 4: The Right to Housing Article 11(1)' (13 December 1991).
[98] General Comment no 3 n 97 above par 10. See Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2001) 119 *SALJ* 484-501, Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *SAJHR* 1-26 and Bilchitz n 94 above for a discussion of the minimum core rights approach. Also see Liebenberg 'The interpretation of socio-economic rights' in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* 2 ed (2003) 33-10 – 33-16 for a discussion of the positive and negative aspects of adopting the core minimum rights approach.
[99]*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).
[100] *Id* par 33. See Bilchitz n 94 above 140-141; Liebenberg n 98 above 33-1 – 33-66; and Liebenberg *Socio-Economic Rights Adjudication Under a Transformative Constitution* (2010) 148-151.
[101] Also see *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC), where the court claimed that adopting a core minimum rights approach would force the state to do the impossible. Also see Bilchitz n 98 above 1-26 where he argues that this statement of the court is without substance.
[102]UDHR n 4 above..
[103]CESCR n 5 above.

always possible to balance the demands of competing human rights as required by this approach.[104]

The South African Constitutional Court has used the method of balancing competing rights with some success, especially where socio-economic rights are involved. In *Laugh It Off v SAB International*,[105] the court weighed up the right to freedom of expression and trade-mark rights and decided that the right to freedom of expression was more important in that situation.[106]

> The WTO, too, has applied the balancing test to resolve conflicting rights[107] and sets out 'a three part balancing test including: (1) the importance of the interests or values that the challenged measure is intended to protect; (2) the extent to which the challenged measure contributes to the realization of the end pursued by that measure; and (3) the trade impact of the challenged measure.' This arguably provides some clarity to the question 'when human rights conflict with each other should there be a priority, a pecking order, or a balancing test'.[108]

The nature of the conflict between human rights would be determinative of which of the three approaches would be best suited to a specific situation. It may even, at times, be best to use a combination of approaches, since they complement one another.

Not all forms of IP are likely to be treated as human rights. For example, interests in corporate trade marks and trade secrets are unlikely to be regarded as worthy of protection as a human right under international law.[109] Rights protecting the economic investment of institutional authors and inventors, such as works-made-for-hire, employee inventions, neighbouring rights, and data exclusivity protection also probably have no human rights basis.[110]

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[104]Yu (*UC Davis LR*) n 10 above 1114-1115.
[105]*Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC).
[106]See Du Bois 'Intellectual property as a constitutional property right: The South African approach' (2012) 24 *SA Merc LJ* 177-193 on the importance of this case to the recognition and protection of intellectual property rights under s 25 of the Constitution.
[107]See World Trade Organization, Report of the Appellate Body, *Korea – Various Measures on Beef*, WTO Doc No WT/DS169/AB/R (11 December 2000); and World Trade Organization, Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc No WT/DS285/AB/R (7 April 2005).
[108]Foster 'Prelude to compatibility between human rights and intellectual property' (2008) 9 *Chicago Journal of International Law* 207.
[109]Yu (*Ga St ULR*) n 10 above 726.
[110]*Id* 727. See United Nations Economic and Social Council 'Comment on Economic, Social and Cultural Rights [CESCR], General Comment no 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic

> Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.[111]

This statement applies equally to tangible property in general, but property is still recognised and protected as a constitutional right without strictly equating it to other human rights. Some IP rights can be described as human rights and others as economic or constitutional rights. So the intellectual property rights may be weighed up against a conflicting right – such as freedom of expression or the right to education – without excluding them from constitutional protection from the outset. In order to resolve this, human rights may be divided into fundamental human rights (for example the right to life), and non-fundamental rights (economic rights such as the right to property). The first kind of right is beyond state interference (and open to international enforcement), while the second is open to individual state interference. If property is placed in the second category, then its protection as a human right would not dilute fundamental human rights.[112] In principle, all constitutional rights may be limited and weighed up against one another, but economic rights may be regulated more readily, while fundamental human rights are non-derogable.

Some also argue that corporations cannot claim human rights protection for their intellectual creations, because the human rights-based interest of individuals creating works-for-hire are viewed as non-transferable.[113] In South Africa, a juristic person would be entitled to the protection of section 25 of the Constitution, at least in principle. Section 8(4) of the Constitution entitles juristic persons to the protection of the rights protected under the Bill of

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Production of Which He Is the Author (Article 15, Paragraph 1(c), of the Covenant)' (12 January 2006) 4 UN Doc E/C12/GC/17, which is considered the authoritative interpretation of article 15(1)(c) of the CESCR – (General Comment no 17).

[111] *Ibid.*

[112] Grosheide 'Intellectual property rights and human rights: Related origin and development' in Grosheide (ed) *Intellectual Property and Human Rights: A paradox* (2010) 3-36.

