

**THE RIGHT OF ACCESS TO EDUCATIONAL  
MATERIALS AND COPYRIGHT:  
INTERNATIONAL AND DOMESTIC LAW**



DPhil Thesis

Sanya Samtani

Magdalen College  
Hilary Term 2021

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## ABSTRACT

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### THE RIGHT OF ACCESS TO EDUCATIONAL MATERIALS AND COPYRIGHT: INTERNATIONAL AND DOMESTIC LAW

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International rules regulating copyright pose obstacles to accessing educational materials, particularly impacting persons living in poverty, persons living with disabilities and other marginalised groups. This Thesis argues that access to educational materials is a human right under the right to education and imposes obligations upon states. State obligations under human rights law thus appear to conflict with international copyright obligations for common parties. In demonstrating that states can reconcile these competing obligations harmoniously, the Thesis advances a rights-based response to the problem of access for those neglected by the market.

This Thesis is divided into two Parts. Part I locates access to educational materials as a human right and gives content to states parties' obligations. It identifies and analyses educational 'exceptions' to copyright in the relevant copyright treaties. It argues that these 'exceptions' coincide with states parties' human rights obligations to facilitate access. States parties can thus concurrently fulfil both sets of obligations to respond to the problem of access for the most marginalised. However, after analysing the relative institutional design of the international trade system and human rights treaty bodies, Part I concludes that trade-based obligations are likely to be prioritised over human rights obligations. This prioritisation negatively impacts access to educational materials in countries that cannot afford to pay for free access for all.

Part II investigates the manner in which two countries in the global South have sought to reconcile these obligations. South Africa's draft copyright legislation seeks to do this but the President has declined to assent to it due to concerns emanating from the international trade system and related actors. This illustrates the conclusions at the end of Part I. In contrast, a recent Indian court decision demonstrates the possibility of adopting a harmonious interpretation that facilitates equitable access for the most marginalised. The Thesis thus emphasises the crucial role of domestic constitutional actors in harmonising competing international obligations.

*In memory of Professor Shamnad Basbeer (1976-2019):*  
Your commitment to access remains unparalleled.

## ACKNOWLEDGEMENTS

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## TABLE OF ABBREVIATIONS

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|          |                                                                        |
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| AACE     | Association for the Advancement of Computing in Education              |
| ADB      | Asian Development Bank                                                 |
| AfCFTA   | Agreement Establishing the African Continental Free Trade Area         |
| AHRLJ    | African Human Rights Law Journal                                       |
| AJCL     | American Journal of Comparative Law                                    |
| AJLM     | American Journal of Law & Medicine                                     |
| ASEAK    | Association of Students for Equitable Access to Knowledge              |
| AsianYIL | Asian Yearbook of International Law                                    |
| ASR      | Articles on Responsibility of States for Internationally Wrongful Acts |
| AU       | African Union                                                          |
| AUILR    | American University International Law Review                           |
| AZAPO    | Azanian Peoples Organisation                                           |
| BEFA     | Basic Education for All                                                |
| BGH      | Bundesgerichtshof (German Federal Court of Justice)                    |
| BJIL     | Berkeley Journal of International Law                                  |
| BVB      | Bharatiya Vidya Bhavan                                                 |
| BYIL     | British Yearbook of International Law                                  |
| C-KLR    | Chicago-Kent Law Review                                                |
| CAB      | Copyright Amendment Bill [B-13 2017]                                   |
| CASAC    | Council for the Advancement of the South African Constitution          |
| CCR      | Constitutional Court Review                                            |
| CCSA     | Competition Commission of South Africa                                 |
| CEDAW    | Committee on the Elimination of Discrimination against Women           |
| CERD     | Committee on the Elimination of Racial Discrimination                  |
| CESCR    | Committee on Economic, Social and Cultural Rights                      |
| CILJ     | Cornell International Law Journal                                      |
| CILSA    | The Comparative and International Law Journal of Southern Africa       |
| CIPR     | Commission on Intellectual Property Rights                             |

|          |                                                                    |
|----------|--------------------------------------------------------------------|
| CJCLL    | Canadian Journal of Comparative and Contemporary Law               |
| CJLA     | The Columbia Journal of Law & the Arts                             |
| CJWL     | Canadian Journal of Women and the Law                              |
| CMC      | Consumption Markets & Culture                                      |
| COVID-19 | SARS-CoV-2 (2019-nCoV) coronavirus disease                         |
| CRC      | United Nations Convention on the Rights of the Child               |
| CRC      | Committee on the Rights of the Child                               |
| CRLPE    | Comparative Research in Law & Political Economy                    |
| CRPD     | Committee on the Rights of Persons with Disabilities               |
| CUP      | Cambridge University Press                                         |
| CVJLA    | Columbia-VLA Journal of Law and the Arts                           |
| DBE      | Department of Basic Education                                      |
| DHET     | Department of Higher Education and Training                        |
| DJCIL    | Duke Journal of Comparative and International Law                  |
| DPSP     | Directive Principle of State Policy                                |
| DSB      | Dispute Settlement Body                                            |
| DSM      | Dispute Settlement Mechanism                                       |
| DSS      | Dispute Settlement System                                          |
| DSU      | Dispute Settlement Understanding                                   |
| EC       | European Communities                                               |
| ECHR     | European Court of Human Rights                                     |
| ECJ      | Court of Justice of the European Union                             |
| ECOSOC   | United Nations Economic and Social Council                         |
| EE       | Edward Elgar Publishing                                            |
| EPW      | Economic and Political Weekly                                      |
| ESULJ    | Ebonyi State University Law Journal                                |
| GATT     | General Agreement on Trade and Tariffs                             |
| GC11     | CESCR General Comment No 11: Plans of Action for Primary Education |
| GC13     | CESCR General Comment No 13: The Right to Education                |

|           |                                                                                                                                                                                                                       |
|-----------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| GC14      | CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health                                                                                                                                   |
| GC16      | CRC General Comment No 16: State obligations regarding the impact of the business sector on children's rights                                                                                                         |
| GC17      | 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 production of which he or she is the author |
| GC20      | CESCR General Comment No 20: Non-discrimination in economic, social and cultural rights                                                                                                                               |
| GC3       | CESCR General Comment No 3: The nature of States parties' obligations                                                                                                                                                 |
| GC4       | CRPD General Comment No 4: Right to inclusive education                                                                                                                                                               |
| GIP       | Graduate Institute Publications                                                                                                                                                                                       |
| GJICL     | Georgia Journal of International and Comparative Law                                                                                                                                                                  |
| GMFU      | Global Mandatory Fair Use                                                                                                                                                                                             |
| GSULR     | Georgia State University Law Review                                                                                                                                                                                   |
| GWILR     | George Washington International Law Review                                                                                                                                                                            |
| HERD      | Higher Education Research & Development                                                                                                                                                                               |
| HILJ      | Harvard International Law Journal                                                                                                                                                                                     |
| HLR       | Harvard Law Review                                                                                                                                                                                                    |
| HouLR     | Houston Law Review                                                                                                                                                                                                    |
| HRC       | Human Rights Committee                                                                                                                                                                                                |
| HRLJ      | Human Rights Law Journal                                                                                                                                                                                              |
| HRLR      | Human Rights Law Review                                                                                                                                                                                               |
| HRQ       | Human Rights Quarterly                                                                                                                                                                                                |
| HSRC      | Human Sciences Research Council                                                                                                                                                                                       |
| HUP       | Harvard University Press                                                                                                                                                                                              |
| IACHR     | Inter-American Court of Human Rights                                                                                                                                                                                  |
| IACL-AIDC | International Association of Constitutional Law-l'Association Internationale de Droit Constitutionnel                                                                                                                 |
| ICCPR     | International Covenant on Civil and Political Rights                                                                                                                                                                  |

|               |                                                                                   |
|---------------|-----------------------------------------------------------------------------------|
| ICERD         | International Convention on the Elimination of All Forms of Racial Discrimination |
| ICESCR        | International Covenant on Economic, Social and Cultural Rights                    |
| ICJ           | International Court of Justice                                                    |
| IJCL          | International Journal of Constitutional Law                                       |
| ICLQ          | International and Comparative Law Quarterly                                       |
| IEA:PLE       | International Environmental Agreements: Politics, Law and Economics               |
| IIC           | International Review of Intellectual Property and Competition Law                 |
| IJAD          | International Journal for Academic Development                                    |
| IJHR          | The International Journal of Human Rights                                         |
| ILC           | International Law Commission                                                      |
| IndConLawPhil | Indian Constitutional Law and Philosophy                                          |
| InJIL         | Indian Journal of International Law                                               |
| InLR          | Indian Law Review                                                                 |
| IPQ           | Intellectual Property Quarterly                                                   |
| JCSL          | Journal of Conflict and Security Law                                              |
| JEP           | Journal of Electronic Publishing                                                  |
| JHD           | Journal of Human Development                                                      |
| JIDS          | Journal of International Dispute Settlement                                       |
| JIEL          | Journal of International Economic Law                                             |
| JILI          | Journal of the Indian Law Institute                                               |
| JILIR         | Journal of International Law and International Relations                          |
| JILT          | Journal of Information, Law and Technology                                        |
| JInLS         | Journal of Indian Law and Society                                                 |
| JIPLP         | Journal of Intellectual Property Law & Practice                                   |
| JIPR          | Journal of Intellectual Property Rights                                           |
| JLS           | Journal of Legal Studies                                                          |
| JWIP          | The Journal of World Intellectual Property                                        |
| JWT           | Journal of World Trade                                                            |
| LCP           | Law and Contemporary Problems                                                     |

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|---------|---------------------------------------------------------------------------------------------------------------------------|
| LDD     | Law, Democracy & Development                                                                                              |
| LDR     | Law and Development Review                                                                                                |
| LIASA   | Library and Information Association of South Africa                                                                       |
| LJIL    | Leiden Journal of International Law                                                                                       |
| LTSM    | Learning and Teaching Support Material                                                                                    |
| MelbJIL | Melbourne Journal of International Law                                                                                    |
| MIPLR   | Marquette Intellectual Property Law Review                                                                                |
| MizLR   | Mizan Law Review                                                                                                          |
| MJIL    | Michigan Journal of International Law                                                                                     |
| MLR     | Modern Law Review                                                                                                         |
| MPEPIL  | Max Planck Encyclopaedia of Public International Law                                                                      |
| MVT     | Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities |
| NEHAWU  | National Education Health & Allied Workers Union                                                                          |
| NICRO   | National Institute for Crime Prevention and the Re-integration of Offenders                                               |
| NICRO   | National Institute for Crime Prevention and the Reintegration of Offenders                                                |
| NILQ    | Northern Ireland Legal Quarterly                                                                                          |
| NILR    | Netherlands International Law Review                                                                                      |
| NJHR    | Nordic Journal of Human Rights                                                                                            |
| NJIL    | Nordic Journal of International Law                                                                                       |
| NUJSLR  | NUJS Law Review                                                                                                           |
| NUMSA   | National Union of Metal Workers of South Africa                                                                           |
| NWULR   | Northwestern University Law Review                                                                                        |
| OAU     | Organisation of African Unity                                                                                             |
| OHCHR   | Office of the High Commissioner for Human Rights                                                                          |
| OJLS    | Oxford Journal of Legal Studies                                                                                           |
| OPCEDAW | Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women                       |
| OPCRPD  | Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities                             |

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|-----------|-------------------------------------------------------------------------------------------------------------------------------------|
| OPICESCR  | Optional Protocol to the International Covenant on Economic, Social and Cultural Rights                                             |
| OUP       | Oxford University Press                                                                                                             |
| PELJ/PER  | Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad                                                          |
| PIJIP/TLS | Programme on Information Justice and Intellectual Property/Technology, Law and Security                                             |
| PLOS      | Public Library of Science                                                                                                           |
| PMG       | Parliamentary Monitoring Group                                                                                                      |
| PNAS      | Proceedings of the National Academy of Sciences                                                                                     |
| PoP       | Perspectives on Politics                                                                                                            |
| PUCL      | Peoples' Union for Civil Liberties                                                                                                  |
| PULP      | Pretoria University Law Press                                                                                                       |
| PUP       | Princeton University Press                                                                                                          |
| QMJP      | Queen Mary Journal of Intellectual Property                                                                                         |
| RdC       | Receuil des Cours de l' Academie de Droit International de la Haye<br>(Collected Courses of the Hague Academy of International Law) |
| Records   | Records of the Intellectual Property Conference of Stockholm                                                                        |
| RIDA      | Revue Internationale du Droit d'Auteur                                                                                              |
| RIPE      | Review of International Political Economy                                                                                           |
| RJGLB     | Richmond Journal of Global Law and Business                                                                                         |
| S-IJHR    | Sur - International Journal on Human Rights                                                                                         |
| SAARC     | South Asian Association for Regional Cooperation                                                                                    |
| SADC      | Southern African Development Community                                                                                              |
| SAJHR     | South African Journal on Human Rights                                                                                               |
| SAJIC     | Southern African Journal of Information and Communication                                                                           |
| SALC      | Southern Africa Litigation Centre                                                                                                   |
| SALJ      | South African Law Journal                                                                                                           |
| SAPL      | Southern African Public Law                                                                                                         |
| SATAWU    | South African Transport and Allied Workers Union                                                                                    |

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|------------|----------------------------------------------------------------------------------------------------------------------------------------------------|
| SAYIL      | South African Yearbook of International Law                                                                                                        |
| SCCR/19/8  | WIPO Study on Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel |
| SCCR/9/7   | WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment                                                |
| SDG        | Sustainable Development Goal                                                                                                                       |
| SIDA       | Swedish International Development Cooperation Agency                                                                                               |
| SPEAK      | Society for the Promotion of Equitable Access to Knowledge                                                                                         |
| TIL        | The International Lawyer                                                                                                                           |
| TJICL      | Tulane Journal of International and Comparative Law                                                                                                |
| TPRB       | Trade Policy Review Body                                                                                                                           |
| TPRM       | Trade Policy Review Mechanism                                                                                                                      |
| TRALAC     | Trade Law Centre                                                                                                                                   |
| TRIPS      | Agreement on Trade-Related aspects of Intellectual Property Rights                                                                                 |
| UCC        | Universal Copyright Convention                                                                                                                     |
| UCDLR      | University of California Davis Law Review                                                                                                          |
| UCILR      | University of California Irvine Law Review                                                                                                         |
| UDHR       | Universal Declaration of Human Rights                                                                                                              |
| ULR        | Utrecht Law Review                                                                                                                                 |
| UN         | United Nations                                                                                                                                     |
| UNCEDAW    | United Nations Convention on the Elimination of All Forms of Discrimination against Women                                                          |
| UNCRC      | United Nations Convention on the Rights of the Child                                                                                               |
| UNCRPD     | United Nations Convention on the Rights of Persons with Disabilities                                                                               |
| UNESCO     | United Nations Economic, Social and Cultural Organisation                                                                                          |
| UNESCO ILL | United Nations Economic, Social and Cultural Organisation Institute for Lifelong Learning                                                          |
| UNSWLJ     | University of New South Wales Law Journal                                                                                                          |
| UNTC       | United Nations Treaty Collection                                                                                                                   |
| UNTS       | United Nations Treaty Series                                                                                                                       |

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|-----------|---------------------------------------------------------------------------------------------|
| UOxHRHJ   | University of Oxford Human Rights Hub Journal                                               |
| UrhG      | Urheberrechtsgesetz (German Copyright Law)                                                  |
| USC       | United States Code                                                                          |
| VCLT      | Vienna Convention on the Law of Treaties                                                    |
| VJTL      | Vanderbilt Journal of Transnational Law                                                     |
| WCT       | World Intellectual Property Organisation Copyright Treaty                                   |
| WILJ      | Wisconsin International Law Journal                                                         |
| WIPO      | World Intellectual Property Organisation                                                    |
| WIPO SCCR | World Intellectual Property Organisation Standing Committee on Copyright and Related Rights |
| WPPT      | World Intellectual Property Organisation Performances and Phonograms Treaty                 |
| WTO       | World Trade Organisation                                                                    |
| WTR       | World Trade Review                                                                          |
| YILC      | Yearbook of the International Law Commission                                                |
| YJIL      | Yale Journal of International Law                                                           |
| YUP       | Yale University Press                                                                       |
| ZACC      | South African Constitutional Court                                                          |
| ZAECBHC   | South Africa: Eastern Cape High Court, Bhisho                                               |
| ZAECGHC   | South Africa: Eastern Cape High Court, Grahamstown                                          |
| ZAECMHC   | South Africa: Eastern Cape High Court, Mthatha                                              |
| ZAGPPHC   | South Africa: North Gauteng High Court, Pretoria                                            |
| ZALMPPHC  | South Africa: Limpopo High Court, Polokwane                                                 |
| ZASCA     | South Africa: Supreme Court of Appeals                                                      |
| ZAWCHC    | South Africa: Western Cape High Court, Cape Town                                            |

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# 1. INTRODUCTION

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The Doors of Learning And of Culture Shall Be Opened!  
The government shall discover, develop and encourage  
national talent for the enhancement of our cultural life;  
All the cultural treasures of mankind shall be open to all,  
by free exchange of books, ideas and contact with other lands  
- South African Congress Alliance, *Freedom Charter*

The role of knowledge in structuring relationships of power has been explored throughout history.<sup>1</sup> This Thesis is thematically concerned with the knowledge production process in society.<sup>2</sup> It analyses the law's creation of monopolies of knowledge by asking whom these monopolies empower and whom they disempower.<sup>3</sup> The Thesis concurrently analyses the law's protection of the most marginalised members of society.<sup>4</sup> Importantly, it identifies an overlap between the groups disempowered by monopolies of knowledge and those concurrently protected by law. The Thesis is located in this space.

## 1.1. Copyright, the industry, and the problem of access

The Thesis analyses copyright as a monopoly of knowledge. Copyright law provides creators of literary, artistic, and other expressive works with a monopoly over how their

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<sup>1</sup> See, for a historical view, Richard Ovenden, *Burning the Books: A History of Knowledge under Attack* (John Murray 2020). See, for a political economy view, RK Sidhu, *Universities & Globalization: To Market, to Market* (Routledge 2006). See, for a critical epistemological view, Michel Foucault, *The Order of Things* (Taylor & Francis 2005); Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (AM Sheridan Smith tr, Pantheon 1972).

<sup>2</sup> Manuel Castells, *The Network Society: A Cross-Cultural Perspective* (EE 2004).

<sup>3</sup> See, for the relationship between technology, communication and monopolies of knowledge, Harold Innis, *The Bias of Communication* (University of Toronto Press 1951); Harold Innis, *The Political Economy in the Modern State* (RA Babe and EA Comor eds, University of Toronto Press 2018). See, applying this theory to creative commons and access to knowledge, Risa Dickens, 'No One Knows Everything: Open Source and "the Crisis Is Public Opinion"' (PhD Thesis) [2006] ProQuest.

<sup>4</sup> EP Thompson, *Whigs and Hunters* (Pantheon 1975) 266.

creations are used.<sup>5</sup> In this way, copyright creates ‘knowledge goods’ that derive economic value from being used.<sup>6</sup> Access to these works thus typically takes place through the market. Historically, one of the justifications<sup>7</sup> for copyright’s monopoly has been ‘the encouragement of learning’.<sup>8</sup> On these terms, the monopoly over the use of the work, granted by copyright, provides an economic incentive for creators to continue to innovate,<sup>9</sup> thereby contributing to knowledge for the benefit of the community as a whole.<sup>10</sup> This gives rise to the creative industry, including the publishing industry.<sup>11</sup> Several studies have confirmed the crucial link between published textbooks and the achievement of numeracy and literacy outcomes consequently leading to economic growth.<sup>12</sup> However these studies

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<sup>5</sup> See Chapter 3.

<sup>6</sup> ‘Economic aspects of intellectual property for countries with economies in transition’ (WIPO, 2012) <[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_transition\\_8.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_transition_8.pdf) 6> accessed 21 March 2021. See also, C May, ‘Between Commodification and “Openness”: The Information Society and the Ownership of Knowledge’ (2005) 2–3 JILT’.

<sup>7</sup> In addition to the utilitarian justification set out above, several justifications have been advanced for copyright including unjust enrichment, a Lockean labour theory of property applied to intangibles, recognition of an inseparable link between the personality of the creator and their creation, among others. It is not the task of this Thesis to traverse them in detail. See, mapping the literature, Tanya Aplin and Jennifer Davis, *Intellectual Property Law*, vol 1 (OUP 2017) 1–26. But see, stating that there is an ‘abyss at the heart of copyright law – its lack of a universally accepted, morally sustainable and philosophically consistent foundation’ in Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart 2010) 298. See also, for a feminist critique, JF Turcotte, ‘Show Me the Copy! How Digital Media (Re)Assert Relational Creativity, Complicating Existing Intellectual Property and Publishing Paradigms’ in Janis Jefferies and Sarah Kember (eds), *Whose Book is it Anyway? a View From Elsewhere on Publishing, Copyright and Creativity* (Open Book Publishers 2019) 347–355.

<sup>8</sup> Copyright Act 1709 8 Anne c21 (Great Britain). See also, JC Ginsburg, ‘A Tale of Two Copyrights: Literary Property in Revolutionary France and America’ (1990) 64 Tulane Law Review 991, 1001.

<sup>9</sup> ‘Guide on surveying the economic contribution of the copyright industries’, (WIPO, 2015) [74], [75] <[https://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo\\_pub\\_893.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf)> accessed 21 March 2021.

<sup>10</sup> M Spence, ‘Justifying Copyright’ in D McClean and K Schubert (eds), *Dear Images: Art, Copyright and Culture* (Ridinghouse 2002) 389–403.

<sup>11</sup> ‘Study on the Economic, Social and Cultural Impact of Intellectual Property in the Creative Industries’ (WIPO, 2007) [15] <[https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/impact\\_creative\\_industries.pdf](https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/impact_creative_industries.pdf)> accessed 21 March 2021

<sup>12</sup> Eg., SP Heyneman, J Farrell and M Sepulveda-Stuardo, ‘Textbooks and Achievement: What We Know’ (*World Bank*, 1978); SP Heyneman and J Farrell, ‘Textbooks in Developing Nations: Economic and Pedagogical Choices’ (*World Bank*, 1989); SP Heyneman, ‘Producing Textbooks in Developing Countries, Finance and Development’, (*World Bank*, 1990).

do not answer the *access* question. This Thesis does not study the general effectiveness of copyright or its justifications, economic or otherwise. Rather, it analyses copyright's legal effect on the realisation of the right to education for all, in its current form.<sup>13</sup>

Nearly 75% of academic research on the internet is paywalled.<sup>14</sup> The open access movement has made significant gains,<sup>15</sup> including securing commitments from funders regarding open research,<sup>16</sup> and prompting new open access publishers.<sup>17</sup> But commercial publishers remain an oligopoly.<sup>18</sup> The problem of access persists.<sup>19</sup> In the global South particularly, this takes the form of paywalls and unaffordable subscriptions,<sup>20</sup> lack of internet access for majority of the population,<sup>21</sup> and reliance on print materials for

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<sup>13</sup> I analyse educational exceptions permitted by copyright in Chapter 3.

<sup>14</sup> Heather Piwowar and others, 'The State of OA: A Large-Scale Analysis of the Prevalence and Impact of Open Access Articles' (2018) 6 PeerJ <<https://peerj.com/articles/4375>> accessed 12 March 2021; M Khabisa and CL Giles, 'The Number of Scholarly Documents on the Public Web' (2014) 9 PLoS ONE <<https://dx.plos.org/10.1371/journal.pone.0093949>> accessed 12 March 2021; Jeroen Bosman and Bianca Kramer, 'Open Access Levels: A Quantitative Exploration Using Web of Science and OaDOI Data' (PeerJ Preprints 2018) preprint <<https://peerj.com/preprints/3520v1>> accessed 12 March 2021.

<sup>15</sup> JP Tennant and others, 'The Academic, Economic and Societal Impacts of Open Access: An Evidence-Based Review' (2016) 5 F1000Research 632.

<sup>16</sup> Eg., 'Bill & Melinda Gates Foundation Open Access Policy' (*Gates Foundation*, 1 January 2021) <<https://www.gatesfoundation.org/How-We-Work/General-Information/Open-Access-Policy>> accessed 21 March 2021. See also, 'Plan-S: making full and open access a reality' (*Coalition-S*) <<https://www.coalition-s.org>> accessed 21 March 2021.

<sup>17</sup> RS Rodrigues, E Abadal, and BKH de Araújo, 'Open Access Publishers: The New Players' (2020) 15 PLOS ONE <<https://doi.org/10.1371/journal.pone.0233432>> accessed 12 March 2021.

<sup>18</sup> Eg., Reed-Elsevier, Wiley-Blackwell, Springer, and Taylor & Francis accounted for more than 70% of all published papers in the social sciences in 2013 alone. See Vincent Larivière, Stefanie Haustein, and Philippe Mongeon, 'The Oligopoly of Academic Publishers in the Digital Era' (2015) 10 PLOS ONE e0127502.

<sup>19</sup> Alice Meadows, 'Beyond Open: Expanding Access to Scholarly Content' (2015) 18 JEP <<https://doi.org/10.3998/3336451.0018.301>> accessed 12 March 2021.

<sup>20</sup> Barbara Kirsop and Leslie Chan, 'Transforming Access to Research Literature for Developing Countries' (2005) 31 Serials Review 246; Christophe Boudry and others, 'Worldwide Inequality in Access to Full Text Scientific Articles: The Example of Ophthalmology' (2019) 7 PeerJ e7850.

<sup>21</sup> For the share of the population in every country in the world using the internet, see Max Roser, Hannah Ritchie and Esteban Ortiz-Ospina, 'Internet' (*OurWorldInData.org*, 2015) <<https://ourworldindata.org/internet>> accessed 21 March 2021.

educational purposes.<sup>22</sup> Even in the global North, several institutions have recently pulled out of subscriptions with commercial publishers<sup>23</sup> on the basis of exorbitant subscription pricing<sup>24</sup> and having to use library budgets to buy back research published by their own academic staff.<sup>25</sup> This indicates the unsustainability and unaffordability of commercial academic publishing models.<sup>26</sup>

In the contemporary moment, those seeking to facilitate access to materials under copyright for educational purposes, with the aim of reaching groups for whom the market has failed, have been taken to court by some of the biggest publishers in the world for infringement seeking millions in damages.<sup>27</sup> Simultaneously, the market enables the same

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<sup>22</sup> Caroline Ncube, 'Using Human Rights to Move beyond Reformism to Radicalism: A2K for Schools, Libraries and Archives' in M Callahan and J Rogers (eds), *Critical guide to intellectual property* (Zed Books 2017) 129; SI Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Brill-Nijhoff 2012) 202. See also, 'The learning generation: Investing in education for a changing world' (*International Commission on Financing Global Education Opportunity*, 2016).