[113] Yu (*Ga St ULR)* n 10 above 728-730 disagrees that the intellectual property interests of corporations are derived from human rights-based interests of creative individuals and that the individual interests would be prejudiced (by reducing the individuals' opportunities and the remuneration they receive) if corporations were not the beneficiaries of fundamental rights.

Rights 'to the extent required by the nature of that juristic person'.[114] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*, the Constitutional Court confirmed the principle that juristic persons may be the beneficiaries of section 25 (constitutional property) protection.[115] It becomes apparent that the constitutional property clause may indeed offer protection to IP as to any other form of property. Similarly, the constitutional property clause could also restrict IP as it does any other form of property. The argument that juristic persons should be excluded from constitutional protection would probably be better phrased to state that the rights of juristic persons may be protected, but viewed as economic constitutional rights rather than fundamental human rights.

The German Federal Constitutional Court's solution uses a scaling approach: constitutional rights receive stronger protection if they are more closely connected to the human individual, but protection is weaker in the case of purely economic interests. Consequently, human or personal rights (for example the rights to liberty and dignity) receive greater protection than economic interests (for example, property rights).[116] This theory of *Güterabwägung* or the 'abstract ranking' of rights and values may be explained as follows:

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[114] Van der Walt *Constitutional Property Law* 3 ed (2011) 70. Also see Roux 'Property' in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* 2 ed (2003) 46-9: a company or other juristic person should enjoy constitutional protection over their property even where their headquarters are situated somewhere other than South Africa.

[115] 2002 4 SA 768 (CC) pars 41-45: The reasons why the court decided to grant constitutional property protection to juristic persons were that only when protection was extended to juristic persons as well could the rights of natural persons be fully realised; and that if juristic persons were not protected, disruptions would occur and the fabric of the democratic state would be undermined. See Van der Walt n 114 above 70-72. According to art 19.3 of the Basic Law for the Republic of Germany 1949, fundamental rights do not apply only to natural persons, but to domestic juristic persons as well, as far as the nature of the right permits: Van der Walt *Constitutional Property Clauses* (1999) 126. Irish law also entitles corporate bodies to constitutional protection for their property: *Iarnród Éireann v Ireland* [1996] 3 IR 321, [1995] 2 ILRM 161. Helfer n 45 above 993: Anglo-American copyright laws have always made provision for juristic persons to be the holders of intellectual property rights.

[116] Van der Walt n 115 above 124-125: 'The property guarantee (a) is a fundamental (human) right, (b) which is meant to secure, for the holder of property, (c) an area of personal liberty (d) in the patrimonial sphere, (e) to enable her to take responsibility for the free development and organization of her own life (f) within the larger social and legal context ... the property guarantee is primarily a guarantee for the protection of personal liberty and not for the protection of property as such. The guarantee of personal liberty in the patrimonial sphere is therefore said to form the foundation for the secondary guarantee of rights, which entails that all valuable patrimonial rights and interests (*vermögenswerte Positionen*) are recognised and protected in terms of (*inter alia*) the property guarantee.' See *BVerfGE* 24, 367 [1968] (*Deichordnung* case) 400. See also Alexander *The global debate over constitutional property* (2006) 139 and Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2000) 292-296.

> According to this hierarchy [of fundamental rights], individual freedom would, for instance, rank higher than property rights and other rights which protect objects, because individual freedom is inextricably connected to the person. Furthermore, the importance of a right depends, inter alia, on its relevance to the community, which in turn links with the importance of individual freedom. This theory basically foresees that the more fundamental a right is for the maintenance of values in a democratic state, the higher its position in this pyramid of fundamental rights will be. Freedom of expression or occupational freedom would, for instance, rank higher than property rights.[117]

A further question is whether or not intellectual creations already receive adequate protection under the right to private property.[118] International human rights instruments neither reject nor endorse the tendency to protect IP interests as private property. Rather, they simply distinguish between moral and material interests (the two interests covered by the right to the protection of interests in intellectual creations). A moral interest[119] falls outside the scope of property and 'safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage', while a material interest 'enable[s] authors to enjoy an adequate standard of living'.[120]

The aim in granting moral rights is to

> proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations … 'moral interests' in article 15, paragraph 1(c), include the right of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification

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[117]Mostert n 116 above. See also Alexander n 116 above 139: The German scaling approach is an illustration of 'another aspect of the Federal Constitutional Court's implementation of the social-obligation norm'.

[118]Yu (*Ga St ULR*) n 10 above 731.

[119]Moral interests traditionally offered in continental Europe include the right of attribution, the right of integrity, the right of disclosure and the right of withdrawal. The right of attribution refers to the right to claim authorship of the protected work. In South African copyright law, the right of attribution exists in the form of a paternity right. The right of integrity grants the 'right to prevent the distortion, mutilation, or other modification of the work in a manner prejudicial to the author's honor or reputation': Yu (*UC Davis LR*) n 10 above 1081 n 166. In South African copyright law, a similar right of integrity is granted to the author of a copyright work. The right of disclosure allows the author to 'determine when the work is ready for public dissemination and in what form the work will be disseminated': Yu (*UC Davis LR*) 1081 n 166. This right does not exist in South African copyright law. In terms of the right of withdrawal, an author may choose to withdraw a work from public dissemination: Yu (*UC Davis LR*) 1081 n 166. In South African copyright law, no such right exists.

[120]General Comment no 17 n 110 above.

> of, or other derogatory action in relation to, such productions, which would be prejudicial to their honour and reputation.[121]

There are arguments that the protection for moral and material rights identified by the CESCR entails the minimum levels of protection that states must afford creators.[122] At first glance, the material interests may seem to include all economic interests arising from the private law right to property. However, not all economic interests protected in IP law are covered and we are dealing here only with the more limited right to just remuneration.[123]

Article 17 of the UDHR[124] protects the right to own property 'alone as well as in association with others'. This may serve as a textual basis for the creation of a rich public domain: unrestricted access to protected materials instead of merely materials that are somehow not protected by a property right. Countries remain free to decide whether they wish to promote strong IP rights or a rich public domain. Article 17 does not require that the term of IP protection must be the lifetime of the creator; an adequate standard of living could also be granted via once-off payments or an exclusive right for a limited time.[125] The important question is whether protection provided by states is adequate, and not whether such protection is provided by the property rights system or by international IP agreements.[126]

On this interpretation, the South African constitutional property clause may be used to accord the required protection for the human rights aspects of IP, provided that the protection is adequate. This required protection 'covers only the protection of sufficient intellectual property-based interests: it does not include the protection of additional interests that are generally not required to meet the essential needs of decent living or to maintain human dignity'.[127]

Concerns have been raised that a human rights framework for IP may strengthen or extend intellectual property protection, which would affect the public domain negatively.[128] However, international human rights instruments

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[121] *Id* pars 12, 13.
[122] Yu (*UC Davis LR*) n 10 above 1083.
[123] Yu (*Ga St ULR*) n 10 above 731-733. Also see Yu (*UC Davis LR*) n 10 above 1083-1092, on material interests and their background.
[124] UDHR n 4 above. CESCR n 5 above.
[125] Yu (*Ga St ULR*) n 10 above 734.
[126] Yu (*UC Davis LR*) n 10 above 1089.
[127] Yu (*Ga St ULR*) n 10 above 735. General Comment no 17 n 110 above and Yu (*UC Davis LR*) n 10 above 1088-1092.
[128] Yu (*Ga St ULR*) n 10 above 738-740. On the public domain (or intellectual commons), see Van der Walt and Du Bois 'The importance of the commons in the context of intellectual property' (2013) 1 *Stell LR* 31-54.

recognise only the human rights attributes of IP rights, so if the framework is used correctly, these negative results should not arise. The key is to determine which IP attributes have a human rights base and which do not.[129]

As noted above, the German scaling approach is useful in resolving conflicting constitutional rights. Even recognised property (including IP) interests in the same object may deserve different levels of protection depending on whether the interest is fundamental or merely economic (with human rights attributes or without such attributes). For example, moral interests in copyright are more closely connected to the personality of the author of a copyright work, and such a right cannot be ceded to someone else; therefore this right would receive greater protection than the material (economic) interests in a copyright work.

Issues such as patented medicines, biodiversity, traditional knowledge, digital content, and the harmonisation of procedural rules, necessitate the speedy development of an IP human rights framework. The textual provisions for international human rights law provide a faint outline as to the creation of human rights-compliant mechanisms for the promotion of creativity and innovation.[130] Remaining questions around the relationship between the IP clauses in the UDHR[131] and the CESCR;[132] their interaction with other economic, social, civil and political rights; and international trade agreements such as the TRIPS Agreement,[133] must be addressed through the development of a comprehensive and coherent human rights framework for IP.[134]

The protection of the rights of authors and inventors is not reflected in the international property system: 'human rights' are mentioned neither in multilateral treaties such as the Paris,[135] Berne[136] or Rome[137] Conventions, nor in the TRIPS Agreement.[138] References in treaties to phrases like 'rights', 'private rights', and 'exclusive rights' to describe creators' rights serve merely to indicate that these treaties govern the scope of private law rather than public law.[139]

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[129]Yu (*UC Davis LR*) n 10 above 1126-1128.
[130]Helfer n 45 above 973, 975-976.
[131]UDHR n 4 above.
[132]CESCR n 5 above.
[133]TRIPS Agreement n 72 above.
[134]Helfer n 45 above 976-977.
[135]Note 71 above.
[136]Note 70 above.
[137]World Intellectual Property Organization International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (26 October 1961) 496 UNTS 43.
[138]TRIPS Agreement n 72 above.
[139]Helfer n 45 above 979-980.