<sup>23</sup> Eg., Quirin Schiermeier, 'Germany vs Elsevier: Universities Win Temporary Journal Access after Refusing to Pay Fees' (2018) 553 *Nature* 137; Lisa Olsson and others, 'Consequences of Sweden Cancelling Elsevier' [2019] Zenodo <<https://zenodo.org/record/3259809>> accessed 12 March 2021. See also, 'Norwegian research institutions have decided not to extend the agreement with the publisher Elsevier' (*Norwegian Directorate for ICT and Joint Services in Higher Education and Research*, 2020) <<https://www.unit.no/en/node/731>> accessed 21 March 2021; Nisha Gaiind, 'Huge US university cancels subscription with Elsevier' (*Nature*, 2019) <<https://www.nature.com/articles/d41586-019-00758-x>> accessed 21 March 2021; Holly Else, 'Europe's open-access drive escalates as university stand-offs spread' (*Nature*, 2018) <<https://www.nature.com/articles/d41586-018-05191-0>> accessed 21 March 2021.

<sup>24</sup> 'Graph 4: Expenditure Trends in ARL Libraries, 1986-2015' (*Association of Research Libraries*, 2018); 'Expenditure Trends' (*ARL*, 2014-2015). See also, TC Bergstrom and others, 'Evaluating Big Deal Journal Bundles' (2014) 111 *PNAS* 9425.

<sup>25</sup> DL Roth, 'The Serials Crisis Revisited' (1990) 18 *The Serials Librarian* 123.

<sup>26</sup> Laura Krier, Rita Premo, and Mary Wegmann, 'The Future Is Wide Open: Sustainable Scholarly Communications and Affordable Learning in Libraries' (2019) 44 *Collection Management* 164; Bo-Christer Björk, 'Scholarly Journal Publishing in Transition- from Restricted to Open Access' (2017) 27 *Electronic Markets* 101.

<sup>27</sup> Over the past 20 years, big publishers have filed infringement suits: against universities for educational use of materials under copyright (*CUP, OUP and Sage v Becker* ND Ga 1:08 Civ 01425 (ODE) (USA)); against publishers of study guides (*Chancellor Masters & Scholars of The University of Oxford v Narendara Publishing House, Syndicate Of The Press Of The University Of Cambridge v BD Bhandari* 2008 (38) PTC 385 (Del), 2011 (47) PTC 244 (Del) (DB)); against an academic works repository (*American Chemical Society & Elsevier v ResearchGate GMBH* DMd 8:18 Civ 03019 (GJH)).

publishers to increase subscription prices<sup>28</sup> and turn a profit,<sup>29</sup> even during the COVID-19 pandemic,<sup>30</sup> further demonstrating that they cater to the cultural, linguistic and moneyed elite.<sup>31</sup>

Those who are excluded by the market thus rely on *shadow* libraries for access, whose legality in the eyes of copyright law is highly contested.<sup>32</sup> These libraries and the people running them are under constant threat from the law,<sup>33</sup> sued for millions in damages,<sup>34</sup> and access is often on the verge of being abruptly cut off.<sup>35</sup> Still others, who do not have internet access, go without, further limiting participation in knowledge production.<sup>36</sup>

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<sup>28</sup> Stuart Lawson, 'Opening the Black Box of Scholarly Communication Funding: A Public Data Infrastructure for Financial Flows in Academic Publishing' (2016) 2 Open Library of Humanities e10.

<sup>29</sup> Richard Van Noorden, 'Open Access: The True Cost of Science Publishing' (2013) 495 Nature 426.

<sup>30</sup> See, for instance, a 4% increase in operating profit from 2019 amounting to £2,245 million for 2020, 'Reed Elsevier Annual Reports 2020' (RELX, 2020) < <https://www.relx.com/~media/Files/R/RELX-Group/documents/reports/annual-reports/2020-annual-report.pdf> > accessed 21 March 2021.

<sup>31</sup> Lea Shaver, *Ending Book Hunger: Access to Print across Barriers of Class and Culture* (YUP 2019) 8–10.

<sup>32</sup> Joe Karaganis, 'Introduction: Access from Above, Access from Below' in Joe Karaganis (ed), *Shadow Libraries: Access to Knowledge in Global Higher Education* (MIT 2018); Balázs Bodó, Dániel Antal, and Zoltán Puha, 'Can Scholarly Pirate Libraries Bridge the Knowledge Access Gap? An Empirical Study on the Structural Conditions of Book Piracy in Global and European Academia' (2020) 15 PLOS ONE e0242509; DS Himmelstein and others, 'Sci-Hub Provides Access to Nearly All Scholarly Literature' (2018) 7 eLife e32822.

<sup>33</sup> Michael O'Sullivan, 'Aaron Swartz, New Technologies, and the Myth of Open Access' in Michael O'Sullivan (ed), *Academic Barbarism, Universities and Inequality* (Palgrave Macmillan UK 2016); Richard Van Noorden, 'Alexandra Elbakyan: Paper Pirate' [2016] Nature's 10: Ten People Who Mattered This Year <<https://www.nature.com/news/nature-s-10-1.21157>>.

<sup>34</sup> *Elsevier Inc v www.Sci-Hub.org* SDNY 1:15 Civ 04828 (RWS) (ex parte; defendants ordered to pay \$15 million).

<sup>35</sup> As a result of court-ordered preliminary and permanent injunctions from infringement suits. Eg., Ernesto van der Sar, 'Court Orders Shutdown of Libgen, Bookfi and Sci-Hub' (*TorrentFreak*, 2015) <<https://torrentfreak.com/court-orders-shutdown-of-libgen-bookfi-and-sci-hub-151102/>> accessed 21 March 2021; Andy Maxwell, 'Vodafone Blocks Libgen Following Elsevier, Springer & Macmillan Injunction', (*TorrentFreak*, 2018) <<https://torrentfreak.com/vodafone-blocks-libgen-following-elsevier-springer-macmillan-injunction-180808/>> accessed 21 March 2021.

<sup>36</sup> See, for economic, practical and philosophical justifications for access, John Willinsky, *The Access Principle: The Case for Open Access to Research and Scholarship* (MIT 2006).

## 1.2. Human rights, capabilities, and the normative importance of access to educational materials

At the same time, human rights law recognises the inherent interest of all human beings in the full development of their personhood and society without discrimination. It guarantees the *equal* right to education to all members of society – and within it the right of access to educational materials.<sup>37</sup> As with copyright, there are several justifications for human rights.<sup>38</sup> The Thesis does not advance arguments preferring one over the other. Rather, it analyses the extent to which human rights guarantees access to educational materials and its interaction with the legal regime of copyright. The crucial role played by educational materials in realising the human right to education is best demonstrated through the capabilities approach.<sup>39</sup> Human rights and human capabilities are closely related. Human rights underscore the urgency of realising human capabilities,<sup>40</sup> while capabilities particularise broad human rights guarantees to tailor them to local contexts and the differentiated circumstances of individuals.<sup>41</sup>

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<sup>37</sup> See Chapter 2.

<sup>38</sup> See for the full range of justifications, R Cruft, MS Liao, and M Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015).

<sup>39</sup> See, applying the capabilities approach to copyright, education and human development, Margaret Chon, 'Intellectual Property from below: Copyright and Capability for Education' (2006) 40 UCCLR 803.

<sup>40</sup> MC Nussbaum, 'Capabilities, Entitlements, Rights: Supplementation and Critique' (2011) 12 *Journal of Human Development and Capabilities* 23, 36.

<sup>41</sup> Amartya Sen, 'Human Rights and Capabilities' (2005) 6 *JHD* 151.

The capability *to be educated* is a basic human capability.<sup>42</sup> It is foundational, as it multiplies existing capabilities.<sup>43</sup> Its deprivation leads to significant harms to other capabilities.<sup>44</sup> Capabilities are defined as the capacity for a person to determine their own conception of the ‘good life’, and to have real freedoms enabling them to achieve this conception.<sup>45</sup> In response to utilitarian economics and aggregate approaches to welfare,<sup>46</sup> the capabilities approach shifts the focus from the distribution of primary goods to what these primary goods enable each person to *do* and to *be*.<sup>47</sup> If every human is able to exercise their agency in enjoying substantive freedoms, society collectively flourishes. Converting capabilities into actual ‘beings and doings’<sup>48</sup> requires an understanding of the particular intersectional location of the individual including socio-economic inequalities and their experience of structural and historical disadvantage.<sup>49</sup> On this approach, the capability to be educated, though particularised to the needs of every member of society, must cultivate these capacities: the capacity for critical thinking, including the expansion and utilisation

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<sup>42</sup> Although Sen leaves the determination of particular capabilities to deliberative processes, he identifies education as a basic human capability, important to well-being. Amartya Sen, *Development as Freedom* (OUP 1999) 20. See also, Nussbaum’s list including education, MC Nussbaum, *Creating Capabilities* (HUP 2011) 31–33.

<sup>43</sup> Melanie Walker and Elaine Unterhalter (eds), *Amartya Sen’s Capability Approach and Social Justice in Education* (Palgrave Macmillan 2007) 8.

<sup>44</sup> Lorella Terzi, ‘The Capability to Be Educated’ in Melanie Walker and Elaine Unterhalter (eds), *Amartya Sen’s Capability Approach and Social Justice in Education* (Palgrave Macmillan 2007) 30–32.

<sup>45</sup> MC Nussbaum, *Creating Capabilities* (n 42) 17.

<sup>46</sup> Amartya Sen, ‘Equality of What?’ [1979] The Tanner Lecture on Human Values 205–213; MC Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (HUP 2006) 71–72.

<sup>47</sup> Amartya Sen, ‘Capability and Well-Being’ in Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Clarendon 1993) 30.

<sup>48</sup> This is termed ‘functionings’. See, MC Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (n 46) 75.

<sup>49</sup> See, in the context of realising the capability to be educated for persons living with disabilities, Lorella Terzi, *Justice and Equality in Education: A Capability Perspective on Disability and Special Educational Needs* (Continuum 2013) 108–124.

of the narrative imagination; and the capacity to see oneself as belonging to a community.<sup>50</sup> Educational materials are integral to cultivating these capacities.

The capacity for critical thinking includes reasoned engagement with the *status quo*, rather than deferring to established authority. This leads to the promise of democratic citizenship being fulfilled through informed dialogue.<sup>51</sup> If the only source of knowledge is the teacher, without additional materials or other sources of knowledge, there is a real risk of the imposition of the teacher's worldview upon students.<sup>52</sup> Access to materials across perspectives enables readers to engage in meaningful dialogue,<sup>53</sup> thereby exercising freedom of thought and ultimately building a society based on reason.<sup>54</sup>

Further, educational materials cultivate the capacity to read, process and engage with information and knowledge, and provide a site for collaborative world building.<sup>55</sup> They expose readers to other worlds through texts, and invite them to exercise their moral agency in re-examining their own worldviews and imagine a better world.<sup>56</sup> In doing so, they cultivate the capacity to expand and utilise the narrative imagination to build

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<sup>50</sup> MC Nussbaum, 'Education and Democratic Citizenship: Capabilities and Quality Education' (2006) 7 JHD 385, 388. See also, Michael Glassman and Rikki Patton, 'Capability Through Participatory Democracy: Sen, Freire, and Dewey' (2014) 46 Educational Philosophy and Theory 1353.

<sup>51</sup> MC Nussbaum, 'Education and Democratic Citizenship' (n 50) 388.

<sup>52</sup> Eg., AE Pattiz, 'The Idea of History Teaching: Using Collingwood's Idea of History to Promote Critical Thinking in the High School History Classroom' (2004) 37 The History Teacher 239, 389.

<sup>53</sup> This does not extend to tolerating intolerance or perspectives that erode human dignity. See, Melanie Walker, *Higher Education Pedagogies: A Capabilities Approach* (Society for Research into Higher Education & Open University Press 2006) 54.

<sup>54</sup> Kate Douglas and others, 'Building Reading Resilience: Re-Thinking Reading for the Literary Studies Classroom' (2016) 35 HERD 254, 257–258.

<sup>55</sup> David Aldridge, 'Reading, Engagement and Higher Education' (2019) 38 HERD 38.

<sup>56</sup> MC Nussbaum, 'Education and Democratic Citizenship' (n 50) 389; Tom Schuller and others (eds), *The Benefits of Learning: The Impact of Education on Health, Family Life, and Social Capital* (RoutledgeFalmer 2004) 190.

empathy.<sup>57</sup> Reading engages readers as narrative generators who are able to make sense of their own lives and the world they are born into through narrative.<sup>58</sup> This enables the capacity for self-reflection, challenging internalised prejudices and encouraging reflection on social and political structures that marginalise certain groups,<sup>59</sup> developing a conception of ethics.<sup>60</sup> Educational materials in the form of expressive texts such as poetry, dramatic works and films are crucial to this task.

Importantly, educational materials cultivate the capacity to see oneself as belonging to a local, national, and more broadly, world intellectual community of knowledge.<sup>61</sup> This community of ideas and scholarship spans space and time and is a continuous conversation across journal articles, textbooks, academic works amongst others. Access to these materials imbues learners with a sense of belonging, and provides common ground on which members of the community of knowledge may interact, engage and importantly, build on one another's ideas.<sup>62</sup> This is crucial to building an epistemological universe that is contextually created rather than externally imposed.<sup>63</sup> Access to these texts empowers readers to name and define the world around them.<sup>64</sup> Limited access can lead to a culture

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<sup>57</sup> Lea Shaver, 'The Right to Read' (2015) 54 Columbia Journal of Transnational Law 1.

<sup>58</sup> Reuben Brower, 'Reading in Slow Motion' in Reuben Brower and Richard Poirier (eds), *In Defense of Reading: A Reader's Approach to Literary Criticism* (EP Dutton 1962) 3–21.

<sup>59</sup> Paulo Freire, *Pedagogy of the Oppressed* (30th anniversary ed, Continuum 2000); SR Phillips and C Archer-Lean, 'Decolonising the Reading of Aboriginal and Torres Strait Islander Writing: Reflection as Transformative Practice' (2019) 38 HERD 24.

<sup>60</sup> Ingrid Robeyns, 'The Capability Approach: A Theoretical Survey' (2005) 6 JHD 93, 108.

<sup>61</sup> Nussbaum (n 93).

<sup>62</sup> See generally, Raewyn Connell and others, 'Toward a Global Sociology of Knowledge: Post-Colonial Realities and Intellectual Practices' (2017) 32 International Sociology 21.

<sup>63</sup> See generally, Raewyn Connell, 'Southern Theory and World Universities' (2017) 36 HERD 4.

<sup>64</sup> Paulo Freire and Loretta Slover, 'The Importance of the Act of Reading' (1983) 165 The Journal of Education 5.

of silence where only particular groups have access to this knowledge and thereby the power to define the world.<sup>65</sup> For a truly inclusive pedagogy, universal access to educational materials is crucial.

### 1.3. The central argument of the Thesis

The Thesis comprehensively analyses the extent of states parties' concurrent obligations under human rights and copyright treaties. It demonstrates the overlap between 'permissive' exceptions to copyright for educational purposes, and states' duties in respect of realising the equal right of access to educational materials for all. It recognises that educational purposes are not only 'enduring aspects of the public interest',<sup>66</sup> but *also* the subject of rights-based guarantees that impose obligations upon states.<sup>67</sup>

The implications of this are significant. Where these concurrent obligations can be met by states parties purchasing access for all through the marketplace, they appear to sit well with one another. However, global inequality entails that a vast majority of states have significant resource constraints and cannot afford to do so.<sup>68</sup> The likelihood of these obligations coming into conflict is thus greater for states in the global South.<sup>69</sup> The Thesis

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<sup>65</sup> See, bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* (Routledge 1994).

<sup>66</sup> RL Okediji, 'The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries' (International Centre for Trade and Sustainable Development 2006) 8. See also, RL Okediji, 'Reframing International Copyright Limitations and Exceptions as Development Policy' in RL Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (CUP 2017).

<sup>67</sup> This formulation 'challenges the very reference points that in the past have defined what is central and what is marginal'. See, Martha Minow, 'Beyond Universality' [1989] University of Chicago Law Forum 115, 126. For an overview of copyright at the centre and access at the margins, see Amy Kapczynski and Gaëlle Krikorian (eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books 2010) 17–57.

<sup>68</sup> Similarly, Chon proposes 'IP from below [...] highlight[ing] the needs of users in both developed and developing countries for knowledge goods that are accessible and affordable, particularly for purposes of basic human development'. She proposes a substantive equality norm for future IP policy-making but does not ground the argument in rights. See, Margaret Chon (n 39) 813.

<sup>69</sup> Recognising the Third world in the First world and vice versa, see JH Mittleman and MK Pasha, *Out from Underdevelopment Revisited: Global Structures and the Remaking of the Third World* (St Martins Press 1997) 23. For the usefulness of the global South/Third World as a contingent category see, OC Okafor, 'Newness,

argues that ‘permissive’ exceptions often constitute the *only* way for global South countries to discharge their human rights obligations in respect of access to materials under copyright for the most marginalised members of society.<sup>70</sup> At its highest, the overlapping human rights obligations lend an obligatory character to ‘permissive’ educational exceptions undertaken by the same state.

Be that as it may, the domestic application of states’ international obligations is conditioned by several factors. The Thesis sets out key international institutional constraints that amount to preventing global South countries from exercising their latitude in ways that respond to their particular needs. It demonstrates the rise of a hegemonic trade-based value system that has coercive consequences for states that do not prioritise their copyright obligations. This leads to the under-realisation of the human right of access to educational materials in domestic contexts. The Thesis discusses the delays in the recent process of legislative reform in South Africa as a key example of this phenomenon.

However, it also offers an antidote. The Thesis demonstrates that in constitutional democracies like South Africa and India, the Bill of Rights provides a helpful tool to anchor a harmonious interpretation of states’ competing obligations. The Indian case study provides a glimmer of hope, demonstrating how judges have adopted a context-sensitive interpretation of India’s international obligations bearing in mind deep socio-economic inequalities. In the legislative context, despite the current delay, Parliament’s reconciliation of South Africa’s competing international obligations is another example of a harmonious interpretation. In doing so, both domestic jurisdictions contribute to constructing and re-

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Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective’ (2005) 43 Osgoode Hall Law Journal 21, 174–176.

<sup>70</sup> Eg., Andrew Rens, Achal Prabhala, and Dick Kawooya, *Intellectual Property, Education and Access to Knowledge in Southern Africa* (TRALAC 2006) 27–32.

constructing the meaning of international law. This, I argue, constitutes an important site for the domestic harmonisation of competing obligations in international law.

#### **1.4. Standpoint: framing the research question**

I adopt a feminist anti-caste approach<sup>71</sup> my research question and the analysis in this Thesis. This research arose from my lived experiences.<sup>72</sup> As an upper caste woman educated in one of the best law schools in India, I had access to a library and online resources throughout my legal education. However, despite the fact that my university was better resourced than most others, we studied from course packs for almost all our subjects. A class of 80 students could not possibly access a single library reference book at the same time. If these are the experiences of a relatively privileged person in a deeply unequal society, one can only imagine the deprivation faced by persons at the intersecting axes of disadvantage.

Further, whilst feminist approaches to legal research traditionally emerged from centring women's experiences in a patriarchal legal system, they are equally understood to include the centring of experiences of other marginalised groups.<sup>73</sup> Law's subjectivity plays an important role in this Thesis.<sup>74</sup> Legal subjects are constructed by what and whom they

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<sup>71</sup> BR Ambedkar, *Annihilation Of Caste: An Undelivered Speech* (Arnold Press 1990).

<sup>72</sup> See RK Sidhu (n 1) xvii:

Decades of feminist research have raised awareness that generating a research problem, investigating it using particular methodologies, and analysing and resolving it, cannot be a disinterested undertaking. How researchers receive, interpret, and transmit the findings of their work is mediated by individual histories and positionings. On this basis, feminist researchers tend to acknowledge and make explicit their positioning and politics – their standpoint.

<sup>73</sup> KT Bartlett, 'Feminist Legal Methods' (1990) 103 HLR 829, 847–849.

<sup>74</sup> ML Fineman, 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (1990) 42 Florida Law Rev 25, 31.

include and, importantly, what and whom they *exclude*.<sup>75</sup> I identify that persons living with visual and print disabilities, learning disabilities, and other sensory disabilities; persons living in poverty and disadvantaged by other socio-economic circumstances as well as those at the intersections of all of the above are excluded by the marketplace created by copyright's legal monopoly.

The Thesis thus asks: to what extent do states undertake obligations to recognise the members of the above groups as human rights-bearers and consequently counter this deprivation of access? How can these obligations be reconciled with states' obligations regarding the creation of a monopoly of knowledge through copyright?

## **1.5. Sources and methods**

My research employs qualitative legal methods: principally, doctrinal and normative research methods in context. Doctrinal research requires the identification of legal artefacts and subsequently, their interpretation and analysis through legal reasoning.<sup>76</sup> A normative element exists at both stages – in determining the relevant statutes, rules, judicial decisions amongst other legal artefacts as well as in selecting the 'best' interpretation of these primary sources.<sup>77</sup>

As lamented in the literature, most legal scholars consider the doctrinal method so implicit in their work that they do not articulate their research methods.<sup>78</sup> This obscures

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<sup>75</sup> Margaret Davies, 'Exclusion and the Identity of Law' (2005) 5 *Maquarie Law Journal* 5.

<sup>76</sup> Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 111.

<sup>77</sup> Deborah Hellman and Sophia Moreau, 'Introduction' in Deborah Hellman and Sophia Moreau, *Philosophical Foundations of Discrimination Law* (OUP 2013) 1.

<sup>78</sup> Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review* 130, 131; Terry Hutchinson and Nigel Duncan (n 76) 99–100.

the normative choices implicit in framing the research question<sup>79</sup> and organising the analysis, tending to reinforce conservative normative positions.<sup>80</sup> Doctrinal methods on their own tend to be removed from the social, political and economic systems which constitute the law and are constituted by the law.<sup>81</sup> I employ doctrinal methods *in context*, in order to understand the actual operation of the law.<sup>82</sup> I explain the application of these methods in the following sections.

### 1.5.1. International law

Given the pluralistic nature of international law, identifying the relevant legal rules is an important first step.<sup>83</sup> The formal sources of international law are treaties, customary international law, general principles of law, judicial decisions, whether domestic or international, and writings of ‘highly eminent publicists’.<sup>84</sup> In this Thesis, I identify a treaty-based human right of access to educational materials in international human rights treaties. I also identify treaty-based obligations of copyright in international copyright and trade treaties that regulate access to educational materials. However, the identification exercise does not stop there, as I identify other relevant sources of international law to engage in interpreting the relevant treaty provisions. I also use soft law instruments such as UN

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<sup>79</sup> See section 1.4.

<sup>80</sup> Terry Hutchinson, ‘Doctrinal Research: Researching the Jury’ in Mandy Burton and Dawn Watkins (eds), *Research methods in law* (2nd edn, Routledge 2018) 17.

<sup>81</sup> William Twining, ‘Academic Law and Legal Development’ [1975] Taylor Lectures: University of Lagos Law Faculty 20.

<sup>82</sup> See also Martha Minow, ‘Archetypal Legal Scholarship: A Field Guide’ (2013) 63 *Journal of Legal Education* 65.

<sup>83</sup> Martti Koskenniemi, ‘Methodology of International Law’ [2007] MPEPIL 9; Christian Dominicé, ‘Methodology of International Law’ in Jeanne Belhumeur and Luigi Condorelli (eds), *L’ordre juridique international entre tradition et innovation* (GIP 1997).

<sup>84</sup> Charter of the United Nations and Statute of the International Court of Justice (signed 24 October 1945) 1 UNTS XVI (‘ICJ Statute’), art 38(1).

resolutions, concluding observations, general comments, recommendations, views, WIPO reports, and ILC reports to aid in the interpretive process.<sup>85</sup> I principally employ the Vienna Convention on the Law of Treaties (VCLT) to interpret the identified treaty provisions. The VCLT provisions governing the interpretation of treaties have attained the status of customary international law and are applicable to all states.<sup>86</sup>

#### **1.5.1.1. Rules of treaty interpretation**

One way of reading the Thesis is to understand it as a comprehensive exercise in treaty interpretation. In this section, I set out the VCLT's rules of interpretation that will be applied throughout the Thesis.<sup>87</sup>

At the outset, treaty provisions must be interpreted in good faith.<sup>88</sup> This includes deciding whether an evolutionary interpretation of a treaty provision is appropriate.<sup>89</sup> An interpreter must interpret the ordinary meaning of text in its surrounding context and in light of the treaty's object and purpose.<sup>90</sup> The context includes the preamble and annexes to the treaty, as well as those treaties that have been concluded in connection with the treaty in question.<sup>91</sup> Along with the context, the interpreter must take into account

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<sup>85</sup> Alan Boyle, 'The Choice of a Treaty: Hard Law versus Soft Law' in Simon Chesterman, David Malone, and Santiago Villalpando (eds), *The Oxford Handbook of United Nations Treaties* (OUP 2019) 113–114.

<sup>86</sup> The ICJ has held on several occasions that arts 31 and 32 are customary international law. Eg., *Arbitral Award of 31 July 1989 (Judgment)* [1991] ICJ Reports 53 [48]; *Kasikili Sedudu Island (Botswana v Namibia)* [1999] ICJ Reports 1045 [18]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 43 [16].

<sup>87</sup> Vienna Convention on the Law of Treaties (adopted on 22 May 1969, came into force on 27 January 1980) 1115 UNTS 331 arts 31, 32.

<sup>88</sup> VCLT art 31(1). See, Hugh Thirlway, 'Treaty Interpretation', *The Law and Procedure of the International Court of Justice: Fifty years of Jurisprudence* (1st edn, OUP 2013) 1229–1232.

<sup>89</sup> Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (OUP 2014).

<sup>90</sup> VCLT art 31(1).

<sup>91</sup> VCLT arts 31(2)(a), (b).

subsequent agreements regarding how the treaty must be interpreted and applied;<sup>92</sup> the domestic implementation of the treaty (including domestic court decisions) as evidence of how states parties understand the treaty in the form of subsequent practice;<sup>93</sup> and the development of other relevant international law norms.<sup>94</sup> Finally, if intended, special meanings must be given to a term under interpretation.<sup>95</sup> Although the text is the necessary starting point, all the materials referred to in art 31 are equally important to interpretation.<sup>96</sup>

*Only* if an interpretation pursuant to the rule described above leads to an ‘obscure or ambiguous’ meaning, or a ‘manifestly absurd or unreasonable’ result must the interpreter turn to the *travaux préparatoires* to confirm the interpretation.<sup>97</sup> The VCLT is not only applicable to interpreting international law on the international plane as Chapters 2, 3 and 4 demonstrate, but equally to the domestic interpretation of international law in Chapters 5 and 6 as a part of customary international law.<sup>98</sup>

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<sup>92</sup> VCLT art 31(3)(a).

<sup>93</sup> VCLT art 31(3)(b). See also, LB de Chazournes, “Subsequent Practice”, and “Family- Resemblance”: Towards Embedding Subsequent Practice in Its Operative Milieu’ in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 53–62. I adopt a wide understanding of ‘subsequent practice’ that comports with de Chazournes’ account stating

There is a complex interplay among many species of practices that relate to a given treaty norm, and that can only be ignored at the peril of reducing the role of subsequent practice as a means of interpretation to its minimalist expression, something which could have very little to do, in the end, with the actual meaning, scope, and efficacy of the treaty norm.