Two things triggered IP consideration by human rights norm-creating bodies: the neglected cultural rights of indigenous peoples; and linking of IP to trade via the TRIPS Agreement[140] and bilateral and regional so-called 'TRIPS-plus' treaties.[141] The function of a human rights framework for IP in promoting traditional knowledge interests is important.[142] Article 27 of the UDHR[143] and article 15(1)(c) of the CESCR[144] can be interpreted broadly to include the rights of traditional communities and indigenous groups, although the drafters may not have foreseen this extension. Traditional knowledge was previously treated as part of the public domain 'either because it did not meet established subject matter criteria for protection, or because the indigenous communities who created it did not endorse private ownership rules'.[145] This knowledge was exploited – privatised through patents, copyright, and plant breeders' rights. Benefits were rarely shared with the indigenous communities who initially held the traditional knowledge. The Draft Declaration on the Rights of Indigenous Peoples,[146] and the Principles and Guidelines for the Protection of the Heritage of Indigenous People,[147] were drafted to close the loophole in IP law that facilitated exploitation of traditional knowledge. These documents encourage states to use existing IP protection mechanisms to include traditional knowledge; but also caution states not to grant exclusive IP rights

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[140]TRIPS Agreement n 72 above.

[141]'TRIPS-plus' treaties refer to treaties that contain more stringent intellectual property protection rules than those in the TRIPS Agreement, require developing countries to implement the TRIPS Agreement earlier than the date specified in the Agreement or require developing countries to conform to other multilateral intellectual property agreements' requirements. See Helfer n 45 above 982 n 28. See also Helfer n 65 above 51-57.

[142]Yu (*Ga St ULR*) n 10 above 740. On traditional knowledge, see Du Bois 'Recognition and protection of traditional knowledge interests as property in South African law' (2013) 2/2 *EPLJ* 144-170.

[143]UDHR n 4 above.

[144]CESCR n 5 above.

[145]Helfer n 45 above 982-983.

[146]United Nations Economic and Social Council [ECOSOC] Sub-Commission on Prevention of Discrimination and Protection of Minorities Draft Declaration on the Rights of Indigenous Peoples (1994) UN Doc E/CN4/Sub2/1994/2/Add1.

[147]United Nations Economic and Social Council [ECOSOC] Sub-Commission on Prevention of Discrimination and Protection of Minorities Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, Final Report of the Social Rapporteur UN Doc E/CN4/Sub2/1995/26, Annex 1 (21 June 1994) (initial text draft of Principles and Guidelines); United Nations Economic and Social Council [ESOSOC] Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People' (2000) UN Doc E/CN4/Sub2/2000/26 (revised text of draft Principles and Guidelines). The Sub-Commission later adopted the Revised Draft Principles and Guidelines and transmitted them to the Commission for its approval. United Nations Economic and Social Council [ECOSOC] Sub-Commission on the Promotion and Protection of Human Rights Decision 2000/107 (2000) UN Doc E/CN4/Sub2/DEC/107/2000/107.

over traditional knowledge where no provision is made for the indigenous peoples to share in ownership, control, use, and benefits.[148] The Intellectual Property Laws Amendment Act 28 of 2013 was assented to by the President and published in the *Government Gazette* on 10 December 2013 and will come into effect on a date to be fixed by the President. This Act aims to protect traditional knowledge within the framework of existing intellectual property protection mechanisms. The Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill of 2014 was also published in the *Government Gazette* No 38574 on 20 March 2015 for public comment, and is aimed at providing *sui generis* protection to traditional knowledge.

The United Nations Committee on Economic, Social, and Cultural Rights (the Committee) guides member nations as to the meaning of the CESCR.[149] It issues general comments that interpret specific treaty articles or human rights issues and these provide a standard that the Committee may use when reviewing states' compliance with the Covenant. These interpretations apply to governments and private parties whose actions are significant to social, economic and cultural rights. The Committee's 'Statement on Human Rights and Intellectual Property',[150] analysed the CESCR's[151] intellectual property provisions and set out an agenda for the drafting of comments on each intellectual property clause in the CESCR. The first comment on IP clauses[152] interpreted article 15(1)(c) of the CESCR.[153] This comment, together with the 'Statement on Human Rights and Intellectual Property' may form the basis for the development of a human rights framework for intellectual property.[154]

The Committee developed a 'violations approach' for the interpretation of the Covenant, distinguishing 'core obligations' or minimum essential levels for immediate implementation by states, from other obligations which need to be realised progressively and implemented as resources become available. The core obligations consist of the undertakings to respect, protect, and fulfil the

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[148]Helfer n 45 above 983-984. On the South African position of traditional knowledge, see Du Bois n 142 above 144-170.
[149]CESCR n 5 above.
[150]United Nations Economic and Social Council [ECOSOC] Commission on Economic, Social and Cultural Rights 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights' (14 December 2001) UN Doc E/C12/2001/15.
[151]CESCR n 5 above.
[152]General Comment No 17 n 110 above.
[153]CESCR n 5 above.
[154]Helfer n 45 above 989-990.

relevant rights.[155] Fulfilling the obligation to respect requires states to not interfere with the moral and material interests of the author or creator (either directly or indirectly), while the obligation to protect means that the state must prevent other parties from infringing these interests. The obligation to fulfil requires states to implement 'legislative, administrative, budgetary, judicial, promotional and other measures' to realise article 15(1)(c).[156]

Though the obligations are framed in human rights terms, they appear similar to IP law protection. States are: prevented from interfering with moral and material interests of creators; mandated to protect the works of creators; required to provide effective remedies for infringements of creators' rights; and obliged to provide for participation by creators in decisions that affect their moral and material interests.[157] These obligations overlap with some IP treaty provisions, such as the Berne Convention's reproduction and moral rights clauses, which indicates that state obligations imposed by article 15(1)(c) of the CESCR[158] can be partially fulfilled by ratifying international IP instruments and enacting national IP laws to protect and enforce copyright, patents, and other rights.[159]

As mentioned above, the Commission generally distinguishes article 15(1)(c) of the CESCR[160] from IP protection. The human right (to the protection of moral and material interests) derives from the dignity and worth of persons and is contrasted with the legal entitlements recognised in IP systems. Human rights are also described as fundamental, inalienable and universal entitlements because they are inherent to the human person, as opposed to intellectual property rights as incentives for inventiveness and creativity.[161]

> In contrast to human rights, intellectual property rights are generally temporary 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.[162]

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[155]General Comment no 17 n 110 above.
[156]Helfer n 45 above 990.
[157]*Id* 990; General Comment no 17 n 110 above pars 30, 31, 34.
[158]CESCR n 5 above.
[159]Helfer n 45 above 991-992.
[160]CESCR n 5 above.
[161]General Comment no 17 n 110 above par 1, see also pars 30, 31, 34. See Helfer n 45 above 993 on these distinctions.
[162]General Comment no 17 n 110 above par 2.

Human rights protection of moral and material interests in intellectual creations is also distinguished from IP protection in so far as the first 'safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage' and the basic material interest guaranteeing their adequate standard of living; while intellectual property protects investments and interests of juristic persons.[163] The Committee cautioned against treating the human rights protection in article 15(1)(c) of the CESCR[164] as IP protection.[165]

Accepting the protection of moral and material rights as a fundamental right would mean that governments could only regulate these rights under narrow circumstances – only to protect other human rights or attain social objectives.[166] The right protecting the moral and material interests can be limited and 'must be balanced with the other rights recognized in the Covenant', but limitations must

> be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society … Limitations must therefore be proportionate, meaning that the least restrictive measures must be adopted when several types of limitations may be imposed. Limitations must be compatible with the very nature of the rights protected in article 15, paragraph 1(c).[167]

Compensatory measures may also be required for the imposition of limitations.[168] South African law only allows expropriation (with compensation) and deprivation of property under strict requirements provided in the Constitution.[169] Therefore, South Africa can comply (at least partially) with the protection of the moral and material interests in IP through use of the constitutional property clause (s 25 of the Constitution).

A human rights framework has a twofold purpose: to protect the 'personal link between authors and their creations' and 'basic material interests which are necessary to enable authors to enjoy an adequate standard of living.'[170] This

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[163] *Ibid.*
[164] CESCR n 5 above.
[165] General Comment no 17 n 110 above par 3.
[166] *Id* par 28: 'The obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author.' See Helfer n 45 above 994.
[167] General Comment no 17 n 110 above pars 22-23.
[168] *Id* par 24: 'adequate compensation for the use of scientific, literary or artistic productions in the public interest'.
[169] For a discussion of the requirements, see Van der Walt n 114 above 15-22.
[170] General Comment no 17 n 110 above par 2.

approach indicates 'irreducible core rights – a zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent, intellectual lives, all of which are essential prerequisites for any free society'[171] where state infringements are subject to the stringent test. Any additional protection would not be subject to this test.[172] In other words, it would be more difficult to justify infringements of core rights (based on the public interest in access to knowledge), while non-core rights may be shaped by member states to fit a country's particular economic, social, and cultural conditions.[173]

The Committee's comment provides three specific recommendations, as well as an interpretive principle.[174] The recommendations are: the right to the protection of the moral and material rights of authors should be read together with other rights protected under the CESCR;[175] state parties should find a balance between authors' rights protected under article 15(1)(c) and the other rights in the Covenant in order to promote and protect all the various rights; and consideration of the private interests of the author should not neglect the public interest in access to information.

The interpretive principle provides that states are allowed some freedom to decide how to resolve human rights, IP rights, and other policy objectives, but should ensure that the IP protection does not impede the 'ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant'.[176] The recommendations to states are aimed at preventing unreasonably high prices for access to essential IP products; to prevent IP rights that violate other essential rights; and to conduct a human rights impact assessment before and after implementing IP legislation.[177]

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[171]Helfer n 45 above 994-996.