<sup>94</sup> VCLT art 31(3)(c). See section 1.5.1.2.

<sup>95</sup> VCLT art 31(4).

<sup>96</sup> ILC, Draft Articles on the Law of Treaties with commentaries, (1966) A/CN4/185, 220 [9]. See also, DH Regan, ‘Understanding What the Vienna Convention Says About Identifying and Using ‘Sources For Treaty Interpretation’ in Samantha Besson and Jean d’Aspremont (eds), *Oxford Handbook of the Sources of International Law*, vol 1 (OUP 2018) 1053–1054.

<sup>97</sup> VCLT art 32. See also, Oliver Dörr and Kristen Schmalenbach (eds), ‘Article 32’, *Vienna convention on the law of treaties : a commentary* (2nd edn, Springer).

<sup>98</sup> For the desirability of the VCLT’s application in domestic legal systems’ interpretation of international law, see Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Brill-Nijhoff 2020) 191–222; Dire Tladi, ‘Interpretation of Treaties in an International

### 1.5.1.2. *Systemic integration: international law as a single system*

In this Thesis, I treat both systematised bodies of law i.e., international human rights law and copyright and trade law, as part of a single overarching system of international law.<sup>99</sup> The organising principle at work is systemic integration, which requires that states' international obligations be interpreted harmoniously (to the greatest extent possible) and as a part of a coherent system.<sup>100</sup> This principle is codified by the VCLT as follows:

There shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties.<sup>101</sup>

'Rules of international law' in art 31(3)(c) clearly include treaties, customary international law, and general principles of law.<sup>102</sup> Courts have also included subsidiary sources such as soft law, views, recommendations and general comments from UN human rights treaty bodies, and judicial decisions of domestic and international courts within the ambit of this provision.<sup>103</sup> However, the application of this provision has been widely contested in the literature.<sup>104</sup> Commentators argue that it offers a portal to import values outside of the

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Law-Friendly Framework' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts* (OUP 2016).

<sup>99</sup> P Sands, 'Treaty, Custom and the Cross-Fertilisation of International Law' (1998) 1 Yale Human Rights and Development Law Journal 85, 95.

<sup>100</sup> Yuval Shany, 'One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?' in André Nollkaemper and Ole Kristian Fauchald (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 16–17.

<sup>101</sup> VCLT art 31(3)(c).

<sup>102</sup> ICJ Statute art 38(1). See also, Ivo Tarik de Vries-Zou, 'Divided but Harmonious? The Interpretations and Applications of Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2020) 16 ULR 86, 88.

<sup>103</sup> Eg., Iron Rhine Arbitration, *Belgium v Netherlands*, Award, ICGJ 373 (PCA 2005) [58], [79]; *Golder v United Kingdom* App No 4451/70 (1979) 1 EHRR 524; Ahmadou Sadio Diallo (*Guinea v DRC*), Judgment on compensation [2012] ICJ Reports 324 [65]–[69].

<sup>104</sup> Eg., Chin Leng Lim, 'Trade Law and the Vienna Treaty Convention's Systemic Integration Clause' in Julien Chaisse and Tsai-yu Lin (eds), *International Economic Law and Governance* (OUP 2016); Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2005) 54 ICLQ 279; Martins Paparinskis, 'Come Together or Do It My Way: No Systemic Preference' (2014) 108 Proceedings of the ASIL Annual Meeting 246.

treaty being interpreted and that this affects the consent of states to be bound.<sup>105</sup> This misses the important role that systemic integration plays in contributing to the *normativity* of international law as a single system.<sup>106</sup> This Thesis utilises the principle of systemic integration as a guide to harmoniously interpreting the competing treaty obligations set out in Chapters 2 and 3.

To determine the ‘relevance’ of the rules and the nature of the ‘parties’, I adopt the ‘proximity criterion’ developed by Merkouris after a systematic analytical study of jurisprudence of international courts and tribunals.<sup>107</sup> The ‘proximity criterion’ sets out four inter-related criteria that an interpreter can use to determine the relevance of the rules of international law outside of those at issue that would assist in their interpretation. These criteria are not meant to be applied cumulatively or formalistically, but reserve a measure of discretion for the interpreter in applying the relevant criteria in light of the dispute at hand. This is consistent with international law’s pluralism.<sup>108</sup> These criteria are preferable to an overly formalistic interpretation requiring ‘parties’ to be identical.<sup>109</sup>

The four inter-related criteria are: terminological similarity; similarity of subject matter of regulation; complete or partial overlap of parties to the treaty at issue and the other treaty sought to be used as an interpretive tool; and temporal proximity.<sup>110</sup> I justify the use of the treaties discussed in Chapter 2 for the purposes of interpreting the treaties

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<sup>105</sup> Eg., DH Regan (n 96) 1061–1062.

<sup>106</sup> Campbell Mclachlan (n 104) 280–282.

<sup>107</sup> Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave* (Brill-Nijhoff 2015) 84–101.

<sup>108</sup> Ivo Tarik de Vries-Zou (n 102) 100.

<sup>109</sup> Ulf Linderfalk, ‘Who Are “the Parties”? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the “Principle of Systemic Integration” Revisited’ (2008) 55 NILR 343, 353.

<sup>110</sup> Panos Merkouris (n 107) 100.

set out in Chapter 3 on the basis that there is terminological proximity in ‘education’ and ‘illustrations for teaching’; the subject matter of treaties in Chapter 3 is the same as those in Chapter 2; there is a substantial overlap between the parties to the ICESCR<sup>111</sup> and the Berne Convention<sup>112</sup> and TRIPS<sup>113</sup> in that they have near universal application due to the number of states parties; and, in terms of temporal proximity, the final Act of the Berne Convention was concluded in 1979 while the ICESCR came into force in 1976. My argument in Chapter 3 and subsequently the conclusions I arrive at in Chapter 4 are based on this interpretation.

### **1.5.1.3. Critical international law**

Another reading of the Thesis indicates a subaltern critique of international institutions and their *jurispathic* effect on international law’s pluralism.<sup>114</sup> I identify elements of institutional design as contributing to the attenuation of marginalised groups’ access to educational materials in domestic law. My doctrinal analysis illuminates the global prioritisation of trade-based values that has been widely documented in the critical literature.<sup>115</sup> The Thesis does not stop at critique – it offers a constructive account

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<sup>111</sup> International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3.

<sup>112</sup> Berne Convention for the Protection of Literary and Artistic Works of 9 September, 1886, completed at Paris on 4 May, 1896, revised at Berlin on 13 November, 1908, completed at Berne on 20 March, 1914, revised at Rome on 2 June, 1928, revised at Brussels on 26 June, 1948, and revised at Stockholm on 14 July, 1967 (with Protocol regarding developing countries) 888 UNTS 221.

<sup>113</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, (adopted 15 April 1994, came into force January 1995), Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 UNTS 299.

<sup>114</sup> The *jurispathic* function of law refers to the imposition of a particular interpretation of law precluding all other meanings. See, Robert Cover, ‘The Supreme Court, 1982 Term—Foreword: Nomos and Narrative’ (1983) 97 HLR 4; PS Berman, ‘A Pluralist Approach to International Law’ (2007) 32 YJIL 301; PS Berman, ‘Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism’ (2013) 20 Indiana Journal of Global Legal Studies 665.

<sup>115</sup> Eg., Balakrishnan Rajagopal, *International Law from below: Development, Social Movements, and Third World Resistance* (CUP 2003); Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2020).

describing how domestic constitutional actors adopt a harmonious interpretation that takes seriously states' overlapping human rights obligations.<sup>116</sup>

As discussed in section 1.4, the Thesis centres those who have been historically marginalised by international law. For instance, persons living with disabilities were neglected in international law until the mid-late 2000s.<sup>117</sup> Further, this Thesis takes the critique of the universality of human rights law<sup>118</sup> as an entry-point for a context-sensitive interpretation of human rights grounded in domestic constitutions, in service of those at the peripheries.<sup>119</sup> In doing so, the Thesis participates in a 'critical appraisal of 'international law's doctrines, operative logics and normative commitments and assumptions' and crucially, a 're-writing and writing [of] international law from third world perspectives'.<sup>120</sup>

The Thesis pays particular attention to the geographies of international law production.<sup>121</sup> In selecting India and South Africa as case studies, the Thesis deliberately recognises states and peoples that were historically *subjects* of colonially constructed

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<sup>116</sup> In contrast, the jurisgenerative function of law refers to the interpretation of law to create a normative universe of meaning. See Robert Cover (n 114); Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (CUP 2011).

<sup>117</sup> Amita Dhanda, 'Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities' (2008) 5 S-IJHR 43; Arlene Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (Routledge 2015).

<sup>118</sup> Eg., Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002).

<sup>119</sup> Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 195. See for a similar use of human rights, Paulina García-Del Moral, 'Feminicidio: TWAIL in Action' (2016) 110 *AJIL Unbound* 31.

<sup>120</sup> James Thuo Gathii, 'The Agenda of Third World Approaches to International Law (TWAIL)' in Jeffrey L. Dunoff and Mark Pollack (eds), *International Legal Theory: Foundations and Frontiers (forthcoming)* (CUP 2019) 2.2. See also, on the reimagination of international law as a rebel enterprise, Vasuki Nesiah, 'Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence' (2018) 112 *AJIL Unbound* 313.

<sup>121</sup> James Thuo Gathii, 'The Promise of International Law: A Third World View' [2020] Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law 3–16; RP Anand, *New States and International Law* (Vikas 1972) 46.

international law as *actors* in international law-making in the contemporary landscape.<sup>122</sup> It is for this reason that Part II of the Thesis focuses on the manner in which the domestic legal systems of India and South Africa converse with the international legal system in a continuous process of negotiation, renegotiation and at times, rejection of international norms.<sup>123</sup>

### 1.5.2. Domestic case studies

This Thesis would be incomplete without understanding how states (and non-state actors) interpret, apply and generate international law in their particular domestic contexts.<sup>124</sup> Part II of the Thesis provides insight into the role of domestic actors in interpreting competing international obligations. Despite the fact that domestic judicial decisions are a source of international law,<sup>125</sup> several states do not view themselves as *contributing* to international law meaning-making in their daily activities. This has been particularly observed in the Indian<sup>126</sup> and South African contexts.<sup>127</sup> The Thesis offers a methodological response to this gap.

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<sup>122</sup> BS Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 MelbJIL 499; Babatunde Fagbayibo, 'Some Thoughts on Centering Pan-African Epistemic in the Teaching of Public International Law in African Universities' (2019) 21 International Community Law Review 170; Annelise Riles, 'The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law' (1995) 6 Law & Critique 39.

<sup>123</sup> Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (CUP 2004) 20; Seyla Benhabib, *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations* (OUP 2006) 49.

<sup>124</sup> See André Nollkaemper, 'Grounds for the Application of International Rules of Interpretation in National Courts' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts* (OUP 2016).

<sup>125</sup> ICJ Statute art 38(1)(d).

<sup>126</sup> Lavanya Rajamani, 'International Law and the Constitutional Schema' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*, vol 1 (OUP 2016).

<sup>127</sup> Dire Tladi, 'The Constitutional Court's Judgment in the SADC Tribunal Case: International Law Continues to Befuddle' [2020] CCR 129.

I select India and South Africa as case studies for descriptive and explanatory purposes.<sup>128</sup> Case studies enable an '[investigation into] how actors consider, interpret and understand phenomena (e.g., law, procedure, policy)' and to 'help to understand how laws are understood, and how and why they are applied and misapplied, subverted, complied with or rejected'.<sup>129</sup> This Thesis studies the existence and contextual application of domestic legal frameworks in these countries to understand the extent to which they facilitate access to educational materials. It also studies the particular international obligations that both states have undertaken. I identify important methodological questions that states (and indeed non-state actors) must ask when applying international law relating to access to educational materials domestically. These questions are identified in the constitutional contexts of both India and South Africa but they provide direction to any other state seeking to interpret international law in their own contexts, thereby contributing to international law-making in a rigorous and replicable manner.<sup>130</sup>

Recent developments in India and South Africa illustrate the contemporary struggles over access to educational materials and copyright.<sup>131</sup> South Africa is in the midst of a legislative process to amend its apartheid-era Copyright Act 98 of 1978 to give effect to the right of access to educational materials, amongst other rights. At the time of writing Parliament is seized with the issue. In India, a recent Delhi High Court decision ruling on the permissibility of course packs has taken the jurisprudence a step forward. At the time of writing, a copyright infringement suit against a shadow library is pending in court. Further, the government has issued a call for public participation in respect of future

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<sup>128</sup> RK Yin, *Case Study Research Design and Methods* (5th edn, SAGE 2014) 8–10.

<sup>129</sup> Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research' [2016] *Law and Method* 2–3.

<sup>130</sup> See, outlining a need for direction to be given to domestic courts, Odile Ammann (n 98) 15–43.

<sup>131</sup> RK Yin (n 128) 16–17.

amendments to the Copyright Act 14 of 1957. The argument in this Thesis provides direction on how these contemporary issues can be harmoniously resolved.

Further, the South African Constitution empowers courts to take into account comparative law in constructing rights in the Bill of Rights,<sup>132</sup> whilst Indian courts have drawn extensively on comparative law.<sup>133</sup> Both countries belong to the global South, and have significant resource constraints,<sup>134</sup> making it less likely for them enable access to educational materials for all in a resource-intensive manner. As this Thesis demonstrates, countries like India and South Africa are thus more likely to find their copyright and human rights obligations coming into conflict. This Thesis thus advances a context-sensitive harmonious interpretation of their international obligations that takes this into account.

The other reasons for selecting India and South Africa as case studies are as follows: both jurisdictions have an extremely high degree of inequality,<sup>135</sup> making access to educational materials through the existing marketplace model challenging if not impossible.<sup>136</sup> Given the entrenchment of racially discriminatory apartheid education policy and resources, inequality of access in South Africa today continues to track race, with the majority of the Black population excluded from accessing quality education at all levels.<sup>137</sup> This extends to other marginalised groups such as persons living with disabilities and those

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<sup>132</sup> Constitution of South Africa, s 39(1).

<sup>133</sup> See, for Indian courts' use of comparative law, Priya Urs, 'Making Comparative Constitutional Law Work: "Naz Foundation" and the Constitution of India' (2013) 46 *Law and Politics in Africa, Asia and Latin America* 95.

<sup>134</sup> See, 'Table A3 Developing Economies' (*UN World Economic Situation and Prospects*, 2021) [139]-[140].

<sup>135</sup> See, 'South Africa: Gini index' (*World Bank*, 2014); 'India: Gini index' (*World Bank*, 2011).

<sup>136</sup> See T Schonwetter, C Ncube, and P Chetty, 'South Africa' in C Armstrong and others (eds), *Access to knowledge in Africa: the role of copyright* (UCT Press 2010); Shamnad Basheer and others, 'Exhausting Copyrights and Promoting Access to Education: An Empirical Take' (2012) 17 *JIPR* 335.

<sup>137</sup> 'Inequality Trends in South Africa: A multidimensional diagnostic of inequality' (*Statistics South Africa*, 2019) [6], [27].

living in poverty.<sup>138</sup> In the Indian context, too, inequality of access affects the majority of the population,<sup>139</sup> particularly those living in poverty, persons living with disabilities,<sup>140</sup> and along caste lines.<sup>141</sup> During COVID-19, with tuition going online, both countries have struggled to ensure equity of access to educational materials for vulnerable groups.<sup>142</sup>

However, despite being unlawful under the apartheid-era Copyright Act and its attendant regulations, course packs are widely used in university education in South Africa.<sup>143</sup> In India, too, prior to the 2012 amendment that included a broader educational exception, course packs were widely used despite their ambiguous status.<sup>144</sup> The Thesis thus advances a coherent, interpretive legal argument in the international, Indian and South African legal systems recognising this ground reality. It injects social realities into the legal system using the language of the law, thereby enabling the law to better respond to the evolving needs of society.<sup>145</sup>

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<sup>138</sup> *ibid* [6]. See also, 'Profile of persons with disabilities in South Africa' (*Statistics South Africa*, 2014) [xiii].

<sup>139</sup> Lucas Chancel and Thomas Piketty, 'Indian Income Inequality, 1922-2015: From British Raj to Billionaire Raj?' (2019) 65 *Review of Income and Wealth*.

<sup>140</sup> 'Disabled persons in India: a statistical profile' (*Ministry of Statistics and Programme Implementation*, 2016) [25]-[33].

<sup>141</sup> Surajit Deb, 'Income and Poverty in India: Social Inequality Across States' (2020) 50 *Social Change* 272.

<sup>142</sup> See generally, 'Global Education Monitoring Report: Inclusion and education: all means all' (*UNESCO*, 2020).

<sup>143</sup> Eve Gray and Laura Czerniewicz, 'Access to Learning Resources in Post-Apartheid South Africa' in Joe Karaganis (ed), *Shadow Libraries: Access to Knowledge in Global Higher Education* (MIT 2018).

<sup>144</sup> Lawrence Liang, 'India: The Knowledge Thief' in Joe Karaganis (ed), *Shadow Libraries: Access to Knowledge in Global Higher Education* (MIT 2018).

<sup>145</sup> Niklas Luhmann, 'Law as a Social System' (1988) 83 *NWULR* 136. For a full exposition, see Niklas Luhmann, *Law as a Social System* (Fatima Kastner and others trs, OUP 2004).

## 1.6. Scope of the argument and key concepts

This Thesis focuses squarely on accessing materials under copyright *for the purposes of education*. It does not deal with access to materials under copyright for any other purpose. To the limited extent that they are relevant to educational purposes, I briefly analyse the use of materials under copyright for private or personal purposes, quotations, and by libraries and archives as the latter are the key locations for access. I define educational purposes as those purposes normatively contributing to the *capability to be educated* and doctrinally grounded in international law. The Thesis does not purport to empirically measure the extent of access to educational materials on the ground – rather it advances a legal argument to demonstrate how states can reconcile competing obligations regarding access.

The Thesis analyses authors' interests as guaranteed by copyright law and human rights law where necessary. In particular, Chapters 2, 3 and 4 set out authors' human and legal rights, and their possible conflicts. A deeper analysis is outside the scope of this Thesis. In terms of identifying other related rights, the Thesis does not identify the right to property in international human rights law as the core UN human rights treaties do not guarantee it. Moreover where domestic and international actors have advanced the right against arbitrary deprivation of property as a constitutional hook for copyright, the Thesis responds to these claims in Chapters 5 and 6. A full analysis of this right is outside the scope of the Thesis.

Further, where states parties to the treaties in Chapters 2 and 3 enter into preferential trade agreements and other treaties that explicitly provide for greater copyright protection than the Berne Convention, the interpretive method advanced by this Thesis remains applicable. The particular language of the additional agreement would have to be examined carefully. Although a full exposition of TRIPS Plus measures is outside the scope

of this Thesis, the systemic integration imperative equally applies to interpreting these measures to avoid a conflict with concurrent human rights obligations. This is important at the stage of negotiating and interpreting these agreements. Similarly, where competing obligations are sought to be resolved at arbitration panels through investor-state dispute settlement, the VCLT would remain applicable since these obligations are likely to be sourced in treaties. The institutional analysis carried out in Chapter 4 would be helpful to understand to what extent the institutional design in these arbitration panels conditions a harmonious interpretation.

I define ‘educational materials’ with reference to their overlapping regulation by copyright law and human rights law.<sup>146</sup> Traditionally, materials under copyright for educational purposes have included textbooks, journal articles, and other academic and literary works or excerpts thereof. Artistic works, in the form of diagrams, are also included.<sup>147</sup> With the rise of information and communication technologies, and distance learning, the nature of educational materials has evolved significantly to include digital media as well. Audio-visual materials such as films, images, and music also constitute educational materials, depending on the subject matter sought to be understood. Simply put, educational materials are materials (in academic, literary, artistic, musical, dramatic, cinematographic form) used by any person seeking to realise their capability to be educated in any form.<sup>148</sup> Although access for those enrolled in educational institutions falls squarely

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<sup>146</sup> See, for the same reference points, SE Foster, ‘The Conflict between the Human Right to Education and Copyright’ in P Torremans (ed), *Intellectual property law and human rights* (3rd edn, Kluwer 2015); LR Helfer and GW Austin, ‘The Right to Education and Copyright in Learning Materials’, *Human rights and intellectual property: mapping the global interface* (CUP 2011) 316–364.

<sup>147</sup> A Smart and others, ‘Learning for uncertain futures: the role of textbooks, curriculum and pedagogy’ (UNESCO *Futures of Education*, 2021) [7]–[11].

<sup>148</sup> See, for an expansive definition of educational materials, A Smart and M Sinclair, ‘Networking to Integrate SDG 4.7 and SEL into Educational Materials Global Briefs II: Educating for the social, emotional and sustainable: pedagogy, practice and materials’ (NISSEM, 2020). See also, C Armstrong and others (eds), *Access to Knowledge in Africa: The Role of Copyright* (UCT Press 2010) 1–17.

within this Thesis, I argue that this is not a necessary condition. Rather, the *purpose* for which access is sought must be education.

## **1.7. Structure and flow of the argument**

The Thesis consists of five chapters divided into two parts. Part I (Chapters 2-4) begins with an analysis of the concurrent regulation of access to educational materials by human rights and copyright and trade law.

In Chapter 2 on ‘Locating the Right of Access to Educational Materials: the Right to Education in Human Rights Law’, I argue that the core UN human rights treaties guarantee the right of access to educational materials for all under the right to education. In constructing this right, I conduct a careful reading of the documents emerging from the relevant UN human rights treaty bodies, amongst other sources. I then turn to the obligations incumbent upon states parties. I highlight the aspects of the right that are immediately realisable through the minimum core, and those that are progressively realisable. This Chapter concludes that states bear obligations under international human rights law to respect, protect, and fulfil the right of access to educational materials for all without discrimination.

In Chapter 3 on ‘Regulating Access to Educational Materials: “Exceptions” to the International Copyright Regime’, I set out the scheme of the international copyright treaties. This, I argue, is in *prima facie* conflict with the right of access to educational materials. However, I focus on the Berne Convention’s exception to copyright permitting states parties to enact laws enabling access to educational materials outside the market. I analyse the extent to which this provision suffices in resolving the apparent conflict. I argue that the Berne Convention’s access mechanism is capable of being interpreted in a manner that enables states parties to both sets of treaties in Chapters 2 and 3 to harmoniously fulfil their obligations under international human rights law and copyright law. I argue that

despite the constraining language of TRIPS, art 10(2) of the Berne Convention remains the applicable provision for educational materials. Finally, I draw on the logic of the MVT<sup>149</sup> to advance an interpretation that, at its highest, would imbue art 10(2) of the Berne Convention with an obligatory character for overlapping states parties, particularly those belonging to the global South.

Chapter 4 on ‘Diluting Access to Educational Materials: International Institutional Design’ demonstrates the constraining effect of the normative environment in which the above obligations reside. I first explain that while human rights obligations bind states to protect the interests of authors and users as ‘human rights’, copyright and trade obligations have drawn on the legitimacy of protecting interests of authors to prioritise the interests of the industry, particularly with the conclusion of TRIPS and establishment of the WTO Dispute Settlement System (‘DSS’).<sup>150</sup> I set out the various ways in which the above obligations come into conflict with one another impacting access to educational materials. Then, I analyse the International Law Commission’s tools for resolving normative conflict. In analysing the application of these tools, I conclude that while they are helpful in respect of intra-regime conflicts, they are unlikely to be helpful with regard to inter-regime conflicts. The ILC recognises that norm conflict cannot be resolved in the abstract as there are several considerations that go into preferring a particular interpretation. The Chapter turns to a comparative analysis of the institutional features of the WTO DSS<sup>151</sup> and CESC to understand these considerations. I analyse the constitutive instruments, jurisdiction and

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<sup>149</sup> Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled (adopted on 27 June 2013, came into force 30 September 2016) 54134 UNTS (to be determined) (‘MVT’).

<sup>150</sup> Marrakesh Agreement Establishing the World Trade Organisation (adopted 15 April 1994, came into force 1 January 1995) 1867 UNTS 154 (‘WTO Agreement’).

<sup>151</sup> Set up by the Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 1869 UNTS 401. (‘DSU’)

standing rules, applicable rules of interpretation, standards of review, remedies and enforcement and the monitoring function of both these bodies in turn. I demonstrate that among other features, the power of the WTO DSS to authorise states to impose sanctions upon other 'defaulting' states significantly damages the pluralistic fabric of the international legal system, especially when viewed in light of the non-binding nature of the views and recommendations of the CESCR. Moreover, this results in a 'chilling effect' on states acting in good faith to adopt a harmonious interpretation of their human rights obligations and copyright and trade obligations.

Further, states are likely to select a 'cautious interpretation' which strictly adheres to TRIPS rather than making full use of the exceptions in the Berne Convention, thereby significantly under-realising their international human rights obligations. This is particularly the case for states in the global South who cannot afford to pay for access. In practical terms, this sees states enacting narrower exceptions for educational purposes, exceptions that strictly adhere to the three-step test in TRIPS rather than the 'fair practice' test in the Berne Convention, ultimately leaving out large sections of the population by relying almost entirely on the marketplace created by copyright for access to educational materials.

In Part II (Chapters 5-6), I examine how South Africa and India domestically construct their competing obligations. In addition to locally contextualising the application of broadly framed international guarantees, this aspect is crucial for the interpretation of treaties. Subsequent practice of states parties feeds back into constructing the meaning of international law. In other words, this Part recognises that individual states are key *actors* in creating, interpreting and applying international law rather than passive recipients. How

every state decides to interpret and give effect to its international obligations domestically shifts the meaning of international law itself.<sup>152</sup>

In Chapter 5 on ‘Legislating Access to Educational Materials: South Africa’, I focus on the South African Parliament’s attempt at harmoniously constructing South Africa’s competing obligations. I set out the relevant constitutional framework to demonstrate how South Africa gives effect to its international obligations. In particular, I argue that the Copyright Amendment Bill [B13-2017] (‘CAB’) is a constitutionally defensible interpretation of South Africa’s competing obligations set out in Part I. I argue that the pushback against this recent process, by the President of South Africa as well as the industry lobby, is indicative of the caution stemming from the conclusions in Chapter 4. Upon conducting a fuller investigation into the domestic constitutional and statutory framework, I demonstrate that the South African Copyright Act and its attendant regulations are inconsistent with the South African Constitution. This, along with the global pandemic, reinforces the urgency of the situation and the significance of the legislative amendments both to fulfil domestic constitutional obligations and South Africa’s international human rights obligations. This case study illustrates the conclusions in Part I.

In Chapter 6 on ‘Adjudicating Access to Educational Materials: India’, I critically analyse the Delhi High Court’s judicial reconciliation of India’s competing obligations. I set out the Indian constitutional and judicially evolved framework regulating the domestic application of India’s international obligations. Using these interpretive injunctions, I interpret India’s constitutional obligations as including a right of access to educational

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<sup>152</sup> See also, Anthea Roberts, *Is International Law International?* (OUP 2017).

materials at all levels. I analyse the arguments before the Court in *DU Photocopy*<sup>153</sup> and argue that the Division Bench correctly placed equity in accessing educational materials at the heart of the inquiry. The Court did not employ the fundamental right to education in interpreting the Indian Copyright Act, despite constitutional imperatives to do so. I demonstrate how future courts can rectify this. Further, I argue that *DU Photocopy* is an instance of the Delhi High Court correctly applying the ‘fair practice’ test in art 10(2) of the Berne Convention, despite the fact that the Court did not see itself as an international actor. In doing so, I demonstrate how future courts in similarly situated countries can apply the fairness inquiry.

The Conclusion reinforces the central argument of this Thesis, that competing obligations are likely to come into conflict in global South countries that cannot afford to pay for access, and that a harmonious interpretation is indeed possible to avoid such a conflict. It also recognises the important role played by domestic constitutional actors in constructing and adopting this interpretation.

## **1.8. Significant original contribution to knowledge**

The Thesis constitutes a significant original contribution to knowledge in the following ways. Methodologically, the Thesis demonstrates how states parties to both sets of treaties may interpret their competing obligations harmoniously through the application of the VCLT’s rules of interpretation. Further, it also offers direction to domestic courts and legislatures in highlighting their important role in constructing international law. Structurally, this Thesis contributes to understanding the continuous, discursive process between international and domestic law. These bodies are in dialogue – making and

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<sup>153</sup> *The Chancellor, Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 5128; (2016) 160 DRJ (SN) 678); *The Chancellor, Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229; (2016) 235 DLT 409 (DB); (2017) 69 PTC 123.

remaking one another on a near-constant basis. An understanding of this practice makes it easier for states upon whom international law has been historically foisted to resist interpretations antithetical to their societal needs. In immersing itself in the domestic legal systems of South Africa and India, the Thesis is able to effectively demonstrate this discursive practice as a core aspect of the methodology of treaty interpretation located in the VCLT.

The Thesis spans several legal disciplines and contributes to an integrated understanding of their role in providing access to educational materials for all. In comprehensively arguing for the right of access to educational materials and its obligations, the Thesis draws on significantly under-researched sources – in particular, the work of the UN human rights treaty bodies. In doing so, the Thesis contributes to a rigorous analysis of international human rights responding to phantom concerns of vagueness. By applying the VCLT to the copyright treaties outside of the WTO system, the Thesis demonstrates the possibilities of a harmonious interpretation in recognising the overlap in international copyright law’s educational exceptions and obligations arising from the right of access to educational materials. Crucially, the Thesis displaces the notion that the three-step test is universally applicable to all exceptions irrespective of their purpose,<sup>154</sup> and argues for the ‘fair practice’ test as the appropriate standard for educational exceptions.<sup>155</sup> This is a significant contribution to the interpretation of international copyright law. Moreover, the Thesis analyses the MVT to demonstrate the systemic integration imperative at its heart

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<sup>154</sup> See, eg., EB Rodrigues Jr, *The General Exception Clauses of the TRIPS Agreement: Promoting Sustainable Development* (CUP 2012).

<sup>155</sup> This conclusion is confirmed by recent scholarship on associated provisions of the Berne Convention regarding quotations in Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (CUP 2020).

and draws from this instrument to bolster the argument, thereby contributing to mainstreaming disability studies.

The Thesis illustrates the various tools available to resolve the tensions across human rights and copyright obligations and their application. This has application in several other contexts where states undertake competing international obligations – in particular, where two specialised regimes are involved. Importantly, the Thesis makes a case for recognising the underlying substantive dimension of integral obligations (obligations *erga omnes partes*) as a tool for conflict resolution beyond its widely recognised procedural dimensions.<sup>156</sup> This is a novel contribution to public international law and regime interaction.

In closely analysing the institutional design of the WTO DSS and Committee on Economic, Social and Cultural Rights (‘CESCR’), the Thesis offers an explanation as to why states parties to both sets of treaties often select cautious interpretations as opposed to interpretations that give full effect to their human rights obligations. This has significant implications for other private law regimes that intersect with human rights. The application of this institutional approach<sup>157</sup> is entirely novel in the literature on intellectual property and human rights. It connects the dots between the procedural, substantive and sanctioning powers of the relevant international institutions and the interpretation of access to educational materials selected by states parties.

In the South African context, the Thesis traverses a rigorous legal argument to demonstrate the likely unconstitutionality of the existing statutory copyright regime. It also

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<sup>156</sup> CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (1st edn, CUP 2005).

<sup>157</sup> Martti Koskeniemi, ‘The Politics of International Law - 20 Years Later’ (2009) 20 EJIL 7. See for its application in another context, Andrea Bianchi, ‘Choice and (the Awareness of) Its Consequences: The ICJ’s “Structural Bias” Strikes Again in the Marshall Islands Case’ (2017) 111 AJILUnbound 81.

provides a constitutional analysis of the recent legislative amendments thereby directly feeding into the contemporary discourse. The Thesis is thus at the cutting edge of constitutional analysis of contemporary developments in South Africa.<sup>158</sup>

In the Indian context, the Thesis provides a comprehensive overview of the equal right of access to educational materials in the Indian Constitution. It draws on recent developments in constitutional law, particularly on the right to equality and the right to life, to give content to the right of access to educational materials and the extent to which it may be limited statutorily. In doing so, it provides direction on how to read *DU Photocopy* moving forward. This analysis acquires contemporary significance in two respects. It offers a toolbox to litigators and courts in arguing and deciding the pending litigation on access to scientific knowledge;<sup>159</sup> and it provides guidance for legislators (and the public) in ensuring that the right of access to educational materials is not unjustifiably limited through any future statutory amendments of the copyright regime.

Finally, in addition to the contributions to public international law, international human rights law, international copyright and trade law, South African constitutional law, and Indian constitutional law, the Thesis importantly contributes to mainstreaming disability studies by placing the rights of people living with disabilities at the heart of the research question.<sup>160</sup> In this way, the Thesis contributes to pluralising inclusion by engaging

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<sup>158</sup> At the time of writing there is no other literature on this issue from a constitutional perspective.

<sup>159</sup> *Elsevier Ltd. v Alexandra Elbakyan* CS(COMM) 572/2020 & I.A. 12668/2020, 12671/2020 & 12672/2020 <<https://indiankanoon.org/doc/90397612>> accessed 21 March 2021.

<sup>160</sup> Amita Dhanda and Saurabh Bhattacharjee, 'Conversation on the Pedagogy of Law and Impoverishment' (2020) 13 NUJS Law Review 4.

interpreters of all stripes, including judges, legislators, activists, academics with the interests of marginalised groups in interpreting the law and understanding its effects.<sup>161</sup>

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<sup>161</sup> See for the same principle in interpreting and understanding the impact of the UNCPRD on all human rights, Amita Dhanda (n 117) 48–54.

# **PART I**

## 2. LOCATING THE RIGHT OF ACCESS TO EDUCATIONAL MATERIALS:

### THE RIGHT TO EDUCATION IN HUMAN RIGHTS LAW

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#### 2.1. Introduction

In the Introduction to this Thesis, I identified the particular problem that copyright poses to securing equal access to educational materials for all. I drew on the capabilities approach to explain the normative significance of access to educational materials. In this Chapter, I doctrinally locate the right of access to educational materials in international human rights law.

This Chapter makes a significant original contribution to knowledge. It is the first of its kind to comprehensively study the work of UN human rights treaty bodies in respect of the right of access to educational materials. In addition to systematising this work and utilising it as an interpretive tool, this Chapter argues for the existence of the right of access to educational materials in international human rights law and crystallises its obligations in a contextual manner. It offers a coherent reading of the various doctrinal frameworks on understanding obligations emerging from human rights.

In this Chapter, I apply the VCLT<sup>1</sup> to interpret the treaty-based right of access to educational materials.<sup>1</sup> In doing so, I start with the text along with the surrounding context and the object and purpose of the treaty. The relevant UN human rights treaty body provides inseparable context as an agreement in connection with the particular treaty in most cases,<sup>2</sup> and provides a rich repository of subsequent practice to be taken into account

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<sup>1</sup> See, for the application of the VCLT to human rights treaties, Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).

<sup>2</sup> In the case of the ICESCR, the CESCR is established by a General Assembly resolution. It would be irrational to distinguish between the relevance of CESCR to interpreting the ICESCR and the CRPD

in interpreting the particular treaty.<sup>3</sup> While Chapter 4 analyses the institutional features of these treaty bodies and their monitoring and quasi-adjudicatory functions in more detail, this Chapter systematises their substantive output to aid treaty interpretation.

To locate the right of access to educational materials, I conduct a comprehensive study of the work of the UN human rights treaty bodies charged with monitoring states' realisation of the right to education. Although non-binding, the work of the treaty bodies is of particular importance in interpreting the guarantees present in the relevant treaties.<sup>4</sup> The primary function of UN human rights treaty bodies is to monitor the domestic implementation of international human rights guarantees under the treaty which it is set up to supervise. States parties undertake the obligation to periodically submit reports detailing their implementation of the treaty in question.<sup>5</sup> This sets up a dialogue between individual states' domestic construction of international human rights obligations and the treaty body in question, creating the space for contextual normative development to take

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(established by a treaty) on the sole basis that the instrument establishing the body is different. The functions they carry out are the same. See, ILC 'Commentary to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' (3448th session, 6-8 August 2018) A/73/10 (para 51) [603-604]. See also, ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties', (3448th session, 6-8 August 2018) A/73/10 (para 52) [4.1], [13].

<sup>3</sup> *ibid* (conclusions) [13.3]; *ibid* (commentary) [106].

<sup>4</sup> See M O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 HRLR 27, 36; Nigel Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 639; Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (CUP 2012) 129.

<sup>5</sup> Helen Keller and Geir Ulfstein, 'Introduction' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (CUP 2012) 3-4.

place. Several international,<sup>6</sup> regional,<sup>7</sup> and domestic courts<sup>8</sup> have utilised the work of UN human rights treaty bodies as an interpretive tool to determine the scope and content of states' obligations under the relevant treaty. This Chapter adopts a similar approach by marshalling the following sources: General Comments, General Recommendations and Views offer insights into how relevant treaty bodies understand the right and the duties that the state is expected to undertake in this regard; Concluding Observations and State Party Reports offer insights into the domestic steps that states have taken to realise the right and the relevant treaty body's assessment of the adequacy of these steps.

After establishing the right, I analyse the corresponding duties incumbent upon states parties to the relevant treaties. I discuss the nature and content of states' myriad obligations in respect of the right of access to educational materials. On the basis that human rights are indivisible and interdependent,<sup>9</sup> I conclude the Chapter by briefly outlining the other related rights that are engaged in securing access to educational materials. I then turn to the legal regime creating and regulating copyright in Chapter 3.

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<sup>6</sup> Eg., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Reports 136 [109]-[112]; Ahmadou Sadio Diallo (*Republic of Guinea v DRC*), Merits, [2010] ICJ Reports 639 [66],[77]; Judgment No 2867 of the Administrative Tribunal of the International Labour Organisation upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, [2010] ICJ Reports 403 [39].

<sup>7</sup> Eg., *Civil Liberties Organisation v Nigeria*, Communication No 218/98, Decisions on Communications brought before the African Commission, 29<sup>th</sup> ordinary session, Tripoli, May 2001 [24]; *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*, Decisions on Communications brought before the African Commission, 30<sup>th</sup> ordinary session, Banjul, October 2001 [63]; *Case of the Constitutional Tribunal (Campa Campos) v Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 August 2013, Series C No 268 [189-191] [IACHR]; *Marguš v Croatia* [GC], No 4455/10, ECHR 2014 [48-50]; *Gäfgen v Germany* [GC], No 22978/05, ECHR 2010 [68-72].

<sup>8</sup> Eg., Colombia, Constitutional Court, *Sentencia T-077/13* (2013); India, *Subramanian Swamy v Raju*, (2014) 8 SCC 390 [28].

<sup>9</sup> L Minkler and S Sweeney, 'On the Indivisibility and Interdependence of Basic Rights in Developing Countries' (2011) 33 HRQ 381; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn, PUP 1996) 70-71.

## 2.2. Locating the right of access to educational materials within the right to education

Education was first recognised as a human right in the Universal Declaration of Human Rights (UDHR).<sup>10</sup> The UDHR, while not legally binding in itself,<sup>11</sup> has influenced the recognition of the right to education in over 186 constitutions<sup>12</sup> and several regional<sup>13</sup> and international instruments.<sup>14</sup> Although the literature indicates that some aspects of the UDHR have attained the status of customary international law,<sup>15</sup> whether education has attained this status is unclear. I limit my analysis to the treaty-based right to education, without precluding the possibility for the relevant treaty giving rise to or bolstering emerging customary international law.<sup>16</sup>

In this section, I analyse the right to education in the core UN human rights treaties.<sup>17</sup> I doctrinally locate access to educational materials as a part of this right. I then turn to the states parties' corresponding obligations in section 2.3. To recap, I have defined educational materials in the Introduction as materials (in academic, literary, artistic,

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<sup>10</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) art 26.

<sup>11</sup> Hurst Hannum, 'The UDHR in National and International Law' (1998) 3 Health and Human Rights 145, 147.

<sup>12</sup> For a full list, see 'Education' (*The Constitute Project*) <<https://www.constituteproject.org>> accessed 20 March 2021.

<sup>13</sup> Eg., African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 28 December 1988) 1520 UNTS 217 art 17(1); Charter of the Organisation of American States (adopted 30 April 1948, entered into force 16 January 1952) 119 UNTS 3 art 47.

<sup>14</sup> For the role of the UDHR in influencing the development of this right, see Manisuli Ssenyonjo, 'The Right to Education: Articles 13 and 14', *Economic, Social and Cultural Rights in International Law* (1st edn, Hart 2009).

<sup>15</sup> Eg., Douglas Hodgson, 'Education, Right to, International Protection' [2006] MPEPIL 16; Hurst Hannum (n 11) 145.

<sup>16</sup> Yoram Dinstein, 'The Interaction between Customary International Law and Treaties' (2006) 322 RdC 243.

<sup>17</sup> A comprehensive analysis of the content of the right to education is outside the scope of the Thesis. I draw on the purposes of the right to the extent that it relates to educational materials.

musical, dramatic, cinematographic form) that are used for educational purposes by any person seeking to realise their capability to be educated in any form.

### 2.2.1. Educational materials in the International Covenant on Economic, Social and Cultural Rights

The right to education is guaranteed in ICESCR, using language identical to the UDHR to describe its object and purpose

[E]ducation shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms [...] [E]ducation shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.<sup>18</sup>

The right to education is guaranteed to everyone without discrimination. ‘Education’ in this context includes both formal and informal education, within and outside of educational institutions.<sup>19</sup> In terms of its scope, states parties to the ICESCR are obliged to make free compulsory primary education available immediately;<sup>20</sup> take ‘every appropriate means’ to make higher and secondary education available and accessible and progressively free;<sup>21</sup> encourage fundamental education for persons who have not completed primary education;<sup>22</sup> and continually develop school systems and improve teaching conditions.<sup>23</sup>

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<sup>18</sup> ICESCR art 13(1).

<sup>19</sup> Jin Yang, Chripa Schneller, and Stephen Roche (eds), *The Role of Higher Education in Promoting Lifelong Learning* (UNESCO ILL 2015).

<sup>20</sup> ICESCR art 13(2)(a).

<sup>21</sup> ICESCR art 13(2)(b),(c).

<sup>22</sup> ICESCR art 13(2)(d).

<sup>23</sup> ICESCR art 13(2)(e).

States parties' obligations vary according to the levels of education. I return to this in section 2.3.

Although the text does not describe the normative content of 'education', the work of the CESCR, UN Special Rapporteurs and UNESCO is helpful in interpreting the content of the right, including the inputs integral to its realisation. The interconnected features of the right to education at all levels have been widely recognised in the literature<sup>24</sup> and the work of the UN human rights mechanisms through the application of the '4-A framework'.<sup>25</sup> Developed in the context of the right to adequate food<sup>26</sup> and housing,<sup>27</sup> this framework has been modified and applied to crystallise the rights to water,<sup>28</sup> health,<sup>29</sup> and importantly for the purposes of this Thesis, education.<sup>30</sup> Education under the ICESCR must thus be available, accessible, acceptable and adaptable.<sup>31</sup> These four dimensions must be directed towards the object and purpose of the right. As I demonstrate below,

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<sup>24</sup> Eg., S Kalantry, JE Getgen, and SA Koh, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 HRQ 253, 274–279; Hajrulla Hajrullai and Basri Saliu, 'The Application of 4-A Scheme in the Context of Higher Education in Macedonia' (2016) 232 Procedia - Social and Behavioral Sciences 70; K Tomaševski, *Human Rights Obligations in Education: The 4-A Scheme* (Wolf Legal Publishers 2006). See also, Gauthier de Beco, Peter Hyll-Larsen and Maria Balsera, 'The Right to Education: human rights indicators and the right to education of Roma children in Slovakia', Background paper for the Education for All Global Monitoring Report 2010: Reaching the marginalised, 2010/ED/EFA/MRT/PI/19.

<sup>25</sup> Eg., CESCR, General Comment No 13, The Right to Education (art 13) ('GC13') (1999) E/C12/1999/10 [6]. See also, ECOSOC, Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomaševski, submitted in accordance with Commission on Human Rights res 1998/33, E/CN.4/1999/49 [42-74]; K Tomaševski, Human rights obligations: making education available, accessible, acceptable and adaptable, Right to Education Primers No 3 (SIDA 2001).

<sup>26</sup> CESCR, General Comment No 12: The Right to Adequate Food (art 11) (1999) E/C12/1999/5 [8],[11]-[13].

<sup>27</sup> CESCR, General Comment No 4: The Right to Adequate Housing (art 11(1)) (1992) E/1992/23 [8].

<sup>28</sup> CESCR, General Comment No 15: The Right to Water (arts 11 and 12) (2002) E/C12/2002/11 [12].

<sup>29</sup> CESCR, General Comment No 14: The Right to the Highest Attainable Standard of Health (art 12) ('GC14') (2000) E/C12/2000/4 [12].

<sup>30</sup> GC13 (n 25).

<sup>31</sup> Tomaševski (SR) (n 25) [42]-[74].

educational materials are an integral part of each of these features. This has been recently recognised by UNESCO and affirmed by the member states of the UN, having placed access to educational materials at all levels of education, including lifelong education, ‘at the core for the new sustainable development goal on education’.<sup>32</sup>

### **2.2.1.1. Availability**

The availability dimension of the right to education includes the meaningful availability of educational infrastructure.<sup>33</sup> This goes beyond the construction of a school building – it includes providing salaried teachers, transportation, sanitation, desks and chairs, and, importantly for the purposes of this Thesis, educational materials.<sup>34</sup> When assessing states parties’ fulfilment of the availability dimension of the right, the CESCR has noted acute shortages of teaching materials and textbooks, and recommended that states parties rectify the situation by taking steps to improve availability and access to these materials, including funding them.<sup>35</sup> Specifically, the CESCR has observed that educational materials form a part of the indirect costs of accessing education,<sup>36</sup> thus drawing the important link between availability and affordability. Where educational materials are unaffordable, they are not meaningfully available.<sup>37</sup>

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<sup>32</sup> ‘Every child should have a textbook, Global education monitoring report: policy paper 23’ (UNESCO, 2016) ED/GEMR/MRT/2016/PP/23 REV [1]. See, for SDG 4 on education along with specific targets related to educational infrastructure, UNGA, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, 21 October 2015, A/RES/70/1 [14], [17] (‘SDG Agenda’).

<sup>33</sup> GC13 (n 25) [6(a)]. See also, Ben Saul, David Kinley, and Jacqueline Mowbray, ‘Article 13 The Right to Education’, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (1st edn, OUP 2014) 1109.

<sup>34</sup> GC13 (n 25) [6]. See, CESCR, Concluding Observations, *Nigeria*, 16 June 1998, E/C12/1/Add 23 [31].

<sup>35</sup> CESCR, Concluding Observations, *Republic of the Congo*, 23 May 2000, E/C12/1/Add 45 [29]; *Turkmenistan*, 13 December 2011, E/C12/TKM/CO/1 [25].

<sup>36</sup> CESCR, Concluding Observations, *Tanzania*, 13 December 2012, E/C12/TZA/CO/1-3 [26].

<sup>37</sup> CESCR, Concluding Observations, *Solomon Islands*, 19 December 2002, E/C12/1/Add 84 [14].

Finally, the CESCR has highlighted that the unavailability of educational materials leads to poor quality education, particularly in under-resourced areas,<sup>38</sup> reinforcing existing socio-economic inequalities.<sup>39</sup> This has been widely demonstrated in the empirical development literature.<sup>40</sup> The affordability dimension of availability of educational materials overlaps significantly with the economic accessibility of education. I discuss this below.

### **2.2.1.2. Accessibility**

The accessibility dimension of the right to education is premised on the principle of non-discrimination.<sup>41</sup> As I discuss in section 2.3.1, states bear an obligation to fulfil the right to education without discrimination. The fulfilment of this obligation is not subject to resource availability or any other constraints. The right to education is an equal right of access for all, without discrimination of any kind, whether direct or indirect.<sup>42</sup> This includes discrimination in respect of access to educational infrastructure that is made available, such as educational materials.

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<sup>38</sup> CESCR, Concluding Observations, *Niger*, 4 June 2018, E/C12/NER/CO/1 [58(c)].

<sup>39</sup> CESCR, Concluding Observations, *Guinea*, 30 March 2020, E/C12/GIN/CO/1 [47(d)]; *Pakistan*, 23 June 2017, E/C12/PAK/CO/1 [79(e)]; *Tunisia*, 14 May 1999, E/C12/1/Add 36 [28]; *Saint Vincent and the Grenadines*, 2 December 1997, E/C12/1/Add 21 [27].

<sup>40</sup> Eg., Andy Smart and Shanti Jagannathan, *Textbook Policies in Asia: Development, Publishing, Printing, Distribution, and Future Implications* (1st edn, ADB 2018); UNESCO, *Education for People and Planet: Creating Sustainable Futures for All* (2nd edn, Unesco 2016); Tony Read, *Where Have All the Textbooks Gone?: Toward Sustainable Provision of Teaching and Learning Materials in Sub-Saharan Africa* (World Bank 2015); PW Glewwe and others, 'School Resources and Educational School Outcomes in Developing Countries: A Review of the Literature from 1990 to 2010' [2011] NBER Working Paper No. 17554; CUP and Cambridge Assessment, *The Learning Passport Research and Recommendations Report: Summary of Findings* (2020).

<sup>41</sup> GC13 (n 25) [6(b)].

<sup>42</sup> Tomaševski (SIDA) (n 25) [57]. See generally, for the forms and types of discrimination recognised by the CESCR under this principle, CESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2) (2009) ('GC20') E/C12/GC/20.

Educational materials must be designed so that everyone can *actually* access them.<sup>43</sup> For instance, where education is taking place through a distance learning programme, relevant technological infrastructure must be constructed to enable access.<sup>44</sup> During the global pandemic, due to closures of educational institutions and libraries, educational materials have had to be adapted to ensure that they remain accessible for all. I address this in the overlapping adaptability dimension of the right to education below.

Although disability does not explicitly feature in the text of the right to education in the ICESCR, the CESCR has recognised the adverse impact of structural and ongoing discrimination against persons living with disabilities in accessing education.<sup>45</sup> A significant aspect of accessibility relates to the format in which educational materials are produced.<sup>46</sup> In order for persons living with print, visual, sensory, cognitive and learning disabilities to access educational materials, the materials must be available in accessible formats.<sup>47</sup> Given the overlapping subject matter of the ICESCR and the UNCRPD in respect of the right to education of persons living with disabilities, the work of the CRPD is particularly relevant.<sup>48</sup> I discuss this in section 2.2.2 below.

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<sup>43</sup> See, for a recent recognition by the CESCR of the importance of ‘universal design’ in accessing scientific knowledge and its applications for persons living with disabilities, CESCR, General comment No. 25: Science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4)) (2020) E/C12/GC/25 [35], [42].

<sup>44</sup> GC13 (n 25) [6(b)].

<sup>45</sup> CESCR, General Comment No 5: Persons with Disabilities, (1994) E/1995/22 [35],[36] (‘GC5’); GC20 (n 42) [28].

<sup>46</sup> See Kaya Köklü, ‘The Marrakesh Treaty – Time to End the Book Famine for Visually Impaired Persons Worldwide’ (2014) 45 IIC 737, 737; WBU Marrakesh Treaty Ratification and Implementation Campaign Committee, ‘The World Blind Union Guide to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled’ (2017).

<sup>47</sup> Paul Harpur, *Discrimination, Copyright and Equality: Opening the e-Book for the Print-Disabled* (CUP 2017) 32–63.

<sup>48</sup> See, for instance, the CESCR referring to the work of CEDAW when addressing the rights of women and girls in CESCR, Concluding Observations, *Philippines*, 26 October 2016, E/C12/PHL/CO/5-6 [52]. Further, the CESCR has adopted language from the UNCRPD when assessing the fulfilment of the right to education of persons living with disabilities. See, for example the use of ‘inclusive education’, CESCR, Concluding Observations, *Guinea*, 30 March 2020, E/C12/GIN/CO/1 [22],[23]; *Switzerland*, 18 November 2019,

Further, the economic dimension of accessibility overlaps with the affordability concern outlined in section 2.2.1.1. Although some states may provide fee-free primary education as they are obliged to by the ICESCR,<sup>49</sup> the burden to pay for educational materials continues to disproportionately falls upon parents.<sup>50</sup> For people living in poverty, the quality of educational outcomes (whether students succeed at school) is thus directly dependent on the ability of parents to afford to pay these indirect costs, including the cost of educational materials.<sup>51</sup> The right of access to educational materials entails that these materials be accessible to all, irrespective of their social and economic circumstances.<sup>52</sup> The CESCR has noted that where a group is particularly disadvantaged, whether historically, systemically or structurally, and is denied access to educational materials on that basis, states parties must take necessary steps to enable access. These steps include allocation of adequate funding, distribution of free textbooks and the adoption of other special measures to ensure equal realisation of the right.<sup>53</sup>

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E/C12/CHE/CO/4 [52]; *Kazakhstan*, 08 March 2019, E/C12/KAZ/CO/2 [48]; and the use of ‘universal design’, CESCR, Concluding Observations, *Norway*, 06 March 2020, E/C12/NOR/CO/6 [19].

<sup>49</sup> KD Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights* (Brill-Nijhoff 2006) 490–492.

<sup>50</sup> Friedrich Huebler and Elise Legault, ‘The World’s Families: Hidden Funders of Education, Data for Sustainable Development’ (*UNESCO Institute for Statistics Blog*, 02 June 2017) <<https://sdg.uis.unesco.org/2017/06/02/the-worlds-families-hidden-funders-of-education/>> accessed 21 March 2021. See also, UNESCO, IIEP Pôle de Dakar, World Bank and United Nations Children's Fund, ‘Chapter 3: Cost and Financing, Education sector analysis methodological guidelines’ in *Sector-wide analysis, with emphasis on primary and secondary education*, Dakar: 2014 [157]–[163] (highlighting that the average household education expenditure on textbooks and other learning materials from 12 African countries is 32% of the total amount spent on education by a household).