[172]This particular approach is close to the German Federal Constitutional Court's approach of balancing property rights with conflicting rights and the public interest by asking whether an individual's particular right may 'serve the fundamental constitutional purpose of securing a sphere of personal liberty for the individual to take responsibility for her own affairs in the patrimonial field' and protecting or limiting the right accordingly: Van der Walt n 115 above 151. Rights that do not fall in that sphere will receive less protection in terms of the scaling approach by reason that these would most likely pertain to commercial interests which is viewed as being further removed from the core principle of human flourishing – in terms of which article 14 determines whether constitutional protection is suitable given the nature of a particular property interest.

[173]Helfer n 45 above 996-999.

[174]General Comment no 17 n 110 above par 35. See Helfer n 45 above 997- 998: The three aspects of the Comment are important 'specific prescriptions for member states'.

[175]CESCR n 5 above.

[176]General Comment no 17 n 110 above para 35.

[177]Helfer n 45 above 997-999.

Countries that wish to implement more human rights-friendly national IP legislation may use the recommendations as a template. The World Trade Organisation (WTO) dispute settlement panels could also use these recommendations to interpret the TRIPS Agreement[178] in a human rights-compatible way.[179] The TRIPS Agreement[180] adopted relatively high minimum protection standards for all WTO members – including many developing and undeveloped countries. The fact that the TRIPS Agreement 'has teeth'[181] sets it apart from previous IP agreements. Treaties can be enforced through the WTO's dispute settlement system, which uses mandatory adjudication backed up by the threat of retaliatory sanctions.[182] Proponents of the TRIPS Agreement[183] argue that developing countries gain freer access by means of benefits and concessions received from WTO agreements.

However, many less developed countries have found the international IP system unsatisfactory in that it does not consider local conditions in, or the needs and interests of, less developed countries. The TRIPS Agreement[184] also hampers access to information, knowledge and essential medicines.[185] The focus of the human rights scrutiny of the TRIPS Agreement[186] has fallen on its provisions that affect public health, human rights, biodiversity, and plant genetic resources.[187]

Resolution 2000/7 on 'Intellectual Property and Human Rights'[188] deemed intellectual property protection flawed due to conflicts between the implementation of the TRIPS Agreement[189] and the realisation of economic, social and cultural rights. Five areas of conflict were identified: '(1) the transfer of technology in developing countries; (2) the consequences for the right to food of plant breeders' rights and patents for genetically modified

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[178]TRIPS Agreement n 72 above.
[179]Helfer n 45 above 1000.
[180]TRIPS Agreement n 72 above.
[181]Helfer n 45 above 984.
[182]Helfer 'Regime shifting: The TRIPS agreement and new dynamics of international intellectual property lawmaking' (2004) 29 *Yale J Int'l L* 2.
[183]TRIPS Agreement n 73 above.
[184]*Ibid.*
[185]Yu 'Symposium: The first ten years of the TRIPS agreement: TRIPS and its discontents' (2006) 10 *Marq Intell Prop LR* 370. See also Helfer n 183 above 3.
[186]TRIPS Agreement n 72 above.
[187]Helfer n 184 above 4.
[188]United Nations Economic and Social Council [ECOSOC] Sub-Commission on Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights Resolution 2000/7 (17 August 2000) UN Doc E/CN4/Sub2/RES/2000/7. Also see Weissbrodt and Schoff 'A human rights approach to intellectual property protection: The genesis and application of sub-commission resolution 2000/7' (2003) 5 *Minn Intell Prop R* 1-46.
[189]TRIPS Agreement n 72 above.

organisms; (3) biopiracy; (4) the protection of the culture of indigenous communities; and (5) the impact on the right to health of legal restrictions on access to patented pharmaceuticals'.[190]

The resolution suggests the use of human rights primacy over economic policies and agreements in order to resolve the conflicts, but is without legal force. It further does not provide which specific human rights the TRIPS Agreement[191] violates. The area of economic, social and cultural rights is the least developed of all the human rights categories, but is also the area where human rights and IP rights overlap most often.[192]

Helfer[193] proposes three different hypothetical scenarios for a human rights framework. The first uses human rights to expand IP; the second uses human rights to impose external limits on IP; and the third proposes that human rights ends be achieved through IP means. The first (arguably undesirable) scenario would promote IP rights to the detriment of other human rights. Human rights protection would be used to argue for the expansion of IP protection which has raised scepticism as to a human rights framework for IP.[194]

If domestic courts keep the core purpose of property protection in mind while using some variation of the German scaling approach to determine which particular rights in a specified IP category are deserving of human rights protection and which are not, this encroachment on the public domain can be prevented. South African courts use a balancing approach to determine which constitutional rights should take precedence, so this unfortunate outcome may be avoided, at least in South African law. Intellectual property rights may be protected by the South African constitutional property clause in instances where this is necessary, but will be trumped where a more important right takes precedence.[195]

The second scenario uses human rights law to impose limitations on IP. Arguments in favour of more lenient use of IP rights could rely on other human rights to counter the extension of IP rights. Limitations on copyright (not

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[190]Helfer n 45 above 985.
[191]TRIPS Agreement n 72 above.
[192]Helfer n 45 above 986-987. See also Foster n 108 above 205 and Helfer 'Adjudicating copyright claims under the TRIPS Agreement: The case for a European human rights analogy' (1998) 39 *Harv Intl LJ* 387.
[193]Helfer n 45 above 1014-1020.
[194]Helfer n 45 above 1015. See Chon 'Intellectual property and the development divide' (2006) 27 *Cardozo LR* 2853; Raustiala 'Density and conflict in international intellectual property law' (2007) 40 *UC Davis LR* 1031-1032.
[195]See Van der Walt and Shay 'Constitutional analysis of intellectual property' (2014) 17/1 *PER* 52-85; and Du Bois 'Intellectual property as a constitutional property right: The South African approach' (2012) 24 *SA Merc LJ* 174-190.

provided for in IP law) through freedom of expression are an example.[196] This reaches beyond the exceptions and limitations of IP and imposes external limits or maximum standards of protection on right holders. In *Laugh It Off v SAB International*,[197] the South African Constitutional Court limited trade-mark rights in terms of the right to freedom of expression in a similar way, justifying a use outside of the limitations provided for in the Trade Marks Act 194 of 1993.

Judges may be more likely to impose external limits on IP rights if there were more treaties that provided specific instructions as to how these limits should be applied. However, when faced with an excessive number of conflicting rules, judges might be less likely to refer to international law due to uncertainty as to how to interpret national legislation in line with international law.[198]

The third scenario would achieve human rights ends through IP means, which moves beyond taking the existing intellectual property system as is and merely adding human rights protection. First, the minimum outcomes for health, education, social welfare, and other human rights that states must protect and promote are specified, followed by the mechanisms that can assist in achieving the goals. Where IP laws help to achieve the goals, they are protected, but are modified or restricted where they hinder the process. Here IP plays second fiddle; the focus falls on providing minimum levels of human well-being by using IP laws.[199] An example would be the Australian Tobacco Plain Packaging Act 148 of 2011 which was enacted to promote public health, and which restricts some trade-mark rights because they hinder this aim.[200]

There is still no clear dominant scenario, but the fields of IP law and human rights law are becoming more intertwined as the rules of international human rights law become more relevant to IP law.[201]

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[196]See Geiger 'Fundamental rights, a safeguard for the coherence of intellectual property law?' (2004) 35 *IIC* 277. For a South African law example see Van der Walt and Shay 'Parody as a means to advance the objectives of copyright law' (2013) 25 *SA Merc LJ* 1-12.
[197]*Laugh it Off Promotions v SAB International* n 105 above.
[198]Helfer n 45 above 1017-1018.
[199]*Id* 1018-1020.
[200]See *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited and Ors v The Commonwealth of Australia* [2012] HCA 43 and on this decision and the possibilities of tobacco plain packaging legislation in South African law, see Harms 'Plain packaging and its impact on trademark law' (2013) 46 *De Jure* 387-400; Du Bois 'Trade marks for tobacco products as constitutional property: Australian plain packaging legislation' (2013) 25/2 *SA Merc LJ* 197-222; and Dean 'Deprivation of trade marks through state interference in their usage' (2013) 35 *European Intellectual Property Review* 576-589.
[201]Helfer n 45 above 1020.

5 Conclusion

The 1996 South African Constitution assigns international law an important role in the new constitutional dispensation. South African courts are compelled to consider international law, especially when dealing with issues arising under the Bill of Rights. This article has shown the most important international human rights instruments that may aid South African courts in deciding which aspects of IP should enjoy constitutional property protection, as well as providing a preliminary IP human rights framework to assist where fundamental rights conflict. This framework is necessary to ensure that IP rights develop in a way that assists the promotion of human rights, instead of unduly restricting human rights

South African courts must consider article 27(2) of the UDHR[202] and article 15(1)(c) of the CESCR[203] in seeking the correct approach in balancing conflicting fundamental rights, especially since the CESCR has now been ratified by South Africa in addition to being signed.[204] These articles protect human rights-based IP attributes as fundamental human rights. State parties have binding obligations to afford a level of protection to the human rights attributes of IP (the moral and material interests in IP creations). States have a wide discretion to provide protection for these rights because the international instruments do not prescribe or endorse any specific method. The South African Bill of Rights provides no separate right by which to protect the human rights attributes of IP, but protection could be provided via the property clause (section 25 of the Constitution).