<sup>51</sup> Every child should have a textbook (n 32) [7]–[8].

<sup>52</sup> See GC20 (n 42) [35].

<sup>53</sup> CESCR, Concluding Observations, *Tajikistan*, 25 March 2015, E/C12/TJK/CO/2-3 [37]; *Lebanon*, 24 October 2016, E/C12/LBN/CO/2 [4(c)], [4(h)]; *Hungary*, 16 January 2008, E/C12/HUN/CO/3 [50]; *Ukraine*, 4 January 2008, E/C12/UKR/CO/5 [54].

### 2.2.1.3. *Adaptability*

The adaptability dimension of the right means that education should be able to respond to society's evolving needs.<sup>54</sup> The means and modes of education must be flexible and adaptable,<sup>55</sup> including the nature and form of educational materials. Education must be adaptable to circumstances of crisis and emergency.<sup>56</sup> During the Covid-19 global pandemic,<sup>57</sup> as of April 2020, 191 states had closed educational institutions in the interests of public health and have attempted to move to remote learning.<sup>58</sup> Textbooks and other educational materials have had to be adapted to digital formats in order to continue to fulfil the right to education across all levels through distance learning.<sup>59</sup> Youth and adult learning has also required this shift.<sup>60</sup> However, the adaptation of physical educational materials to virtual learning environments has faced many barriers. Copyright is one,<sup>61</sup> the

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<sup>54</sup> GC13 (n 25) [6(d)].

<sup>55</sup> Tomaševski (SIDA) (n 25) [70]-[71].

<sup>56</sup> UNHRC, Right to education in emergency situations: report of the Special Rapporteur on the Right to Education, Vernor Muñoz Villalobos, 20 May 2008, A/HRC/8/10 [112].

<sup>57</sup> CESCR, Statement on the Covid-19 Pandemic and Economic, Social and Cultural Rights, 6 April 2020, E/C12/2020/1.

<sup>58</sup> See, 'COVID-19: a global crisis for teaching and learning', (UNESCO, 2020) ED/ESC/TED/2020/01 REV2. See also, for a sample of the regional responses, UNESCO, 'Distance education in the context of COVID-19: accomplishments and perspectives in sub-Saharan Africa, (Dakar: 2020); UNESCO, 'Latin American Education Systems in response to COVID-19: Educational continuity and assessment analysis from the evidence of the Latin American Laboratory for Assessment of the Quality of Education', (Santiago de Chile: 2020); UNESCO, 'Regional Education Support Strategy to respond to COVID-19 and beyond in Asia and the Pacific (2020–2021)', (Bangkok: 2020); 'COVID-19 education response: distance education programmes using radio and television in Arab States', (UNESCO, 2020) ED/ESC/TED/2020/07; UNESCO, 'Online and open education in Shanghai: emergency response and innovative practice during COVID-19 pandemic', (Moscow: 2020).

<sup>59</sup> UNESCO, 'Distance learning strategies in response to COVID-19 school closures, COVID-19 education response: Education Sector issue notes 2.1', April 2020, ED/2020/IN2.1/REV.

<sup>60</sup> UNESCO, 'Open and distance learning to support youth and adult learning, COVID-19 education response: Education Sector issue notes 2.5', June 2020, ED/2020/IN2.5.

<sup>61</sup> UNESCO, 'COVID-19 crisis and curriculum: sustaining quality outcomes in the context of remote learning, COVID-19 education response: Education Sector issue notes 4.2', April 2020, ED/2020/IN4.2 [2].

digital divide is another,<sup>62</sup> and technical know-how is a third, among many others.<sup>63</sup> Prevailing inequalities in accessing infrastructure essential to facilitate online learning have been exacerbated across the world,<sup>64</sup> underscoring the need for further state investment in universalising access to educational materials.<sup>65</sup> Approximately half the world's students face barriers to accessing virtual learning environments and continue to have their education interrupted.<sup>66</sup> For the adaptability dimension of the right to education to be fulfilled in these times, access to electricity, access to technology such as the internet, computers, mobile phones with internet connectivity in order to access digitised educational materials and textbooks, as well as a safe home environment for children are integral.<sup>67</sup> Other elements of adaptability (that education must be adaptable to people living with disabilities, in rural areas, women and girls, amongst others) overlap with the principle of non-discrimination as discussed in the section on accessibility.<sup>68</sup> I will return to the particular disadvantage faced by different groups in section 2.2.2. Thus, the adaptability of educational materials is key to continuing to fulfil the objects and purposes of education during crises.

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<sup>62</sup> UNESCO, 'National education responses to COVID-19: summary report of UNESCO's online survey', April 2020, ED/PLS/EDP/2020/03 [4]. See also, 'Measuring the Information Society Report' (*International Telecommunications Union*, 2017).

<sup>63</sup> *ibid* (survey) [5],[6].

<sup>64</sup> UNESCO & International Bureau of Education, 'Some implications of COVID-19 for remote learning and the future of schooling: Current and Critical Issues in Curriculum, Learning and Assessment', April 2020, No 36, IBE/2019/WP/CD/36; UNESCO Institute of Statistics, 'The need to collect essential Education data during the COVID-19 crisis, UIS fact sheet no 58, UIS/2020/ED/FS/58.

<sup>65</sup> UNESCO and International Commission on the Futures of Education, 'Protecting and transforming education for shared futures and common humanity: a joint statement on the COVID-19 crisis', 14 April 2020, ED-2020/FoE-ST/1.

<sup>66</sup> UNESCO, 'COVID-19: a global crisis for teaching and learning', April 2020, ED/ESC/TED/2020/01 REV.2.

<sup>67</sup> UNESCO, 'COVID-19 response – Remote learning strategy: remote learning strategy as a key element in ensuring continued learning', July 2020, ED/PLS/2020/01/REV.

<sup>68</sup> Tomaševski (SIDA) (n 25) [31]-[35].

#### **2.2.1.4.    *Acceptability***

The fourth dimension of the 4-A framework, acceptability, entails that education at all levels must be safe; culturally, linguistically and religiously appropriate; and of good quality.<sup>69</sup> This is related to the principle of non-discrimination. The CESCR has noted that the subject matter of educational materials must be inclusive, in that these materials must not contain negative stereotypes of women and girls and other religious, racial, and ethnic minorities.<sup>70</sup> Further, these materials must be accessible, through state subsidies, in a wide variety of languages including minority languages and must not be of inferior quality.<sup>71</sup>

#### **2.2.1.5.    *The content of the right of access to educational materials***

Thus, under the ICESCR, educational materials must be meaningfully available and affordable; accessible to everyone without discrimination; adaptable in circumstances of crisis; and acceptable to all groups. The realisation of this right must be directed towards ‘the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms’.<sup>72</sup> The ICESCR notably does not restrict the right to children – rather it is a right guaranteed to everyone at all levels of education, whether within or outside of an educational institution. In addition to the ICESCR, the UN human rights treaty body system also protects the right of access to educational materials in respect of particular disadvantaged groups. To the extent that the subject matter overlaps, these treaties are relevant to interpreting the

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<sup>69</sup> GC13 (n 25) [6(c)]. See also, KD Beiter (n 49) 494–495.

<sup>70</sup> CESCR, Concluding Observations, *Pakistan*, 23 June 2017, E/C12/PAK/CO/1 [83]; *Former Yugoslav Republic of Macedonia*, 15 January 2008, E/C12/MKD/CO/1 [28], [47]–[48]; *Montenegro*, 15 December 2014, E/C12/MNE/CO/1 [25(b)].

<sup>71</sup> CESCR, Concluding Observations, *Cambodia*, 22 May 2009, E/C12/KHM/CO/1 [34]; *Republic of Moldova*, 12 July 2011, E/C12/MDA/CO/2 [29]; *Djibouti*, 30 December 2013, E/C12/DJI/CO/1-2 [37].

<sup>72</sup> ICESCR art 13(1). See also, KD Beiter (n 49) 470–475.

guarantee in the ICESCR. I now turn to access to educational materials in the UN human rights treaty body system.

### 2.2.2. Educational materials in the other core UN human rights treaties

In this section, I analyse the right of access to educational materials in the UNCRC,<sup>73</sup> UNCEDAW,<sup>74</sup> ICERD<sup>75</sup> and the UNCRPD<sup>76</sup> as recognised in the work of their respective treaty bodies.

The UNCRC adopts language from the ICESCR in the specific context of children as rights-bearers.<sup>77</sup> The CRC Committee emphasises international cooperation in facilitating access to ‘modern teaching methods’<sup>78</sup> and ‘scientific and technical knowledge’.<sup>79</sup> The CRC has noted that textbooks and other educational materials fall squarely within children’s right to education – in particular that the indirect costs of educational materials have an exclusionary effect on marginalised groups’ access to education.<sup>80</sup> It has also noted that unaffordability of educational materials

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<sup>73</sup> Convention on the Rights of the Child (came into force 2 September 1990) 1577 UNTS 3.

<sup>74</sup> Convention on the Elimination of All Forms of Discrimination against Women (came into force 3 September 1981) 1249 UNTS 13.

<sup>75</sup> International Convention on the Elimination of All Forms of Racial Discrimination (came into force 4 January 1969) 660 UNTS 195.

<sup>76</sup> Convention on the Rights of Persons with Disabilities (came into force 3 May 2008) 2515 UNTS 3.

<sup>77</sup> UNCRC arts 28,29. See also, Mieke Verheyde and others, *A Commentary on the United Nations Convention on the Rights of the Child, Article 28: The Right to Education* (Brill-Nijhoff 2005) 11–69.

<sup>78</sup> CRC, Concluding Observations, *Costa Rica*, 4 March 2020, CRC/C/CRI/CO/5-6 [23].

<sup>79</sup> UNCRC art 28(3).

<sup>80</sup> CRC, Concluding Observations, *Bosnia and Herzegovina*, 5 December 2019, CRC/C/BIH/CO/5-6 [40(e)]; *Spain*, 5 March 2018, CRC/C/ESP/CO/5-6 [39]; *Zimbabwe*, 7 March 2016, CRC/C/ZWE/CO/2 [69]; *Lithuania*, 4 October 2013, CRC/C/LTU/CO/3-4 at [45,46]; *Namibia*, 16 October 2012, CRC/C/NAM/CO/2-3 [64]. This includes children of refugees and asylum seekers, see, CRC, Concluding

disproportionately affects low-income households, contributing to dropout rates at higher levels of education.<sup>81</sup> In terms of accessibility, the CRC has noted with concern the inaccessible format of educational materials for children living with disabilities and recommended that states take steps to enable appropriate access.<sup>82</sup> It has also made recommendations that states parties take steps to ensure that educational materials do not contain gender stereotypes, are not discriminatory and are acceptable to ethnic, religious, linguistic and cultural minorities.<sup>83</sup>

The UNCEDAW protects the equal right of access to education and educational opportunities for women and girls.<sup>84</sup> The CEDAW has clarified that this includes a right of access to educational materials that eliminate gender stereotypes, are gender sensitive and do not discriminate against women and girls.<sup>85</sup> Where this intersects with socio-economic disadvantage, the CEDAW has recommended special measures to enable free access to textbooks for women and girls.<sup>86</sup>

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Observations, *China (including Hong Kong and Macau Special Administrative Regions)*, 4 October 2013, CRC/C/CHN/CO/3-4 [76].

<sup>81</sup> CRC, Concluding Observations, *Bosnia and Herzegovina*, 5 October 2012, CRC/C/BIH/CO/2-4 [62].

<sup>82</sup> CRC, Concluding Observations, *Palestine*, 6 March 2020, CRC/C/PSE/CO/1 [54]; *Belarus*, 28 February 2020, CRC/C/BLR/CO/5-6 [36].

<sup>83</sup> CRC, Concluding Observations, *Spain*, 5 March 2018, CRC/C/ESP/CO/5-6 [39,40]; *Solomon Islands*, 28 February 2018, CRC/C/SLB/CO/2-3 [44],[45]; *Timor-Leste*, 30 October 2015, CRC/C/TLS/CO/2-3 [55]; *the Holy See*, 25 February 2014, CRC/C/VAT/CO/2 [27],[28]; *Kuwait*, 29 October 2013, CRC/C/KWT/CO/2 [38]; *Israel*, 4 July 2013, CRC/C/ISR/CO/2-4 [65]-[66].

<sup>84</sup> UNCEDAW art 10. See also, B Rudolf, MA Freeman, and CM Chinkin (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (OUP 2012) 257–275.

<sup>85</sup> CEDAW, Concluding Observations, *Andorra*, 8 November 2019, CEDAW/C/AND/CO/4 [31]; *Serbia*, 14 March 2019, CEDAW/C/SRB/CO/4 [34]; *Iraq*, 8 November 2019, CEDAW/C/IRQ/CO/7 [30]; *Angola*, 14 March 2019, CEDAW/C/AGO/CO/7 [35]-[36]; *Tajikistan*, 9 November 2018, CEDAW/C/TJK/CO/6 [24].

<sup>86</sup> CEDAW, Concluding Observations, *Cyprus*, 20 July 2018, CEDAW/C/CYP/CO/8 [35].

Similarly, the ICERD guarantees everyone a right to education free from prejudice or discrimination on the basis of race and ethnicity, and that promotes tolerance and combats discrimination.<sup>87</sup> The CERD has interpreted this right as including access to educational materials designed in a participatory manner and with adequate financial support from the state.<sup>88</sup> Educational materials must substantively include the histories of marginalised groups<sup>89</sup> and exclude discriminatory stereotypes.<sup>90</sup> The CERD has also recommended that states parties provide free access to textbooks to aid integration in segregated localities.<sup>91</sup>

The UNCRPD guarantees a comprehensive right of access to educational materials for persons living with disabilities.<sup>92</sup> It does so by crystallising the concepts of ‘accessibility’,<sup>93</sup> ‘universal design’<sup>94</sup> and ‘reasonable accommodation’<sup>95</sup> in the provision of ‘inclusive education’<sup>96</sup> for all.<sup>97</sup> In other words, persons living with disabilities are entitled

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<sup>87</sup> ICERD art 7. See also, Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (1st edn, OUP 2016) 430–455.

<sup>88</sup> CERD, Concluding Observations, *Turkey*, 11 January 2016, CERD/C/TUR/CO/4-6 [31]; *Saudi Arabia*, 8 June 2018, CERD/C/SAU/CO/4-9 [24]; *Turkmenistan*, 13 April 2012, CERD/C/TKM/CO/6-7 [20].

<sup>89</sup> CERD, Concluding Observations, *Ireland*, 23 January 2020, CERD/C/IRL/CO/5-9 [33]; *Portugal*, 31 January 2017, CERD/C/PRT/CO/15-17 [26]–[27].

<sup>90</sup> CERD, Concluding Observations, *Nepal*, 29 May 2018, CERD/C/NPL/CO/17-23 [14]; *Costa Rica*, 25 September 2015, CERD/C/CRI/CO/19-22 [15]–[16].

<sup>91</sup> CERD, Concluding observations, *Montenegro*, 13 March 2014, CERD/C/MNE/CO/2-3 [14].

<sup>92</sup> See Valentina Della Fina, ‘Article 24 Education’ in Rachele Cera, Valentina Della Fina, and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (1st edn, Springer 2017) 451–458.

<sup>93</sup> UNCRPD art 9.

<sup>94</sup> UNCRPD art 2. See also, on Universal Design for Learning, CRPD, General Comment No 4: Right to inclusive education (art 24) (‘GC4’) (2016) CRPD/C/GC/4 [25].

<sup>95</sup> UNCRPD art 2, 5(3), 24(2)(c).

<sup>96</sup> UNCRPD art 24(1), 24(2)(b).

<sup>97</sup> Paul Harpur (n 47) 43–54.

to educational infrastructure that is inclusive and designed as far as possible to be accessible to all persons. Where infrastructure, including educational materials, is inaccessible, then states parties are obliged to provide reasonable accommodation to enable access for persons living with disabilities. Inclusive education as a fundamental human right, a means, a principle and a process,<sup>98</sup> must thus be aimed at ensuring that persons living with disabilities have meaningful, lifelong access to education of equal quality as those living without disabilities.<sup>99</sup> This includes access to educational materials through information and communication technologies.<sup>100</sup>

The CRPD has drawn on the work of the CESCR in employing the 4-A framework to set out the content of inclusive education.<sup>101</sup> In doing so, it noted the ‘widespread lack of textbooks and learning materials in accessible formats and languages, including sign language’<sup>102</sup> and called upon states parties to take appropriate measures to enable access<sup>103</sup> including investing in resources for Braille translations; taking legislative steps; and ratifying and implementing the MVT in this regard.<sup>104</sup> Further, the CRPD clarified that persons living with disabilities must not be made to bear additional costs in terms of making these materials accessible.<sup>105</sup>

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<sup>98</sup> GC4 (n 94) [10].

<sup>99</sup> See generally, Ravi Malhotra and Robin Hansen, ‘The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education’ (2011) 29 Windsor Yearbook on Access to Justice 73.

<sup>100</sup> UNCRPD art 9.

<sup>101</sup> GC4 (n 94) [19]-[25].

<sup>102</sup> GC4 (n 94) [22].

<sup>103</sup> CRPD, Concluding Observations, *Honduras*, 4 May 2017, CRPD/C/HND/CO/1 [52]; *Guatemala*, 30 September 2016, CRPD/C/GTM/CO/1 [60]; *Mexico*, 27 October 2014, CRPD/C/MEX/CO/1 [47(c)].

<sup>104</sup> GC4 (n 94) [22]. See also, Chapter 3.

<sup>105</sup> GC4 (n 94) [23].

Although the treaties I have analysed above address the disadvantage faced by groups from a single dimension (whether race, disability or gender), the respective treaty bodies have, albeit to a limited extent, grappled with intersectional discrimination.<sup>106</sup> My analysis in this Chapter recognises the overlapping subject matter across the above treaties in respect of the right to education. Claimants may be located at the intersection of multiple axes of disadvantage, which may require different responses from the state.<sup>107</sup> The UNCRPD's guarantee of inclusive education for all with a particular emphasis on universal design offers a crucial site for future development of intersectional analysis as the implications of its approach go far beyond the rights of persons with disabilities.<sup>108</sup>

The core UN human rights treaties thus guarantee the right of access to educational materials. The rights-bearers are all people seeking education at all levels, formal or informal. This includes children; racial, linguistic and ethnic minorities; women and girls; persons living with disabilities; asylum seekers, refugees and migrants; and persons living in poverty. The right entails equal access to educational materials that must be made available, accessible, adaptable and acceptable. But this raises the question – to what extent is a state party to any or all of the above treaties compelled to make educational materials available? I address the nature and content of state obligations in section 2.3.

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<sup>106</sup> Whether they have done so adequately is a different question. Eg., on CEDAW, Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' (2015) 11 *Revista Direito GV* 479. See, on CRPD, Gauthier de Beco, 'Intersectionality and Disability in International Human Rights Law' (2020) 24 *IJHR* 593. In contrast, see how the HRC has *not* taken an intersectional approach in Shreya Atrey, 'Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR' (2017) 35 *NJHR* 220. See, documenting the worry of fragmented responses to the same subject matter from different treaty bodies, B Çalı and AS Galand, 'Towards a Common Institutional Trajectory? Individual Complaints before UN Treaty Bodies during Their "Booming" Years' (2020) 24 *IJHR* 1103.

<sup>107</sup> For an analysis of existing ways in which treaty bodies have applied or misapplied intersectional discrimination, see PYS Chow, 'Has Intersectionality Reached Its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) 16 *HRLR* 453.

<sup>108</sup> Amita Dhanda, 'Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities' (2008) 5 *S-IJHR* 43; Margarita Schiemer, *Education for Children with Disabilities in Addis Ababa, Ethiopia* (Springer 2017) 176–178. See, the approach taken in UNCRPD arts 6, 7.

### **2.3. State obligations to realise the right of access to educational materials**

The right of access to educational materials under the above treaties imposes corresponding obligations upon states parties. Although the precise contours of the obligations must be determined by states in domestically constructing and applying their international obligations,<sup>109</sup> the work of the treaty bodies offers normative direction. In this section, I examine the extent to which states parties to the ICESCR undertake the obligation to realise the right of access to educational materials for all. I also discuss the obligations arising from the UNCRC, UNCEDAW, ICERD and UNCRPD. I first determine the nature of state duties in section 2.3.1. The relevant treaties place obligations of varying priority upon states parties. I identify those aspects of access to educational materials that are immediately realisable, those that are programmatic and those programmatic obligations that have been identified as a part of the ‘minimum core’ and hence immediately realisable. I argue that states undertake obligations across these priorities to realise the right of access to educational materials. I apply the tripartite ‘respect, protect, fulfil’ framework developed in the work of the UN human rights treaty bodies in section 2.3.2. I then offer insights to contextualise duties in section 2.3.3.

#### **2.3.1. Nature and priority of duties**

The obligations that stem from the right to education as contemplated by the ICESCR are of two types – immediately realisable obligations and progressively realisable obligations.<sup>110</sup>

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<sup>109</sup> States typically take into account their domestic constitutional and legal framework, their constitutional relationship with international law, their socio-economic circumstances and governmental priorities amongst others. See Chapters 5 and 6.

<sup>110</sup> GC13 (n 25) [43]. For a critique of this distinction and implications for states’ inadequate realisation of economic, social and cultural rights, see Katharine Young, ‘Waiting for Rights: Progressive Realization and Lost Time’ in Katharine Young (ed), *The Future of Economic and Social Rights* (1st edn, CUP 2019).

This distinction is mirrored in the obligations imposed by the UNCRPD,<sup>111</sup> UNCEDAW<sup>112</sup> and the UNCRC<sup>113</sup> in respect of the right to education. I focus primarily on the obligations of states parties towards the rights-bearers within their jurisdictions, but it must be noted that the ICESCR also imposes extra-territorial obligations in this regard.<sup>114</sup>

### **2.3.1.1. Immediate realisation**

Immediately realisable obligations bind states to directly realise certain aspects of the right of access to educational materials. States parties may not delay or fail to perform these obligations on the basis of scarce resources or any other justification.<sup>115</sup> The ICESCR imposes three common immediately realisable obligations upon states parties in respect of all rights. They are: the obligation to ‘take steps [...] to the maximum of its available resources’,<sup>116</sup> the obligation to ensure that all rights be realised without discrimination of any kind,<sup>117</sup> and the obligation to monitor, report, and create programmes for the realisation of rights.<sup>118</sup> This applies to the right of access to educational materials, as a part of the right to education, established in section 2.2.<sup>119</sup> Should a state party fail to take any

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<sup>111</sup> GC4 (n 94) [39]-[40].

<sup>112</sup> CEDAW, General Recommendation No 36 on the right of women and girls to education (2017) CEDAW/C/GC/36 [10], [36].

<sup>113</sup> UNCRC art 28(1).

<sup>114</sup> See, for recent literature on the application of extra-territorial obligations to the right of access to educational materials, KD Beiter, ‘Extraterritorial Human Rights Obligations to “Civilize” Intellectual Property Law: Access to Textbooks in Africa, Copyright, and the Right to Education’ (2020) 23 JWIP 232.

<sup>115</sup> CESCR, General Comment No 3: The Nature of States Parties’ Obligations (art 2 para 1) (‘GC3’) (1990) E/1991/23 [1].

<sup>116</sup> ICESCR art 2(1).

<sup>117</sup> ICESCR art 2(2). See also, UNCRPD art 4(2); UNCEDAW art 1; UNCRC arts 2,4; ICERD art 2, chapeau.

<sup>118</sup> ICESCR art 16. See also, GC3 (n 112) [11]; CESCR, General Comment No 1: Reporting by States Parties (1981) E/1989/22.

<sup>119</sup> See, GC13 (n 25) [31], [43].

steps at all or take action that is discriminatory in any way, it can be held accountable for breaching its immediately realisable obligations under the ICESCR irrespective of the programmatic nature of the overall obligation.<sup>120</sup> I discuss the types of steps in the context of the right of access to educational materials (including legislative steps and other ‘appropriate means’) in section 2.3.2.

Additionally, the ICESCR provides for the right to free and compulsory primary education to be immediately realisable.<sup>121</sup> Here, the immediate nature of the obligation does not translate to the instantaneous realisation of the right. States parties are afforded two years after ratifying the ICESCR to adopt a plan of action to introduce free and compulsory primary education.<sup>122</sup> This plan of action must further specify a reasonable number of years within which the right will be fully realised.<sup>123</sup> State inaction on the basis of resource constraints in this regard is not justifiable.<sup>124</sup> As explained in section 2.2, this includes educational infrastructure and bearing indirect costs,<sup>125</sup> including educational materials, that must be made available, accessible, adaptable and acceptable. Depending on the particular structure of the textbook delivery system and the needs of every state party in realising this right, this obligation may include the actual distribution of free textbooks; making textbooks accessible to children living with disabilities through legislative measures

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<sup>120</sup> GC3 (n 115) [2], [3]; GC13 (n 25) [43]. See also, UN Commission on Human Rights, Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights (‘Limburg Principles’), 8 January 1987, E/CN4/1987/17 [17]-[18].

<sup>121</sup> ICESCR art 13(2)(a), 14. See, M Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights* (Intersentia 2003) 177–178.

<sup>122</sup> CESCR, General Comment No 11: Plans of Action for Primary Education (art 14) (‘GC11’) (1999) E/1992/23 [3], [8].

<sup>123</sup> *ibid*[10].

<sup>124</sup> *ibid* [9].

<sup>125</sup> *ibid* [7].

enabling accessible format shifting; subsidising textbooks for children from disadvantaged communities in furtherance of the principle of non-discrimination, etc. I return to this in the discussion on minimum core in section 2.3.1.3.

### **2.3.1.2. *Progressive realisation***

Obligations that are progressively realisable, on the other hand, are programmatic.<sup>126</sup> These obligations bind states to take steps towards fully realising the right progressively over time.<sup>127</sup> States parties are thus not bound to realise the right to its full extent immediately – rather, they are only immediately bound to take steps ‘[moving] as expeditiously and effectively as possible’ towards its full realisation.<sup>128</sup> The rights in the ICESCR are progressively realisable except for where the text of the ICESCR or the work of the CESCR specifies that an aspect of the right is to be immediately realised. The text of the ICESCR indicates that the right to education, while immediately realisable at the primary level, is progressively realisable at the secondary, higher, fundamental (adult and continuing education) and lifelong levels.<sup>129</sup> The right includes access to educational materials at every level. The steps that states parties are bound to take include, at the very least, the adoption of a national education strategy.<sup>130</sup> I discuss the other programmatic legislative, administrative, executive and judicial steps in section 2.3.2.

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<sup>126</sup> GC3 (n 115) [9].

<sup>127</sup> See, for recent comparative examples of concrete steps taken by states to progressively realise economic, social and cultural rights, Manuel Cepeda, Kate O’Regan and Martin Scheinin, ‘The Development and Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership’ (*Bonavero Institute of Human Rights*, Report 1/21).

<sup>128</sup> GC3 (n 115) [9]; Limburg Principles [21]-[23].

<sup>129</sup> GC11 (n 122) [44]; GC3 (n 115) [10]-[11].

<sup>130</sup> GC13 (n 25) [52].

While progressive realisation requires the state to take steps *towards* the realisation of a right; its corollary, the principle of non-retrogression, bars the state from moving *backwards* once it has done so.<sup>131</sup> States are not generally permitted to take steps that reduce the existing level of enjoyment of the right.<sup>132</sup> If they do, states bear the burden of justifying retrogressive measures,<sup>133</sup> demonstrating that ‘careful consideration of all alternatives’ has been undertaken and that the measure is ‘fully justified by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the state party’s maximum available resources’.<sup>134</sup> For instance, states parties cannot unjustifiably reduce their education spending budgets regarding higher and secondary education; shut down existing public libraries that already provide widespread access; or, where existing copyright law contains provisions to enable accessible format shifting for persons living with disabilities, the law cannot be amended to remove such provisions. I address the application of this principle in Chapter 6 of this Thesis, with reference to India’s constitutional right to education.

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<sup>131</sup> I have written more fully on non-retrogression at Sanya Samtani, ‘International Law, Access to Courts and Non-Retrogression : Law Society v President of the Republic of South Africa’ [2020] CCR 197, 217–221.

<sup>132</sup> GC4 (n 94) [39].

<sup>133</sup> For an understanding of the burden borne by the state in justifying retrogressive measures see, BTC Warwick, ‘Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights’ (2019) 19 HRLR 467; A Nolan, NJ Lusiani, and C Courtis, ‘Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights’ in A Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014).

<sup>134</sup> GC3 (n 115) [9]; GC13 (n 25) [45].

### 2.3.1.3. *Minimum core obligations*

The bifurcated nature of duties incumbent upon states parties to the ICESCR is further complicated by ‘minimum core obligations’ introduced by the CESCR.<sup>135</sup> The concept of minimum core obligations, in one of its first iterations, was defined as the duty to *immediately* realise ‘minimum essential levels of each of the rights [in the ICESCR]’.<sup>136</sup> In advancing the concept of minimum core, the CESCR effectively created a sub-category of immediately realisable obligations within the substantive progressively realisable obligations in the ICESCR.<sup>137</sup> The only justification available to states for not fulfilling their minimum core obligations is to show 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’.<sup>138</sup> In the face of severe resource constraints, the CESCR has emphasised the ‘widest possible enjoyment of the relevant rights under the prevailing circumstances’ and of employing cost-effective targeted programmes for vulnerable groups.<sup>139</sup> The concept has, however, evolved to gradually eliminate the justificatory leeway

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<sup>135</sup> *ibid* (GC3) [10]. The CRC applies this conception of the minimum core obligations in respect of education to states parties to the UNCRC. See CRC, Day of General Discussion for Resources for the Rights of the Child - Responsibility of States, 5 October 2007 [49].

<sup>136</sup> GC3 (n 115) [10]. Minimum core arose in response to the critiques of progressive realisation at the time of drafting of the ICESCR. See Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 HRQ 156.

<sup>137</sup> The concept of minimum core has been widely contested. For its proponents and defendants see, most recently, John Tasioulas, *Minimum Core Obligations: Human Rights in the Here and Now* (World Bank 2017); Lisa Forman and others, ‘Conceptualising Minimum Core Obligations under the Right to Health: How Should We Define and Implement the “Morality of the Depths”’ (2016) 20 IJHR 531. For its critics, arguing that the creation of yet another narrow subset of immediately realisable rights undermines the full realisation of economic, social and cultural rights, see Katharine Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 YJIL 113; Max Harris, ‘Downsizing Rights: Why the “minimum Core” Concept in International Human Rights Law Should Be Abandoned’ (2013) 1 Public Interest Law Journal of New Zealand 169. For a critique of the concept and a reconstruction of it to give normative content to economic, social and cultural rights in a context-sensitive manner, see Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (JUTA 2010) 163–186.

<sup>138</sup> GC3 (n 115) [10].

<sup>139</sup> GC3 (n 115) [11].

available to states,<sup>140</sup> going so far as to state that minimum core obligations are ‘non-derogable’ and that non-fulfilment is unjustifiable.<sup>141</sup>

In respect of the right to education, the CESCR has identified the minimum core obligations to include the provision of primary education for all, which includes educational materials as established in section 2.2.1; as well as the adoption and implementation of a national strategy on providing secondary, higher and fundamental education.<sup>142</sup> In recognition of resource constraints, the strategy on secondary, higher and fundamental education need not include the immediate provision of free educational materials by the state at these levels. This does not mean that there is *no* obligation on states parties to ensure access to educational materials – rather, that *actually* providing such materials does not fall within the minimum core. The state still has the duty to take appropriate steps to facilitate access programmatically. I discuss these steps in section 2.3.2. Under the UNCPRD, the minimum core has been further clarified to include ‘urgent steps to remove all legal, administrative and other forms of discrimination impeding the right of access to inclusive education’<sup>143</sup> and reasonable accommodation to promote inclusion to ensure education at a level equal to those living without disabilities.<sup>144</sup> This extends to the right of access to educational materials. Importantly, states parties to the UNCPRD are bound to take steps to ‘ensure that laws protecting intellectual property rights do not

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<sup>140</sup> International Commission of Jurists, ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’, 26 January 1997 [8].

<sup>141</sup> This statement was made in the context of the right to health, GC14 (n 29) [43], [47].

<sup>142</sup> GC13 (n 25) [57]. See also, GC4 (n 91) [40(c)], [61], outlining the inclusion of specific measures to ensure that persons with disabilities are not discriminated against.

<sup>143</sup> GC4 (n 94) [40(a)].

<sup>144</sup> *ibid* [40(b)].

constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials’.<sup>145</sup> Educational materials fall squarely within this category.

In sum, the nature of the duties incumbent upon states parties to the ICESCR in respect of the right of access to educational materials is as follows: states parties bear immediately realisable obligations to take steps; to act in accordance with the principle of non-discrimination; and to monitor, report and develop and implement a national education strategy. Additionally, states parties bear immediately realisable minimum core obligations to bear the indirect costs of textbooks and other educational materials for primary education and to take urgent steps to remove impediments to equal access to education and educational materials for persons living with disabilities. This includes reasonable accommodation. In respect of education at all other levels, including lifelong education, states parties bear programmatic obligations to facilitate access to educational materials with a view to achieving its full realisation in time and the obligation not to regress. I now turn to the range of the steps that states parties may take to fulfil the above obligations.

### 2.3.2. Content of duties

In this section I discuss the content of the obligations flowing from the right of access to educational materials. I focus on the role of the tripartite typology of duties to respect, protect and fulfil the right.

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<sup>145</sup> UNCRPD art 30.

The tripartite typology was initially proposed in the context of food<sup>146</sup> and subsequently applied to all rights in the ICESCR,<sup>147</sup> including the right to education,<sup>148</sup> and employed by the above treaty bodies.<sup>149</sup> It offers a conceptual framework through which states parties may crystallise the *content* of their duties from the perspective of the types of steps that they are required to take. This does not affect the nature and priority of duties set out above. Both immediate and progressively realisable obligations require the state to take a combination of steps from within the respect, protect, fulfil typology.<sup>150</sup> Reading the work emerging from UN human rights mechanisms coherently, the better view is that this typology applies equally to crystallising immediately realisable obligations (including minimum core obligations) and progressively realisable obligations. For instance, the obligation to progressively realise lifelong education requires states to take steps with a view to the full realisation of the right. What are these steps? The tripartite typology takes us forward from the antiquated debate of *whether* positive duties are engaged – rather it assists with the identification of the steps required to be taken by the state, with a focus on the realisation of the right.<sup>151</sup>

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<sup>146</sup> Asbjorn Eide, Report of the Special Rapporteur on The Right to Adequate Food as a Human Right, 7 July 1987, C/CN.4/Sub.2/1987/23 [66-70]. This typology was developed in response to the characterisation of rights as positive and negative as well as the dichotomy between economic, social and cultural rights and civil and political rights. See Asbjorn Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 HRLJ 35; M Sepúlveda Carmona (n 121) 171.

<sup>147</sup> Maastricht Guidelines [6].

<sup>148</sup> GC13 (n 25) [46], [50].

<sup>149</sup> GC4 (n 94) [38-39]; CEDAW, General Recommendation No 24: art 12 (Women and Health) (1999) A/54/38/Rev.1, chap I [13-18]; CEDAW, General Recommendation No 28 on the core obligations of states parties under art 2 (2010) CEDAW/C/GC/28 [9]; CRC, General Comment No 15: Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013) CRC/C/GC/15 [86-89]; CRC, General Comment No 16, State obligations regarding the impact of the business sector on children's rights (2013) ('GC16') CRC/C/GC/16 [IV.B].

<sup>150</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 68.

<sup>151</sup> *ibid* 69–71.

Additionally, the better understanding of the tripartite typology recognises that respect, protect and fulfil are not watertight categories, embracing the overlap across them.<sup>152</sup> This understanding moves away from strict, formalistic characterisations of positive and negative rights,<sup>153</sup> and indeed, positive and negative duties<sup>154</sup> and towards a qualitative understanding of the cumulative state action required for the realisation of the right (whether the obligations are immediate or progressive). This accounts for the unique contexts in which each state party operates and the challenges it faces. For instance, the same step taken by the state may function both as the discharge of its duty to respect as well as duty to protect. The categorisation of a measure is neither doctrinally nor normatively dispositive.<sup>155</sup> Rather, the better view is that the typology provides a heuristic for states parties to pose three types of questions in determining their duties:<sup>156</sup> What possible steps may be taken to (1) respect the right, avoid a state of deprivation, and treat other rights-bearers like equal moral agents; (2) protect rights-bearers from third party violations of the right, prevent third parties from depriving rights-bearers, and create an environment where everyone can flourish equally without degrading others; (3) fulfil, provide, promote, the right and construct necessary frameworks for the realisation of the right with a view to its full realisation including international cooperation where

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<sup>152</sup> M Sepúlveda Carmona (n 121) 156.

<sup>153</sup> Henry Shue (n 9) 51–53.

<sup>154</sup> DJ Karp, ‘What Is the Responsibility to Respect Human Rights? Reconsidering the “Respect, Protect, and Fulfil” Framework’ (2020) 12 *International Theory* 83, 90.

<sup>155</sup> This understanding of the respect, protect fulfil framework is one that considers states as the primary duty-bearers of human rights obligations. In this regard, it is indirectly applicable to non-state actors in a similar vein as CESCR, General comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (2017), E/C12/GC/24 [10]–[11].

<sup>156</sup> DJ Karp (n 154) 85.

necessary?<sup>157</sup> I apply this understanding to determining the content of states parties' obligations regarding the right of access to educational materials. The principle of non-discrimination cuts across the typology – under no circumstances is the state empowered to discriminate against any person, and should such discrimination exist the state must take administrative, executive, legal and policy steps to address it.

The obligation to respect enjoins the state from taking any steps that limit or inhibit the realisation of the right, or that interfere with the existing levels of realisation of the right.<sup>158</sup> Further, where existing legal and policy choices are contrary to the ICESCR, the state is enjoined to repeal or suspend these regulations in order to discharge its obligation to respect the right of access to educational materials.<sup>159</sup> This also includes the obligation to undertake legal reform where existing laws or policies inhibit the realisation of the right. Depending on the circumstances, the state is thus required to either take positive steps or forbear from acting in order to avoid deprivation of the right of access to educational materials. For instance, as I discuss in Chapter 5, where the existing South African copyright laws regime acts as a barrier to persons with visual impairments accessing educational materials, the state party is enjoined under the ICESCR to immediately undertake law reform or to interpret these laws in line with the principle of non-discrimination to treat rights-bearers as equal moral agents. In addition, where access

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<sup>157</sup> The framing of these questions draws on the rich secondary literature including Henry Shue (n 9); DJ Karp (n 154); Mátyás Bódog, 'Doctrinal Innovation and State Obligations: The Patterns of Doctrinal Development in the Jurisprudence of the Committee on Economic, Social and Cultural Rights' in K Mills and DJ Karp (eds), *Human Rights Protection in Global Politics: Responsibilities of State and Non-State Actors* (Palgrave Macmillan 2015); Philip Alston and Gerard Quinn (n 136); Sandra Fredman (n 150); Amartya Sen, 'Human Rights and Capabilities' (2005) 6 JHD 151.

<sup>158</sup> The obligation not to interfere with existing levels of realisation of the right is related to the principle of non-retrogression explored under the earlier section on the nature of duties. In short, a reduction in the existing levels of enjoyment of the right by the state would not constitute a breach of the obligation to respect only if justifiable under the criteria for the justification of retrogressive measures. GC3 (n 112) [9]. See, for an additional set of criteria to justify retrogressive measures, CESCR, General Comment No 19: The Right to Social Security (art 9) (2008) E/C12/GC/19 [42].

<sup>159</sup> GC13 (n 25) [59]; M Sepúlveda Carmona (n 121) 197.

already exists, the state must not act to deprive people of such access by shutting down public libraries whether digital or physical; or by introducing stringent copyright legislation or any other laws that create barriers to accessing materials. Moreover, existing laws should be interpreted to avoid constituting a measure that would inhibit the realisation of the right.<sup>160</sup> I discuss an instance of using interpretation to fulfil this duty in Chapter 6, in the Indian context.

The obligation to protect entails that states parties must protect rights-bearers from third party infringements or limitations of the right. The state is obliged to regulate individuals, corporations and groups,<sup>161</sup> to prevent them from depriving rights-bearers of their right of access to educational materials. Further, the obligation extends to ensuring the existence of adequate and effective remedies for rights-bearers when their rights are infringed by third parties,<sup>162</sup> for instance by providing access to courts in the event that the right of access to educational materials is infringed. Given the role played by publishers and other intermediaries in publishing materials used for educational purposes at all levels of education, another duty in this respect would be to regulate the prices of academic books and textbooks in order to ensure affordability of these materials at all levels of education.<sup>163</sup>

Further, the state must ensure that marginalised and vulnerable groups' right of access to educational materials is guaranteed and not infringed by third parties.<sup>164</sup> The

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<sup>160</sup> GC13 (n 25) [47].

<sup>161</sup> GC16 (n 149) [IV.B.2].

<sup>162</sup> GC13 (n 25) [47], [50].

<sup>163</sup> For an analogous obligation regarding the right to access adequate housing, recommending that the state regulate the private housing market to control rent increases and enable access to affordable housing, see CESCR, Concluding Observations, *New Zealand*, 1 May 2018, E/C12/NZL/CO/4 [40]; *Spain*, 25 April 2018, E/C12/ESP/CO/6 [36(b)]; *South Korea*, 19 October 2017, E/C12/KOR/CO/4 [53].

<sup>164</sup> GC14 (n 29) [51]; GC13 (n 25) [50].

CESCR has recognised the impact of market forces on vulnerable groups, such as persons living with disabilities, and clarified that

[i]n the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces.<sup>165</sup>

States' obligations in this regard would include the incorporation of explicit exceptions and limitations in copyright legislation to ensure that persons living with disabilities have access to educational materials under copyright at the same level as persons living without disabilities. This duty is particularly salient in light of the increasing privatisation of education and educational materials.<sup>166</sup>

The obligation to fulfil can be realised through facilitating, providing, and promoting the right.<sup>167</sup> Taking steps to facilitate entails that states parties act in good faith to discharge their obligations proactively for the benefit of the community and individual rights-bearers. For instance, states parties are under an obligation to facilitate linguistically appropriate education,<sup>168</sup> including by ensuring that textbooks are available in multiple languages. Another example of this duty would be state measures to enable students to photocopy or scan materials from libraries that already have relevant books thereby not directly distributing educational materials but providing the means for accessing them.

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<sup>165</sup> GC5 (n 45) [12].

<sup>166</sup> See generally, Guiding Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education (The Abidjan Principles), 12-13 February 2019. See also, CESCR, Concluding Observations, *South Africa*, 29 November 2018, E/C12/ZAF/CO/1 [71(d)] (recommending that the state's regulatory framework be improved to take into account private actors in education).

<sup>167</sup> GC14 (n 29) [33].

<sup>168</sup> GC13 (n 25) [50].

The obligation to provide enjoins the state take steps to directly realise the right in circumstances where the rights-bearers are unable to do so due to structural factors outside of their control.<sup>169</sup> In respect of primary education, the obligation to provide extends to *actually* providing free and compulsory primary education for all, including bearing indirect costs.<sup>170</sup> The state thus bears an obligation to *provide* textbooks in respect of primary education.<sup>171</sup> The obligation to provide does not extend secondary, higher and lifelong learning in the same manner. Rather, the state is enjoined to take steps towards the fulfilment of the right. This includes the obligation to progressively facilitate *access* to meaningfully available and affordable educational institutions and infrastructure, including educational materials essential to every level,<sup>172</sup> ensure that the curriculum reflects contemporary needs, and utilises contemporary technology.<sup>173</sup> For example, this would include taking steps towards setting up and resourcing public libraries for lifelong learning, as well as university and school libraries in order to fulfil access to educational materials including increasing resource allocations and education spending. The obligation would also include taking steps to equip schools and universities with computer technology and internet access for digital learning environments, and increasing library budgets in public educational institutions.

The obligation to promote entails that the state should ensure that information about human rights should be widely disseminated and made available to rights-bearers.<sup>174</sup>

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<sup>169</sup> *ibid* [47].

<sup>170</sup> *ibid* [47]-[48].

<sup>171</sup> See, SDG Agenda (n 32) [4.7], [4a].

<sup>172</sup> Faranaaz Veriava and Kate Paterson, 'The Right to Education' in J Dugard, B Porter, and D Ikawa (eds), *Research handbook on economic, social and cultural rights as human rights* (EE 2020) 116–120.

<sup>173</sup> GC13 (n 25) [50].

<sup>174</sup> GC14 (n 29) [33], [37].

In respect of educational materials, this would entail that the state clarify through its policies, laws and other messaging that access to educational materials forms a part of the right to education and that there are human rights remedies available to those who may be deprived of access.

Finally, states parties that are ‘in a position to assist others’,<sup>175</sup> bear obligations to take steps towards international cooperation in realising the right to education.<sup>176</sup> The CESCR has not developed this duty in much detail<sup>177</sup> and it remains an important area for future development regarding accessing educational materials.

### 2.3.3. Contextualising duties

As recognised in the Introduction to this Thesis, the general human rights guarantee of access to educational materials requires contextualisation in order for state obligations to be crystallised. The capabilities approach, discussed in the Introduction, provides helpful tools to assist with this particularisation. Additionally, I identify the following contextual factors that have emerged from the work of the CESCR, CRC, CRPD, CEDAW and CERD in arriving at Recommendations and Concluding Observations. These factors are helpful in tailoring the application of the obligations to particular state contexts.<sup>178</sup>

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<sup>175</sup> GC3 (n 115) [14].

<sup>176</sup> ICESCR art 2(1). See also, GC13 (n 25) [56]. This has been linked to the right to development. See, AC Onuora-Oguno, *Development and the Right to Education in Africa* (1st edn, Macmillan 2019) 45; KD Beiter (n 114) 240.

<sup>177</sup> But see, in the literature, Maastricht Guidelines (n 140). See also, Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2012).

<sup>178</sup> States have wide latitude in domestically applying their human rights obligations. Eg., the ‘margin of appreciation’ doctrine in the ECtHR applied by HRC, *Lämsman v Finland*, Communication No 511/1992, 26 October 1994, CCPR/C/52/D/511/1992 [9.4].

The factors are: the structure of educational institutions in the state (eg., are there public-private partnerships?);<sup>179</sup> the existence and funding of public and private libraries at all levels of education;<sup>180</sup> the technologies used in educational institutions;<sup>181</sup> the state's budgetary allocation to education financing (eg., at what stage is the state in progressively providing free secondary education);<sup>182</sup> the existing domestic legal, constitutional, and policy framework (eg., implementation or accession to the MVT);<sup>183</sup> security threats and crises interfering with the realisation of the right;<sup>184</sup> the existence and marginalisation of linguistic, cultural, ethnic, religious and racial minorities;<sup>185</sup> socio-economic deprivation (eg., rurality).<sup>186</sup>

## 2.4. Other relevant rights

This Thesis locates the right of access to educational materials within the right to education. There are at least four other inter-related rights that are relevant to the realisation of the right of access to educational materials – freedom of expression,<sup>187</sup> the

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<sup>179</sup> Eg., CRC, Concluding Observations, *Brazil*, 30 October 2015, CRC/C/BRA/CO/2-4 [75], [76].

<sup>180</sup> Eg., CRC, Concluding Observations, *Ecuador*, 29 January 2010, CRC/C/ECU/CO/4 [65(a)]; CRC, Concluding Observations, *El Salvador*, 29 November 2018, CRC/C/SLV/CO/5-6 [42(d)].

<sup>181</sup> Eg., CRC, Concluding Observations, *Costa Rica*, 4 March 2020, CRC/C/CRI/CO/5-6 [23]; CRPD, Concluding Observations, *Sudan*, 2 March 2018, CRPD/C/SDN/CO/1 [48(d)].

<sup>182</sup> Eg., CESCR, Concluding Observations, *Japan*, 10 June 2013, E/C12/JPN/CO/3 [6(b)], [29]; CRC, Concluding Observations, *El Salvador*, 29 November 2018, CRC/C/SLV/CO/5-6 [8(a)], [42].

<sup>183</sup> Eg., CRPD, Concluding Observations, *India*, 29 October 2019, CRPD/C/IND/CO/1 [63]; *Myanmar*, 22 October 2019, CRPD/C/MMR/CO/1 [57], [58].

<sup>184</sup> Eg., CESCR, Concluding Observations, *Pakistan*, 23 June 2017, E/C12/PAK/CO/1 [79].

<sup>185</sup> Eg., CESCR, Concluding Observations, *Pakistan*, 23 June 2017, E/C12/PAK/CO/1 [83]; *Tajikistan*, 25 March 2015, E/C12/TJK/CO/2-3 [37]; *Montenegro*, 15 December 2014, E/C12/MNE/CO/1 [25(b)].

<sup>186</sup> Eg., CESCR, Concluding Observations, *Niger*, 4 June 2018, E/C12/NER/CO/1 [58(c)]; CRC, Concluding Observations, *Zimbabwe*, 7 March 2016, CRC/C/ZWE/CO/2 [69]; *Republic of Moldova*, 12 July 2011, E/C12/MDA/CO/2 [29].

<sup>187</sup> ICCPR art 19.

right to culture,<sup>188</sup> the right to science,<sup>189</sup> and authors' rights. A detailed inquiry is outside the scope of this Thesis. In this section, I discuss authors' rights as they are relevant to the central argument.

#### 2.4.1. Authors' rights

In the same provision where it guarantees everyone the right to participate in cultural life and access the benefits of science and technology,<sup>190</sup> the ICESCR guarantees the right of authors to 'benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production'.<sup>191</sup> Given that this is also the stated rationale of copyright law, it intersects with the right of access to educational materials as a potential justification for limiting the latter. The CESCR, however, has explicitly distinguished international intellectual property law from the right of authors under art 15(1)(c).<sup>192</sup> In explaining the difference, the CESCR has highlighted:

Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments.<sup>193</sup>

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<sup>188</sup> ICESCR art 15(1)(a).

<sup>189</sup> ICESCR art 15(1)(b).

<sup>190</sup> ICESCR art 15.

<sup>191</sup> ICESCR art 15(1)(c).

<sup>192</sup> 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 production of which he or she is the author (art 15, para 1(c)) (2006) ('GC17'), E/C12/GC/17 [1]-[3], [10].

<sup>193</sup> *ibid* [2].

States parties are obliged to realise authors' rights under art 15(1)(c) without inhibiting the realisation of other rights in the ICESCR, including rights to education, participation in cultural life, benefiting from developments in science and technology. Further, this duty includes the obligation to prevent 'unreasonably high costs' for accessing educational materials, amongst other public goods.<sup>194</sup> The right recognised by art 15 is a human right. Unlike copyright, it cannot be enjoyed by a corporation, nor can it be transferred from or alienated by its human author. Chapter 4 analyses the interaction between authors' rights, the right to education under the ICESCR and international copyright law.

## **2.5. Conclusion**

The right to education includes the right of access to educational materials. The UN human rights treaty body system also guarantees this right to every member of society without discrimination. This right includes free textbooks at the primary education level and making available, affordable, accessible and adaptable educational materials essential to every other level of education, including formal and informal education for life. The obligations that flow from this right consist of both immediately and progressively realisable duties. States' minimum core obligations that must be immediately achieved include the free and compulsory provision of textbooks at the level of primary education.

The content of the duties in respect of the right of access to educational materials at all levels includes judicial, executive, administrative, legislative and policy steps to be taken by the state party to ensure that no one is deprived of access and that everyone has *equal* access based on their differentiated socio-economic circumstances; that third parties such as intermediaries and other business entities do not deprive rights-bearers of their right of access to educational materials or limit the realisation of their right; and that the

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<sup>194</sup> *ibid* [35].

infrastructure required to fully realise the right is in place for every member of society to have access to educational materials at all levels. The local context in which these obligations are applied will provide greater precision in determining their fulfilment.

Among other related rights, authors' rights are particularly relevant to understanding the extent of the right of access to educational materials as I go on to discuss in Chapter 4. In the next Chapter, I turn to the international copyright and trade law framework regulating access to educational materials.

### 3. REGULATING ACCESS TO EDUCATIONAL MATERIALS: “EXCEPTIONS” TO THE INTERNATIONAL COPYRIGHT REGIME

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#### 3.1. Introduction

In Chapter 2, I argued that the right of access to educational materials, including materials under copyright, is guaranteed under the right to education in the ICESCR and other core UN human rights treaties. Importantly, I set out the binding obligations it imposes upon states parties. In this Chapter, I focus on the regulation of access to educational materials by the international copyright treaties.

The ICESCR is one of the most widely ratified treaties in the world with 171 parties and a further four signatory countries.<sup>1</sup> The Berne Convention, analysed in this Chapter, has 179 states parties.<sup>2</sup> The WTO, which binds its members to the TRIPS Agreement, has 164 member states and a further 24 observer states beginning their accession negotiations in due course.<sup>3</sup> These treaties thus have significantly overlapping states parties. The near-universal application of these treaties is an important factor in the application of the VCLT’s rules of treaty interpretation. I argue that the ICESCR forms a part of ‘other relevant rules of international law’<sup>4</sup> in interpreting the Berne Convention and TRIPS as regards access to educational materials and, therefore, must be taken into account. The relevance of the ICESCR to the interpretive exercise is twofold. First, the overlap between

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<sup>1</sup> ICESCR (UNTC) <<https://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-3.en.pdf>> accessed 20 March 2021.

<sup>2</sup> Berne Union (WIPO) <[https://wipolex.wipo.int/en/treaties/ShowResults?search\\_what=B&bo\\_id=7](https://wipolex.wipo.int/en/treaties/ShowResults?search_what=B&bo_id=7)> accessed 20 March 2021.