As set out above, strategies exist for the establishment of an IP human rights framework.[205] The point of departure demands an exploration of the interface between human rights and IP by reference to the conflict and coexistence approaches. While the conflict approach views IP as always undermining human rights, the coexistence approach views human rights and IP rights as in essence compatible – with a focus on finding the appropriate balance between public and private rights in IP (between access to information and an incentive for the creation of more intellectual works; and also between other human rights and IP rights). South African courts appear to endorse the coexistence approach by not excluding IP rights from human rights protection

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[202]UDHR n 4 above.
[203]CESCR n 5 above.
[204]United Nations C.N.23.2015.TREATIES-IV.3 (Depositary Notification) available at http://www.seri-sa.org/images/ICESR_CN_23_2015-Eng.pdf.
[205]Torremans n 56 above; Helfer n 45 above 971-1020. Yu (*Ga St ULR*) n 10 above 709-753; Yu (*UC Davis LR*) n 10 above 1029-1149.

from the outset.[206] The important task in the creation of a human rights framework for IP is to determine which IP attributes have a human rights basis and which do not.[207]

Once this has been determined, the human rights supremacy principle dictates protecting other human rights above the attributes of IP rights that lack a human rights basis. Where the human rights attributes of IP conflict with other human rights, the human rights supremacy principle provides no guidance, as both of the conflicting rights in question are human rights. Three other approaches are useful here (used separately or in conjunction): the just remuneration approach; the core minimum rights approach; and the progressive realisation approach.

Works held mainly by juristic persons such as corporate trade marks, trade secrets owned by corporations, works-made-for-hire, employee inventions, neighbouring rights, database protection, data exclusivity protection, and other rights that protect the economic investment of institutional authors and inventors, may be excluded from human rights protection as they lack a human rights basis. These rights could still be protected in terms of constitutional law as economic rights, but they would not be considered fundamental rights.

International human rights law suggests that juristic persons should not enjoy human rights protection for their IP rights. At least in South African law, this would imply that the protection would sometimes be for economic rights rather than fundamental rights in constitutional law. A blanket exclusion cannot be supported as the Constitutional Court has explicitly stated that juristic persons may receive human rights protection for their rights as far as this is applicable.[208]

The approach of protecting some attributes of IP rights as a human right, while others without human rights attributes would receive no such protection, is broadly similar to the German scaling approach (which entails balancing property rights with conflicting rights and the public interest by asking whether an individual's particular right may 'serve the fundamental constitutional purpose of securing a sphere of personal liberty for the individual to take responsibility for her own affairs in the patrimonial field',

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[206] See *Laugh it Off Promotions v SAB International* n 105 above, where the court balanced the rights of a trademark owner and the right to freedom of expression.
[207] Yu (*Ga St ULR*) n 10 above 709-753; Yu (*UC Davis LR*) n 10 above 1029-1149.
[208] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) pars 41-45.

and protecting or limiting the right accordingly).[209] The rights that are closer to the concept of human flourishing would be protected more stringently as human rights, while the rights that are merely economic rights would be protected less stringently as constitutional rights. The German scaling approach is actually more efficient, as it does not exclude some IP rights from constitutional protection from the outset. These approaches are useful in determining which rights the state may regulate more easily.

A human rights framework for IP could follow three hypothetical routes: using human rights to expand IP (an undesirable route); using human rights to impose external limits on IP (desirable, but arguably not extensive enough in light of South African constitutional reform obligations); and using IP means to achieve human rights ends (arguably the most appropriate approach for South Africa).[210] This third approach coincides with the German scaling approach – protecting property interests as constitutional property if they serve the fundamental purpose of article 14 (securing an area of personal liberty in the patrimonial sphere for the holder of the property interest). This means that where a particular property interest serves to further other human rights, the property interests is protected more strongly.

In South African law, IP rights are protected as property in private law and once they have vested and been acquired in terms of the statutes (or common law) that create them, they may benefit from constitutional property protection (and be limited accordingly). The international law instruments serve as a mechanism to determine whether member states comply with their mandate to protect fundamental rights. Since South African law does provide property rule-type protection to IP rights, and the constitutional property clause can recognise and protect IP rights, South Africa appears to comply with the duty to protect the moral and material interests in IP rights. Until a particular case comes before the courts, we cannot determine which form of protection is necessary and whether the particular attribute of an IP interest should be protected more or less stringently.

This analysis shows that there is no reason evident from international human rights law why IP could not be protected under the constitutional property clause. Since the South African Constitution does not have a separate clause protecting IP rights, they (together with other intangible property interests) must be included under the property clause in so far as this is required by international norms. The South African property clause has the scope to protect strong human rights like housing as well as weaker economic rights like commercial property.

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[209]Van der Walt n 115 above 151.
[210]Helfer n 45 above.

The International Law Commission

Progressive development and codification of international law: The work of the International Law Commission during its sixty-sixth session 124
Dire Tladi

The work of the Sixth Committee of the United Nations General Assembly 2012-2013 144
Arnold N Pronto