<sup>3</sup> Members and Observers (WTO) <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> accessed 20 March 2021.

<sup>4</sup> VCLT art 31(3)(c).

states parties entails that most states undertake obligations under both treaties and are bound to fulfil them simultaneously. Second, there is overlap in subject matter – materials under copyright.

This Chapter makes a significant original contribution to knowledge as it demonstrates the application of the VCLT in interpreting the extent to which international copyright law enables (or indeed, inhibits) states to fulfil their obligations regarding the human right of access to educational materials, while also fulfilling their copyright obligations. This Chapter analyses both regimes from the vantage point of public international law<sup>5</sup> – as the instruments in question are all treaties – and recognises the important methodological tools that the VCLT offers in harmoniously interpreting them. Chapter 4 takes this analysis forward with a contextual approach to the institutional factors that condition the harmonious interpretation advanced.

In this Chapter, I am concerned with how the international copyright law system regulates access to educational materials. I first discuss the institution of copyright created and regulated by the Berne Convention and states parties' obligations in section 3.2. I then analyse the provisions that permit states parties to enact domestic legislation for access to materials under copyright for educational purposes in section 3.3. In section 3.4, I turn to the other relevant provisions in the Berne Convention, including the 'three-step test'. I briefly address the Berne Appendix in section 3.5 before analysing the operation of the 'three-step test' in the WCT, TRIPS and the MVT in section 3.6. In doing so, I explain the relationship between TRIPS and the Berne Convention and the logic of the MVT to future interpretations of the three-step test and copyright's relationship with human rights.

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<sup>5</sup> The only other study, at the time of writing, that analyses norm conflict in the area of intellectual property from a public international law perspective, is Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (1st edn, OUP 2017). However, Ruse-Khan limits his study to the norm conflicts *within* the international intellectual property regime.

### 3.2. Copyright in the Berne Convention

The Berne Convention is the oldest multilateral international copyright treaty in the world.<sup>6</sup> Its stated purpose is to ‘protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.’<sup>7</sup> States parties to the Berne Convention form the ‘Berne Union’,<sup>8</sup> which, at the time of its negotiation in the late 1800s, comprised mainly of former colonial powers.<sup>9</sup> By depositing their consent to be bound by the Convention, the member states of the Berne Union undertake to provide automatic national treatment to authors’ works from member states.<sup>10</sup>

The most recent revision of the Berne Convention took place in 1971.<sup>11</sup> I analyse this version of the Convention that remains in force today. The Convention obliges states parties to make laws that vest exclusive legal rights in authors over the use of their literary and artistic works.<sup>12</sup> Textbooks and other published educational materials, as defined in the Introduction to the Thesis, fall squarely within the scope of these works.<sup>13</sup> Copyright

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<sup>6</sup> Berne Convention for the Protection of Literary and Artistic Works, 1886. See, on its history, Peter Burger, ‘The Berne Convention: Its History and Its Key Role in the Future’ (1988) 3 *Journal of Law and Technology* 71.

<sup>7</sup> Berne Convention preamble.

<sup>8</sup> Berne Convention art 1.

<sup>9</sup> This precluded the participation of states that were then-colonised. The Berne Union currently comprises of 179 member states, of which only 10 countries concluded the 1886 version of the Berne Convention. See also, Alan Story, ‘Burn Berne: Why the Leading International Copyright Convention Must Be Repealed’ (2003) 40 *HouLR* 763; A Roy, ‘Copyright: A Colonial Doctrine in a Postcolonial Age’ (2008) 26 *Copyright Reporter* 23.

<sup>10</sup> JC Ginsburg and E Treppoz, *International Copyright Law: US and EU Perspectives* (EE 2015) 25.

<sup>11</sup> WIPO, Berne Convention (Paris Act July 24, 1971, and amended on September 28, 1979). For the lack of further revisions see, S Ricketson, ‘The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Obstacles’ (2018) 41 *CJLA* 341.

<sup>12</sup> Berne Convention art 2.

<sup>13</sup> Berne Convention, art 2(1):

does not exist in perpetuity – rather, the Convention provides for the monopoly over the use of works to last for a minimum of 50 years after the author’s lifetime. States are free to increase the duration of copyright at their discretion.<sup>14</sup> The Convention requires states parties to guarantee authors a monopoly over the reproduction,<sup>15</sup> translation and authorisation of translation,<sup>16</sup> adaptation and authorisation of adaptation,<sup>17</sup> public performance,<sup>18</sup> distribution and broadcasting,<sup>19</sup> and communication<sup>20</sup> of works. These economic aspects of copyright are assignable and alienable. In effect, the Convention creates a market for the commercial exploitation of works under copyright to the author’s benefit with the aim of ‘incentivising’ knowledge production.<sup>21</sup>

Additionally, the states parties are required to guarantee authors the legal rights to claim that their works be attributed to them and to object to the alteration of works where

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The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

<sup>14</sup> Berne Convention art 7.

<sup>15</sup> Berne Convention art 9(1).

<sup>16</sup> Berne Convention art 8.

<sup>17</sup> Berne Convention art 12.

<sup>18</sup> Berne Convention art 11(1).

<sup>19</sup> Berne Convention art 11bis(1).

<sup>20</sup> Berne Convention art 11(1).

<sup>21</sup> Lee Edwards, ‘Copyright: A Systemic Marketplace Icon’ (2019) 22 CMC 74. See, for a typical statement of the philosophy underlying economic aspects of copyright WM Landes and RA Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18 JLS 325.

such alteration causes reputational harm.<sup>22</sup> These constitute copyright's moral rights. Their assignment and alienation is a matter that jurisdictions have dealt with differently – but it suffices to note that they may be waived, alienated, and assigned depending on the domestic legal framework of states parties.<sup>23</sup> These are distinct from author's rights in international human rights law, discussed in Chapter 2, as human rights cannot be alienated, assigned or waived. I discuss the interface further in Chapter 4.

States parties are bound to domestically legislate to construct and regulate copyright. However, copyright is not an absolute restriction on the free use of works by persons other than authors (or those authorised by authors) outside the market. The Berne Convention allows states parties to provide for certain free, unremunerated uses of works under copyright for educational purposes. As discussed below, access to educational materials is primarily regulated by this provision.

### **3.3. Educational Purposes in the Berne Convention**

My analysis in this section focuses on art 10(2) of the Berne Convention.<sup>24</sup> I argue that it is the provision applicable to regulating access to educational materials. I first examine the text of the provision, its context, as well as the object and purpose of the Berne

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<sup>22</sup> Berne Convention art 6bis.

<sup>23</sup> L Bently and others, *Intellectual Property Law* (5th edn, OUP 2018) 291–302; Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' (1995) 19 CVJLA 229, 243; EC Lim, 'On the Uneasy Interface between Economic Rights, Moral Rights and Users' Rights in Copyright Law: Can Canada Learn from the UK Experience?' (2018) 15 SCRIPT-ed 70, 77–84.

<sup>24</sup> It is important to note that the extent to which states parties elect to enact library exceptions for the archival, preservation and access to works affects the pool of materials available for educational purposes, since much of the educational use takes place through libraries whether public or institutional. It is outside the scope of this Thesis to study this in full, but it is an important factor affecting access. See generally, Kenneth Crews, Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised, 2 November 2017, SCCR/35/6.

Convention, and then turn to related agreements and other relevant rules of international law to be taken into account along with the context.<sup>25</sup>

Art 10(2) of the Berne Convention, titled ‘illustrations for teaching’ states that:

It shall be a matter for legislation in the countries of the [Berne] Union, and for special agreements existing or to be concluded between them, to permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice.

A plain-language reading of the text of the provision indicates that (1) States parties to the Convention have the discretion to make laws and (2) negotiate further treaties to (3) exempt from the operation of copyright uses that fall within the scope of (4) illustrations for teaching, as long as these uses are (5) compatible with fair practice and (6) their extent is justified by the purpose of the use. Reading propositions 1, 2 and 3 together, it is clear that art 10(2) is *permissive* – the Convention does not *require* states to legislate.<sup>26</sup> Instead, it leaves the matter to states parties’ discretion, in contrast to the provisions analysed in section 3.2.<sup>27</sup> The literature thus characterises art 10(2) as a purpose-based ‘exception’ to copyright.<sup>28</sup> I address propositions 4, 5 and 6 below.

Art 10, within which art 10(2) sits, is titled ‘Certain free uses of works’. Art 10 details particular uses of works under copyright that do not require remuneration or

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<sup>25</sup> VCLT arts 31, 32.

<sup>26</sup> For all the provisions in the Berne Convention characterised as exceptions and limitations, see Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, SCCR/9/7, 5 April 2003 [40].

<sup>27</sup> S Ricketson and JC Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn, OUP 2006) para 13.01-13.02.

<sup>28</sup> Eg., *ibid* 13.01, 13.43-13.46. characterising art 10(2) as a purpose-based limitation with an underlying public interest reason. See also, RL Okediji, ‘Reframing International Copyright Limitations and Exceptions as Development Policy’ in RL Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (CUP 2017) 429–496; P Goldstein and BP Hugenholtz, *International Copyright : Principles, Law and Practice* (Second Edition, OUP 2010) 383–385.

authorial authorisation. Art 10(1),<sup>29</sup> although containing the same conditions as art 10(2),<sup>30</sup> is not left to the discretion of member states. Rather, member states are enjoined to enact laws to enable the use of works under copyright for quotations.<sup>31</sup> Art 10(3) imposes an additional condition on arts 10(1) and 10(2), namely that the work must be attributed to the author, irrespective of the use.<sup>32</sup> Art 10(2) details a type of free use described by Art 10.<sup>33</sup> The fulfilment of art 10(3) ensures that the uses contemplated by art 10, particularly for art 10(2), are in furtherance of the Convention's object and purpose.

I now analyse the three outer limits of art 10(2) outlined in propositions 3, 4 and 5 above. I interpret 'to the extent justified by the purpose'; 'illustrations for teaching,' and 'fair practice' to demonstrate the breadth of art 10(2).

### 3.3.1. '[I]o the extent justified by the purpose'

Art 10(2) does not limit the *type* of use.<sup>34</sup> This means that any use is permitted, including reproduction, broadcast, distribution, or circulation, amongst others. However, art 10(2) limits the *proportion* of the use to the provision's stated purpose. The contemplated use is

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<sup>29</sup> Berne Convention art 10(1):

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

<sup>30</sup> '[F]air practice' and 'to the extent justified by the purpose' outlined in propositions 5 and 6 above.

<sup>31</sup> See generally, Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (CUP 2020); Tanya Aplin and Lionel Bently, 'Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism' in Susy Frankel, *Is Intellectual Property Pluralism Functional?* (EE 2019).

<sup>32</sup> This is a restatement of the moral right of attribution in Berne Convention art 6bis. See also, WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (WIPO 1978) 41–43.

<sup>33</sup> See section 3.3.3.2.

<sup>34</sup> In contrast to eg., Berne Convention art 9(2) specifying reproduction as the only contemplated use. For a broad interpretation of 'utilisation' as meaning 'to make or render useful' see, Lawrence Liang, 'Exceptions and Limitations in Indian Copyright Law for Education: An Assessment' (2010) 3 LDR 198, 216–217.

only justifiable to the *extent* that it fulfils the purpose of ‘illustrations for teaching’.<sup>35</sup> I interpret ‘illustrations for teaching’ in section 3.3.2.

‘To the extent justified by the purpose’ has been interpreted as requiring a proportionality inquiry into the length or the quantity of the work used.<sup>36</sup> It has been applied by courts as containing an additional qualitative element of ‘suitability’ to the purpose in question.<sup>37</sup> This is distinct from ‘fair practice’ discussed in section 3.3.3, on the basis that a good faith interpretation would require the interpreter to adopt an interpretation that avoids rendering any phrase redundant and give full effect to all words in the provision.<sup>38</sup> The key question at this stage would be: does the purpose of ‘illustrations for teaching’ justify the extent of the use in question? The justification analysis includes an inquiry into the nexus between the use and the purpose sought to be achieved; the appropriateness of the use in relation to achieving the purpose; the length and quantity of the work used vis-à-vis the whole work; and whether the use fulfils the purpose of

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<sup>35</sup> Silke von Lewinski, *International Copyright Law and Policy* (OUP 2008) para 5.170; S Ricketson and JC Ginsburg (n 27) para 13.44.

<sup>36</sup> Tanya Aplin and Lionel Bently, *GMFU* (n 31) 78.

<sup>37</sup> See, recently, the German Federal Court of Justice interpreting Directive 2001/29/EC On the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ 2 167/10 art 5(3)(c) that contains the same requirement in respect of reporting on current affairs ‘to the extent justified by the informatory purpose’ alongside its domestic copyright law s50 UrhG that contains the language ‘to the extent required by the purpose’ (tr from German), *Reformistischer Aufbruch VB II v Spiegel Online* BGH 30 April 2020 (I ZR 228/15) [48(aa)]. See also, the same interpretation in Case C-516/17, *Spiegel Online GmbH v Volker Beck* [2019] ECLI:EU:C:2019:625 [68]-[72] responding to the reference for a preliminary ruling from the German Federal Court of Justice in the same case.

<sup>38</sup> Eg, *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* [1994] ICJ Reports 23 [47]; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v Russian Federation*), Preliminary Objections, [2011] ICJ Reports [133]-[134]. See, using the *travaux préparatoires* to confirm this interpretation, Tanya Aplin and Lionel Bently, *GMFU* (n 31) 79.

‘illustrations for teaching’.<sup>39</sup> This interpretation does not preclude the use of whole works,<sup>40</sup> if the use of whole works can be justified by the purpose through the above factors. Turning now to the meaning of the purpose: what does ‘illustrations for teaching’ mean?

### 3.3.2. ‘[I]llustrations for teaching’

The word ‘teaching’ is an open-textured term that lends itself to a range of interpretations.<sup>41</sup> The precise contours of ‘teaching’, however, are to be determined by national legislatures with reference to local needs.<sup>42</sup> Treaty provisions must be interpreted in good faith. Here, the principle of good faith requires art 10(2) to be interpreted in a manner that ensures its effectiveness and fidelity to its purpose within the scheme of the Berne Convention.<sup>43</sup> Since the Berne Convention continues to bind states parties 135 years after its first iteration,<sup>44</sup> a good faith interpretation of ‘teaching’ relevant to contemporary life would require an evolutionary approach.<sup>45</sup> A static approach would render art 10(2) ineffective as it would

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<sup>39</sup> The element of necessity is excluded in my analysis because the text does not *prima facie* require a narrow ‘least intrusive means’ test for the use of the work – rather the assessment of impact of the use upon the author’s rights is left to ‘fair practice’ which is far more open-textured. See *EWCB Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch), [2016] RPC 21 [149], [151], [157]–[158] applying a proportionality test but without a strict necessity requirement. For similar factors developed in the context of the quotation exception, see *ibid* 80–82.

<sup>40</sup> Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967 (‘Records’) 886 [1080.1]. See also, S Ricketson and JC Ginsburg (n 27) para 13.45; Silke von Lewinski (n 35) para 5.170.

<sup>41</sup> In that sense, it is similar to the words ‘natural resources’ interpreted in WTO, *United States–Import Prohibition of Certain Shrimp and Shrimp Products–Report of the Appellate Body* (6 November 1998) WT/DS58/AB/R [129]–[131] or to the word ‘comercio’ interpreted in Dispute Regarding Navigational and Related Rights (*Costa Rica v Nicaragua*) [2009] ICJ Reports 213. In both cases, an evolutionary interpretation was adopted.

<sup>42</sup> SCCR/9/7 (n 26) 14 [1].

<sup>43</sup> Oliver Dörr and Kristen Schmalenbach (eds), ‘Article 31’, *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 34.

<sup>44</sup> Berne Convention (Berne Act 1886). See, for evolutionary interpretation applying to ‘unrevised treaty obligations...exposed to the erosion of time’ Pierre-Marie Dupuy, ‘Evolutionary Interpretation of Treaties: Between Memory and Prophecy’ in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention*, vol 1 (OUP 2011) 137.

<sup>45</sup> The interpretation of open-textured or generic terms is an exception to the static approach taken to interpreting treaty provisions. Eg., *Costa Rica v Nicaragua* (n 41) [66]; *Pulp Mills on the River Uruguay*

not account for technological developments that have transformed the nature of ‘teaching’ over the last century.

I argue that the evolutionary approach is the better approach.<sup>46</sup> This approach is triggered when either a clear intention emerges from the text, context and object and purpose of the treaty that the meaning of the particular term was in fact meant to evolve with time, or where such an intention may be presumed, drawing on the same elements.<sup>47</sup> First, I analyse the previous iterations of the Berne Convention as they provide valuable context to understand the language. Second, I argue that the French language version of the Convention is the authoritative version as stipulated by the parties and the English ‘teaching’ must be interpreted to align with the French ‘enseignement’. Finally, I contrast the static and evolutionary approaches to show the absurdity of a static interpretation. I use other relevant rules of international law and subsequent practice to bolster the broad purpose in art 10(2).

### ***3.3.2.1. The purpose: from ‘educational or scientific purposes, or for chrestomathies’ to ‘illustrations for teaching’***

The first iteration of the Berne Convention reserved, for states’ national legislation, the power to protect ‘the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies [selections of passages]’.<sup>48</sup> Here, the phrase ‘educational purposes’ was contemplated to

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(*Argentina v Uruguay*) [2010] ICJ Reports 14 [204]; *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Reports 3 [77].

<sup>46</sup> See generally, Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (OUP 2014). See also, RK Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 193.

<sup>47</sup> *Costa Rica v Nicaragua* (n 41) [64]. See also, Eirik Bjørge (n 46) 2.

<sup>48</sup> Berne Convention (Berne Act, 1886) art 8.

include uses at all levels of instruction (basic and advanced);<sup>49</sup> ‘scientific purposes’ including self-directed learning and research;<sup>50</sup> and chrestomathies including educational compilations of extracts of published works,<sup>51</sup> or what we now call course packs.

This provision was amended to its current form at the Stockholm Revision of the Berne Convention in 1967.<sup>52</sup> The *travaux préparatoires* indicate that the impetus for this amendment came from a desire to better align the English and French translations of the Convention. The initial proposal was to substitute ‘excerpts’ with ‘borrowings’,<sup>53</sup> rather than an intention to change its objects or scope. The Working Group substituted ‘illustrations for teaching’ in place of ‘educational or scientific purposes, or for chrestomathies’. However, the records indicate that the new language was *not* intended to constrain the scope of the provision.<sup>54</sup> It simply served to ensure that the purpose of the use was *indeed* to engage in teaching.<sup>55</sup> The Chairman of the Working Group clarified at the time that ‘the purpose to which reference [is] made in art 10(2) [is] basically the promotion of education’.<sup>56</sup>

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<sup>49</sup> S Ricketson and JC Ginsburg (n 27) para 13.44.

<sup>50</sup> S Ricketson and JC Ginsburg (n 27).

<sup>51</sup> *ibid* 13.39 fn 84.

<sup>52</sup> Berne Convention (Stockholm Act, 1967) art 10(2).

<sup>53</sup> The intention, rather, was to better translate the French word ‘emprunts’. See Records (n 40) Main Committee I 92-95 [1147]-[1148].

<sup>54</sup> Raquel Xalabarder, WIPO Study on Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel, SCCR/19/8, 5 November 2009 [15].

<sup>55</sup> *ibid*. See on the point of not restricting ‘teaching’, Records (n 40) Proposal of Working Group on 10(2), S/185 886 [1084] (Federal Republic of Germany).

<sup>56</sup> Records (n 40) Summary of Main Committee I, S/83 861 [783.1].

### **3.3.2.2. The French version: authoritative text**

Further, the French version of the Berne Convention uses the *same* word ‘enseignement’ to refer *both* to ‘educational purposes’ in earlier versions of the Convention<sup>57</sup> and to ‘teaching’ in the current version of the Convention.<sup>58</sup> The VCLT provides for the same meaning to be given to all terms of the treaty across all authentic texts adopted by the parties.<sup>59</sup> It also provides that in the event of divergences in meaning across authentic texts in different languages the parties are free to specify which version prevails.<sup>60</sup> Pursuant to this, the Berne Convention specifies that in the event of a dispute in meaning, the *French* text is authoritative.<sup>61</sup> This confirms that ‘teaching’ in the English text retains the same meaning as ‘enseignement’ in the French text.

What does ‘enseignement’ mean? The Oxford French-English Dictionary translates ‘enseignement’ as ‘education, teaching, instruction, tuition, and lesson’.<sup>62</sup> The Larousse French Dictionary defines ‘enseignement’ as (1) an action, transmitting knowledge and experiences; way of teaching; (2) as a profession; an activity of those who teach; (3) lessons learned from experiences, events and realities eg., lessons from

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<sup>57</sup> Berne Convention (Berne Act, 1886) art 8 and Berne Convention (Brussels Act, 1948) art 10 (‘publications destinées à l’enseignement’).

<sup>58</sup> Berne Convention (Stockholm Act, 1967) art 10(2) and Berne Convention (Paris Act 1971 as amended in 1979, in force today) art 10(2) (‘illustration de l’enseignement’).

<sup>59</sup> VCLT art 33(3); Berne Convention art 37(1)(a).

<sup>60</sup> VCLT art 33(1).

<sup>61</sup> Berne Convention art 37(1)(c); Silke von Lewinski (n 35) para 7.12.

<sup>62</sup> Oxford Dictionaries, ‘Enseignement’ <<https://premium.oxforddictionaries.com/translate/french-english/enseignement>> accessed 24 November 2020.

setbacks.<sup>63</sup> The word ‘enseignement’ is an umbrella term carrying several meanings.<sup>64</sup> Importantly, it is not definitionally confined to educational institutions providing a formal course of instruction.<sup>65</sup> The usages indicated in the cited dictionaries provide for a plethora of uses, all indicating that an additional descriptor is required to qualify ‘enseignement’ to refer to an educational *establishment*.<sup>66</sup> Similarly, additional descriptors are required to denote an educational programme,<sup>67</sup> levels of formal education,<sup>68</sup> types of education,<sup>69</sup> educational materials/methods,<sup>70</sup> educational facilities,<sup>71</sup> individual learning,<sup>72</sup> distance education,<sup>73</sup>

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<sup>63</sup> Translated from French ‘Action, manière d'enseigner, de transmettre des connaissances; Profession, activité de ceux qui enseignent: Faire de l'enseignement; Leçon donnée par les faits ou l'expérience: Les enseignements d'un échec.’ See Larousse, ‘Enseignement’ <<https://www.larousse.fr/dictionnaires/francais/enseignement/29804#definition>> accessed 24 November 2020.

<sup>64</sup> On the English word ‘teaching’ see Silke von Lewinski (n 35) para 5.172. (‘The word “teaching” is technically neutral and therefore, in principle, is broad [...]’).

<sup>65</sup> Eg., Loi du 28 mars 1882 sur l’enseignement primaire obligatoire [Law of 28 March 1882 on Compulsory Primary Education], including home-schooling and private tuition part of ‘enseignement’ within this Act.

<sup>66</sup> In French, établissement d'enseignement. Further, formal educational institutions are referred to as école, scolaire, université, lycée, college depending on the level of education.

<sup>67</sup> In French, enseignement programmé (a structured programme of education).

<sup>68</sup> In French, enseignement élémentaire ou primaire (primary education), enseignement du second degré ou secondaire (secondary education), enseignement supérieur (tertiary education), enseignement universitaire (university education).

<sup>69</sup> In French, enseignement privé ou libre (private or denominational education), enseignement public (state organised education), enseignement assisté par ordinateur (EAO) (computer science or information technology education), enseignement polytechnique (vocational education), enseignement professionnel (vocational education and training), enseignement technologique ou technique (technical education), enseignement spécialisé (education for persons living with disabilities), enseignement en alternance (alternating apprenticeship and education), enseignement artistique (art education), enseignement général (mainstream education), enseignement ménager (domestic science education), enseignement religieux (religious instruction), enseignement des langues vivantes (modern language teaching), enseignement théorique/pratique (theoretical/practical education).

<sup>70</sup> In French, programmes/méthodes/matériaux d'enseignement.

<sup>71</sup> In French, activités/équipements d'enseignement.

<sup>72</sup> In French, enseignement individualisé (self-study at one’s own pace), enseignement individuel (individual education).

<sup>73</sup> In French, enseignement par correspondance (distance education), enseignement à distance (distance education).

coeducation,<sup>74</sup> and education sector,<sup>75</sup> *inter alia*. Moreover, the pedagogical and development literature supports the view that ‘teaching’ and ‘learning’ are inseparable in the process of education. Bearing in mind its near-universal application, the Convention cannot be interpreted to be limited to Western forms of education either. The actual practice of education thus supports the interpretation of ‘enseignement’ advanced above.<sup>76</sup>

### ***3.3.2.3. Interpreting Berne 135 years later: triggering the evolutionary approach***

Were the parties to the Convention aware that ‘enseignement’ or ‘teaching’ could evolve? The *travaux préparatoires* indicate that they were. In fact, educational broadcasts through radio and television, emerging technologies of their time, were explicitly contemplated to fall within art 10(2) on the basis that ‘those new techniques were not [to be] relegated to second place’<sup>77</sup> and ‘that it was no longer possible to refuse to grant the same right to teaching by radio and television as to teaching by the traditional methods’.<sup>78</sup> Delegates explicitly favoured ‘modernising’ art 10(2) to enable the inclusion of newer technical media (at the time) within its ambit.<sup>79</sup> This constitutes evidence of a common intention of member states to interpret ‘teaching’ in an evolutionary manner.<sup>80</sup>

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<sup>74</sup> In French, enseignement mixte.

<sup>75</sup> In French, secteur de l’enseignement.

<sup>76</sup> See, similarly advancing good reasons for drawing on actual practice to support the determination of the ordinary meaning of quotations, Tanya Aplin and Lionel Bently, *GMFU* (n 31) 85–89.

<sup>77</sup> Records (n 40) Summary of Main Committee I, S/83 861-862 [782] (Bulgaria), [785] (Australia).

<sup>78</sup> Records (n 40) 886 [1089] (Monaco); Joint Proposal submitted by Bulgaria, Czechoslovakia, Poland and Rumania (S/83) on including radio and television broadcasts and phonograms, and Proposals submitted by Brazil, Mexico and Portugal (S/216) on including visual recordings within the ambit of art 10(2), 902 [1290]. See also [1099], [1103], [1294] for the votes in favour of extending the ambit of art 10(2) to include broadcasting and recordings, including visual recordings, as teaching methods.

<sup>79</sup> Records (n 40) 862 [788] (France), [790] (Czechoslovakia), [786] (the Netherlands).

<sup>80</sup> Silke von Lewinski (n 35) para 5.171; S Ricketson and JC Ginsburg (n 27) para 13.44-13.45.

Alternatively, a static interpretation of ‘teaching’ focuses on the interpretation of ‘teaching’ at the time of conclusion of the Berne Convention. Turning to the *travaux préparatoires*, ‘teaching’ was intended to include classroom instruction through public and private educational institutions at all levels.<sup>81</sup> This included teaching in all forms, including distance learning through radio and television broadcasts and non-traditional teaching methods.<sup>82</sup> Although the records indicate an intention to confine the meaning of teaching to formal educational instruction,<sup>83</sup> at the same time, they indicate a positive intention to include broadcasts within the scope of the provision without restricting it to broadcasts within educational institutions.<sup>84</sup> It would be absurd to interpret broadcasts broadly, to include all forms of ‘teaching’ within and outside of institutions, but all other types of uses narrowly.

The evolutionary approach asks: does the interpretation of ‘teaching’ require a different interpretation from the static approach, given the passage of time? The invention of the internet and other developments (such as the recent COVID-19 pandemic), are good reasons to interpret art 10(2) broadly and dynamically covering educational activities irrespective of whether they take place in the classroom. States parties were aware and intentional about the evolutionary nature of ‘enseignement’ or ‘teaching’ as explained in section 3.3.2.2; the generic nature of ‘enseignement’ does not definitionally limit it to an educational *institution* as explained in section 3.3.2.3; third, the actual practice of ‘teaching’

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<sup>81</sup> Records (n 40) 97 [1148].

<sup>82</sup> Silke von Lewinski (n 35) para 5.172. See also, SCCR/19/8 (n 54) [14]; SCCR/9/7 (n 26) 15 [4].

<sup>83</sup> Records (n 40) 97 [1148]. But, see Proposal of Working Group on 10(2), S/185 886 [1084] (Federal Republic of Germany).

<sup>84</sup> A majority of the Members of the Working Group (19 members) voted in favour of retaining broadcasting without any restrictions whilst 8 members voted against and 6 members abstained. See Records (n 40), Summary Minutes, Main Committee I [1099].

is inseparable from learning, and takes place in several settings, within and outside of educational institutions.<sup>85</sup>

#### ***3.3.2.4. Subsequent domestic practice and other relevant rules of international law***

I now turn to the subsequent practice of states parties and other relevant rules of international law to facilitate the interpretive process.<sup>86</sup>

On the practice of states parties, the WIPO Standing Committee on Copyright and Related Rights (SCCR) surveyed provisions in the domestic copyright laws of all its 189 member states that facilitate uses for educational purposes.<sup>87</sup> A follow up to this study identified the following types of educational uses of materials under copyright in member states, with specific reference to the records of the Stockholm Revision Conference on art 10(2):<sup>88</sup>

access to and use of materials by individuals, such as students, including adults receiving life-long and vocational training, and researchers, for educational and research purposes; the access and use of materials by educational and research institutions, including educators, researchers and staff of such institutions, for educational instruction and research; distance learning activities; online courses; the adaptation and translation of materials for educational and research purposes.<sup>89</sup>

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<sup>85</sup> The pandemic has demonstrated the importance of a flexible interpretation of educational purposes. Eg., an edited collection with perspectives across contexts, Richard Ferdig and others, *Teaching, Technology, and Teacher Education during the COVID-19 Pandemic: Stories from the Field* (AACE 2020). See also, how copyright is exacerbating existing inequalities in education, Emily Hudson and Paul Wragg, 'Proposals for Copyright Law and Education During the COVID-19 Pandemic' (2020) 71 NILQ 571.

<sup>86</sup> VCLT arts 31(3)(b),(c).

<sup>87</sup> Daniel Seng, WIPO Study on Copyright Limitations and Exceptions for Educational Activities, SCCR/33/6, 9 November 2016.

<sup>88</sup> Daniel Seng, WIPO Copyright Limitations and Exceptions for Educational and Research Activities: Typology Analysis, SCCR/38/8, 29 March 2019 [2].

<sup>89</sup> *ibid* [3].

In addition to traditional classroom-based models of teaching and learning,<sup>90</sup> this typology includes individual and experiential forms of learning,<sup>91</sup> distance learning without face-to-face instruction,<sup>92</sup> asynchronous online courses,<sup>93</sup> and the adaptation and translation of works in the course of educational activities.<sup>94</sup> Such variety confirms that educational activities need not occur solely within institutions to be covered by art 10(2).<sup>95</sup>

Further, the right to education in international human rights law is relevant to interpreting ‘teaching’ in art 10(2) as it deals centrally with the same subject matter. In Chapter 2, I discussed the right and states parties’ obligations. Significantly, education is not limited to the narrow definition of ‘teaching’ but includes an integrated process of teaching, learning, self-study, research, vocational training, adult literacy and numeracy drives, as well as lifelong education opportunities.<sup>96</sup> In a similar vein, a coalition of civil society organisations and WIPO member states have consolidated recent developments at the SCCR and domestic practice in the form of a Draft Civil Society Treaty on Copyright Exceptions and Limitations for Educational and Research Activities.<sup>97</sup> This Draft Treaty

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<sup>90</sup> *ibid* [8].

<sup>91</sup> *ibid* [5].

<sup>92</sup> *ibid* [13].

<sup>93</sup> *ibid* [16].

<sup>94</sup> *ibid* [20].

<sup>95</sup> See SCCR/19/8 (n 54) [14]; SCCR/9/7 (n 26), 15 [4].

<sup>96</sup> See Chapter 2.

<sup>97</sup> TERA (*Infojustice*, 2019) <<https://tinyurl.com/TERA-GCV>> accessed 20 March 2021.

includes uses in the course of teaching activities,<sup>98</sup> learning activities,<sup>99</sup> creating educational materials,<sup>100</sup> and uses in the course of research activities.<sup>101</sup> The Draft Treaty thus recognises the wide range of possible educational *and* research uses of materials under copyright, within and without formal programmes offered by educational institutions within the ambit of art 10(2).<sup>102</sup>

### **3.3.2.5. *‘[I]llustrations for teaching’: what does it mean?***

From the above analysis, it is clear that the French version of the Convention is legally authoritative and ‘illustrations for teaching’ must be interpreted in line with ‘enseignement’. Further, for art 10(2) to remain effective, its interpretation must not remain static. The better approach is an evolutionary interpretation that accounts for contemporary educational activities. To sum up, the central case in art 10(2) includes uses for the purposes of teaching (including classroom instruction, internet instruction, whether synchronous or asynchronous, preparing educational materials through course packs) and,

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<sup>98</sup> TERA art 5(2)(a) drawing on eg., SCCR/33/6 (n 87); WIPO Secretariat, Provisional working document towards an appropriate international legal instrument (in whatever form) on limitations and exceptions for educational, teaching and research institutions and persons with other disabilities containing comments and textual suggestions (13 December 2013), SCCR/26/4 Prov. (Proposal from Brazil); Daniel Seng, Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities SCCR/35/5 Rev (13 November 2017); Beijing Treaty on Audiovisual Performances preamble; US Copyright Act, 17 USC s 107; Copyright Law of the Republic of Liberia, s 9.8(a); Sri Lanka, Intellectual Property Act (No. 36 of 2003), s 11(1); Antigua and Barbuda, Copyright Act 2003, s 2(1), 59(1); Belize, Copyright Act (Ch. 252, Revised Edition 2000), ss 3(1), 64(1); Ireland, Copyright and Related Rights Act 2000 (28 of 2000), ss2(1), 57(1).

<sup>99</sup> TERA art 5(2)(b) drawing on eg., SCCR/33/6 (n 87); Berne Convention art 10(1); WIPO, Chair’s Informal Chart on Libraries and Archives, SCCR/33/Chart on Libraries and Archives (24 November 2016); SCCR/26/4 Prov (n 98) proposal from the African Group; SCCR/26/4 Prov (n 98) Proposal from Brazil; WPPT preamble; SCCR/35/5 Rev (n 98) ; Beijing Treaty on Audiovisual Performances (2012) preamble.

<sup>100</sup> TERA art 5(2)(c) drawing on eg., SCCR/26/4 Prov (n 98) proposal from the African Group; SCCR/33/6 (n 87); SCCR/33/Chart on Libraries and Archives (n 99); SCCR/35/5 Rev (n 98); MVT art 6, Preamble.

<sup>101</sup> TERA art 5(2)(d) drawing on eg., SCCR/33/6 (n 87); SCCR/26/4 Prov (n 98) proposal from Brazil and African Group; Berne Convention, art 10(1); SCCR/33/Chart on Libraries and Archives (n 99).

<sup>102</sup> ‘TERA: Section-by-Section Analysis’ (*Infojustice*, 2018) [5] <<http://infojustice.org/wp-content/uploads/2018/11/TERA-Section-by-Section-Analysis.pdf>> accessed 20 March 2021.

to the extent that they can be separated, learning (including self-study and other pedagogical methods). Taking into account international human rights law, subsequent domestic practice and development and pedagogical literature, art 10(2) arguably includes research and scholarship, whether affiliated with an educational institution or not, as well as materials relevant to lifelong learning and public education programmes.

It is critical to note that the broad interpretation of the purposes under art 10(2) advanced above does not defeat the object and purpose of the Berne Convention. Art 10(3) remains applicable to the purposes outlined above, thereby maintaining the authors' moral right of attribution. Further, breadth of purpose does not mean that *all* educational activities irrespective of their nature and extent are within the scope of art 10(2). Both the proportionality inquiry necessitated by 'extent justified by the purpose' discussed in section 3.3.1 *and* 'fair practice' analysed in section 3.3.3 must also be fulfilled for a use to fall within art 10(2).

### 3.3.3. '[F]air practice'

The third condition in art 10(2) is 'fair practice'.<sup>103</sup> The Berne Convention does not directly define 'fair practice'. Given its open-textured nature, commentators have interpreted the normative content of 'fair practice' in various ways. I first advance the better understanding of 'fair practice', and then I respond to the claim that 'fair practice' is none other than the three-step test in art 9(2) of the Berne Convention by another name.

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<sup>103</sup> See also, Berne Convention art 10(1).

### 3.3.3.1. Fairness factors

Fairness is widely considered to be a general principle of international law.<sup>104</sup> Although general principles can constitute independent sources of international law,<sup>105</sup> here I draw on ‘fairness’ to interpret the scope and content of art 10(2).<sup>106</sup> Fairness has been interpreted to contain elements of distributive justice,<sup>107</sup> procedural legitimacy,<sup>108</sup> equity,<sup>109</sup> and equality, amongst others.<sup>110</sup> In the given context, the critical question is whether the particular use (to the extent justified by its educational purpose) is compatible with fair practice.

The WIPO Guide to the Berne Convention defines ‘fair practice’ as requiring ‘an objective appreciation’.<sup>111</sup> In the context of the Berne Convention, the literature has identified notions of harm accruing to the author (both moral and economic) and industry

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<sup>104</sup> Eg., MC Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1990) 11 MJIL 768, 772; Marija Đorđeska, *General Principles of Law Recognized by Civilized Nations (1922-2018): The Evolution of the Third Source of International Law Through the Jurisprudence of the Permanent Court of International Justice and the International Court of Justice* (Brill-Nijhoff 2020) 76; Zeray Yihdego and Alistair Rieu-Clarke, ‘An Exploration of Fairness in International Law through the Blue Nile and GERD’ (2016) 41 Water International 528.

<sup>105</sup> ICJ Statute art 38(1)(c).

<sup>106</sup> See, on using general principles to interpret treaties, Catherine Redgwell, ‘General Principles of International Law’, *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 11.

<sup>107</sup> Eg., TM Franck, *Fairness in International Law and Institutions* (OUP 1998) 8–9. Franck draws on John Rawls, *Justice as Fairness: A Restatement* (HUP 2001). For convergence of Rawls’ approach with the capabilities approach, see Ingrid Robeyns, ‘Justice as Fairness and the Capability Approach’ in Kaushik Basu and Ravi Kanbur (eds), *Arguments for a Better World: Essays in Honor of Amartya Sen* (OUP 2008).

<sup>108</sup> Eg., TM Franck (n 107) 7–8.

<sup>109</sup> Eg., *Diversion of Water from the River Meuse (Netherlands v Belgium)* [1937] PCIJ ser A/B no 70 (Hudson J) [77]. See also, SK Chattopadhyay, ‘Equity in International Law: Its Growth and Development’ (1975) 5 GJICL 381; Rumiana Yotova, ‘Challenges in the Identification of the “General Principles of Law Recognized by Civilized Nations”: The Approach of the International Court’ (2017) 3 CJCCL 269.

<sup>110</sup> See, for an application of substantive equality as fairness, Margaret Chon, ‘Intellectual Property from below: Copyright and Capability for Education’ (2006) 40 UCCLR 803.

<sup>111</sup> WIPO (n 32) para 10.4.

standards and practices as relevant.<sup>112</sup> Further factors include an overarching principle of balance to ensure that the public interest in education is balanced against authors' interests<sup>113</sup> (both moral and economic); technological developments; the institution within which the use is exercised, if any; the nature, extent and purpose of the use in relation to the source,<sup>114</sup> and whether the 'new' work competes with the 'old work' in the market.<sup>115</sup> The four-factor 'fair use' test in the American context,<sup>116</sup> and subsequently widely exported around the world,<sup>117</sup> offers additional factors such as the character of the use, and whether it is transformative in determining whether or not it is fair.<sup>118</sup> Further, the *travaux préparatoires* clarify that the use of whole works<sup>119</sup> and the fact that people other than the intended user may access the work due to a use falling within art 10(2) do not render these uses presumptively unfair.<sup>120</sup>

Given the pluralistic nature of international law,<sup>121</sup> states parties have a degree of latitude in determining the meaning of 'fair practice' in accordance with their domestic

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<sup>112</sup> Tanya Aplin and Lionel Bently, *GMFU* (n 31) 141.

<sup>113</sup> Records (n 40) [764] ('Mr. Wallace (United Kingdom) said that the words "provided they are compatible with fair practice" provided the real safeguard for authors').

<sup>114</sup> SCCR 19/8 (n 40) [17]. See also, Raquel Xalabarder, 'Toward an International Common Core of Exceptions and Limitations?' in Tatiana-Helenē Synodinou (ed), *Pluralism or universalism in international copyright law* (Wolters-Kluwer 2019).

<sup>115</sup> WIPO (n 32) para 10.04.

<sup>116</sup> 17 USC s 107 (US Copyright Act).

<sup>117</sup> See Niva Elkin-Koren and Neil Weinstock Netanel, 'Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition' [2020] PIJIP/TLS Research Paper Series no 50; Peter Yu, 'Customizing Fair Use Transplants' (2018) 7 *Laws* 9.

<sup>118</sup> See *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994). See also, PN Leval, 'Toward a Fair Use Standard' (1990) 103 *HLR* 1105.

<sup>119</sup> Records (n 40) [1080.1] (Britain); S Ricketson and JC Ginsburg (n 27) para 13.45.

<sup>120</sup> *ibid.* See also, Records (n 40) [1099].

<sup>121</sup> See, in the context of intellectual property, Margaret Chon, 'A Rough Guide to Global Intellectual Property Pluralism' [2009] Seattle University School of Law Research Paper No. 09-01.

legal systems and socio-economic conditions.<sup>122</sup> For instance, what may be ‘fair’ in Germany where higher education is virtually free, and institutions and the state bear the cost of education, may not be ‘fair’ in South Africa, where higher education is not free, and the majority of the population cannot afford it. An understanding of states’ education budgets and general resource availability would assist with this inquiry. Further, an empirical understanding of the purchasing power of students and others engaged in educational pursuits is necessary to determine their capacity to purchase educational materials under copyright. Some domestic copyright laws have thus included explicit ‘reasonable availability’ criteria to account for affordability concerns.<sup>123</sup> As I discuss in Chapter 6, engaging in a means-test to understand the extent of meaningful availability of these materials through the market is an important exercise in determining the fairness of the use from the perspective of distribution.

Other relevant rules of international law that are centrally concerned with equality, equity and distributive justice are also vital to interpreting ‘fairness’. As discussed in Chapter 2, equality and non-discrimination in accessing educational materials is an immediately realisable obligation upon states parties. Where the use concerns access to educational materials, the state’s obligations in respect of access to educational materials under international human rights law is a relevant factor in determining whether a practice is fair, in particular where the state’s resources are constrained, and this is the primary mechanism by which they discharge their obligations to realise the right.<sup>124</sup> ‘Fair practice’

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<sup>122</sup> S Ricketson and JC Ginsburg (n 27) para 13.41.

<sup>123</sup> Singapore Copyright Act 1987, s 35(2); Australian Copyright Act 1968, s 40(2); Indian Copyright Act 1957, s 52(1)(o); Canadian Copyright Act 1985, art 29.4.

<sup>124</sup> See on the point of reducing stringent copyright in the global South, Martin Skladany, *Copyright’s Arc* (CUP 2020).

thus provides a site for states parties' human rights obligations and other public interest considerations to enter the inquiry.

Finally, given that art 10(2) requires states parties availing of it to legislate, individual states parties' relationship with international law is an important factor. Domestic constitutional constraints and pressing social realities influence the determination of fair practice. I address this in Chapters 5 and 6.

### **3.3.3.2. *'[F]air practice' as distinct from the three-step test***

I respond to the claim in the literature that 'fair practice' is none other than the 'three-step test' in art 9(2) of the Berne Convention by another name. The effect of this claim is to subject all exceptions to the same criteria irrespective of their purpose or subject matter.<sup>125</sup> In other words, it considers art 10(2) as an instance of a 'certain special case' outlined by art 9(2). I argue that this claim is neither supported by the history<sup>126</sup> nor the scheme of the Berne Convention.

Art 9(2) provides:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The requirements of 'certain special cases', 'does not conflict with a normal exploitation of the work' and 'does not unreasonably prejudice the legitimate interests of the author' constitute the three steps of the three-step test. I discuss this in section 3.6.1.

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<sup>125</sup> Eg., S Ricketson and JC Ginsburg (n 27) para 13.45; Silke von Lewinski (n 35) para 5.165.

<sup>126</sup> Eg., Tanya Aplin and Lionel Bently, *GMFU* (n 31) 150–151.

The structure and text of the Berne Convention indicate that the ‘fair practice’ test applies only to two purposes under ‘certain free uses of works’:<sup>127</sup> quotations and education.<sup>128</sup> As discussed, art 10 covers all types of uses and is not limited to reproduction.<sup>129</sup> Art 9(2), on the other hand, limits its application to ‘the right of reproduction’ as evinced by its title. The three-step test in art 9(2) provides specific criteria in contrast with the open-textured ‘fair practice’. The three-step test requires assessing the impact of the reproduction based on ‘normal exploitation of the work’, and limits the justification analysis to whether or not the ‘legitimate interests of the author’ have been ‘unreasonably prejudiced’. They are thus distinct standards applicable to distinct types of uses. In the commentary on art 10(1), the WIPO Guide to the Berne Convention does not apply the three-step test. Instead, as discussed in section 3.3.3.1, it outlines indicative questions for ‘fair practice’.<sup>130</sup>

Notably, the drafting history of the Berne Convention indicates that art 10(2) was contemplated from the first iteration in 1886.<sup>131</sup> Art 9(2), on the other hand, was introduced at the late stage of the Stockholm Revision in 1967. A close look at the records indicates that art 9(2) was *not* introduced to modify the terms of art 10 or any other existing exception but to capture *other* exceptions to the right of reproduction.<sup>132</sup> Specific exceptions, including those in art 10, are thus best interpreted as containing their own particular criteria

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<sup>127</sup> Berne Convention art 10.

<sup>128</sup> Berne Convention arts 10(1) and 10(2).

<sup>129</sup> SCCR/9/7 (n 26) [12].

<sup>130</sup> WIPO (n 32) para 10.4, 10.9.

<sup>131</sup> Berne Convention (Berne Act 1886), art 8. See Sara Bannerman, *International Copyright and Access to Knowledge* (CUP 2016) 53–79.

<sup>132</sup> Records (n 40) 723–754 [1058.1]–[1076] (the uses that the Committee was concerned with were uses outside of art 10(2) – namely, personal use and uses for administrative or judicial purposes; the normal import of the work prevented by currency reasons amongst others.)

– in this case, ‘fair practice’ and ‘extent justified by the purpose’ – distinct from art 9(2).<sup>133</sup>

Thus, the determination of ‘fair practice’ as discussed in section 3.3.3.1 may, in some cases, overlap with art 9(2) but is *not* limited to the particular criteria in art 9(2).<sup>134</sup>

### 3.4. Other provisions relevant to educational materials in the Berne Convention

Access to educational materials is regulated primarily under art 10(2) of the Berne Convention. In this section, I discuss the quotations exception under art 10(1) and the three-step test regarding reproduction under art 9(2) as the operation of these provisions is related to accessing educational materials.<sup>135</sup>

Under art 10(1), unlike the other exceptions,<sup>136</sup> states parties are obliged to provide for a quotations exception in their domestic laws.<sup>137</sup> The provision does not limit its application to a specific subject area (unlike art 10(2)). Quotations for *all* purposes are contemplated. The textual limits are similar to those in art 10(2). Thus, at the very least, member states have an obligation to ensure that *quotations* for educational purposes are guaranteed even if member states do not elect to enact exceptions under art 10(2).

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<sup>133</sup> This is supported by SCCR 9/7 (n 26) [21]; S Ricketson and JC Ginsburg (n 27) para 13.10; Silke von Lewinski (n 35) para 5.174. (‘art 9(2) will not apply in addition to the specific limitations where their conditions are fulfilled.’) See also, Records (n 40) [1071] (Monaco).

<sup>134</sup> See, arriving at the same conclusion regarding fair practice in art 10(1), Tanya Aplin and Lionel Bently, *GMFU* (n 31) 150–151.

<sup>135</sup> I do not discuss minor reservations as it is only tangentially relevant to educational purposes and in any event has been argued to be subsumed under the three-step test. In this regard, see Raquel Xalabarder (n 114) 413. See also, WTO Analytical Index, ‘TRIPS Agreement art 13’ (*WTO*, December 2020) 2.

<sup>136</sup> See, for an analysis of art 10(1)’s obligatory character and what it entails, Tanya Aplin and Lionel Bently, *GMFU* (n 31).

<sup>137</sup> S Ricketson and JC Ginsburg (n 27) para 13.41.

Art 9(2), discussed in section 3.3.3.2, applies specifically to reproduction. Where a particular reproduction for educational purposes under domestic law does not fall within arts 10(1) or (2), it can still potentially be considered a valid exception under the Berne Convention if the state party satisfies the three-step test in art 9(2). If it can be shown that the legislated reproduction falls within a ‘certain special case’, ‘does not conflict with a normal exploitation of the work’ and ‘does not unreasonably prejudice the legitimate interests of the author’, the exception is valid. I discuss the interpretation of this three-step test in light of TRIPS in section 3.6.1.1.

### **3.5. A very short note on the Berne Appendix**

Art 10(2) enables access to educational materials as a ‘free use’ subject to the fulfilment of its threshold test. In this section, I briefly explain the futility of the Berne Appendix. The Stockholm Revision in 1967 also resulted in the Stockholm Protocol to the Berne Convention.<sup>138</sup> The Protocol, which never came into force, was revised to later become the Berne Appendix.<sup>139</sup> The Appendix was purportedly<sup>140</sup> aimed at providing developing countries with the option of creating a system of non-exclusive compulsory licences for translation,<sup>141</sup> as well as reproduction in ‘systematic instructional activities’.<sup>142</sup> However, the

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<sup>138</sup> Stockholm Protocol regarding Developing Countries, 828 UNTS 223, 281. See, for reasons for its failure, RL Okediji, ‘Sustainable Access to Copyrighted Digital Information Works in Developing Countries’ in KE Maskus and JH Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (1st edn, CUP 2005) 156–158.

<sup>139</sup> SI Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Brill-Nijhoff 2012) 90–92.

<sup>140</sup> *ibid* 96. (‘The logical explanation is that there was no intention on the part of the developed countries to come up with a document that could be implemented.’)

<sup>141</sup> Berne Appendix art II.

<sup>142</sup> Berne Appendix art III.

Appendix is widely considered to be ‘unrealistic’,<sup>143</sup> with ‘expensive, time consuming and frustrating administrative formalities’,<sup>144</sup> a ‘dead letter’,<sup>145</sup> an ‘abject failure’<sup>146</sup> and to entail ‘no real improvement in access to copyright materials’.<sup>147</sup> Moreover, the Appendix’s system of compulsory licencing is incongruent with the ‘free uses’ provided for in art 10(2). Given that it seeks to regulate the same subject matter, it is unclear why countries would opt for the cumbersome process outlined in the Appendix, where they can simply legislate pursuant to art 10(2).<sup>148</sup> For these reasons, I do not discuss the Appendix in detail. I turn now to the other relevant copyright and trade treaties.

### **3.6. The TRIPS Agreement and future iterations of the three-step test**

As mentioned in the Introduction to this Chapter, TRIPS has near-universal application due to its relationship with WTO membership. It is also the primary instrument for the enforcement of intellectual property rights through the WTO DSS.<sup>149</sup> I address the institutional features of this system in Chapter 4. In this section, I analyse the operation of TRIPS and its impact on the Berne Convention. Neither TRIPS nor the WCT has specific

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<sup>143</sup> Alberto Cerda Silva, ‘Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright’ [2012] PIJIP/TLS Research Paper Series no.08.

<sup>144</sup> IA Olian Jr, ‘International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris’ (1974) 7 CILJ 81, 101.

<sup>145</sup> Victor Nabhan, WIPO Study On Limitations And Exceptions For Copyright For Educational Purposes In The Arab Countries, SCCR 19/6, 7 October 2009 [56-57].

<sup>146</sup> Alan Story, ‘Study on Intellectual Property Rights, the Internet, and Copyright’, Study Paper 5, CIPR (London, 2002) [6].

<sup>147</sup> Peter Drahos, ‘Developing Countries and International IP Standard-Setting’, Study Paper 8, CIPR (London, 2002) [10].

<sup>148</sup> SI Štrba (n 139) 96 ([t]he fact that developing countries have not invoked the Appendix acts to assure copyright owners that it is an instrument that cannot be implemented’).

<sup>149</sup> WTO DSU art 1.

provisions regulating access to materials under copyright for educational purposes. I thus analyse the general exception provisions as they have residual application in relation to art 9(2) of the Berne Convention. I first set out the three-step test in the WCT and TRIPS to explain how it transforms the nature of art 9(2) of the Berne Convention in sections 3.6.1.1 and 3.6.1.2. I discuss the MVT's use of the three-step test as heralding the explicit recognition of human rights bearers as a 'certain special case' in international copyright law in section 3.6.1.3. I conclude by advancing an interpretation of art 10(2) of the Berne Convention that draws on the international human rights obligations of states parties to both sets of treaties and the objects and purposes of TRIPS to counterbalance users' shrinking space under the Agreement in section 3.6.1.4.

### 3.6.1. The three-step test

To recap, the three-step test in art 9(2) of the Berne Convention provides

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

I set out the three-step tests in the WCT and TRIPS below and detail their relationship to the Berne Convention's three-step test. I also discuss their application.<sup>150</sup>

#### ***3.6.1.1. Three-step test in the WCT***

The WCT was initially drafted as a possible protocol to the Berne Convention to respond to the rise of information and communication technologies.<sup>151</sup> It was later adopted as an

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<sup>150</sup> I analyse the three-step test to the extent relevant to understanding its impact on access to educational materials.

<sup>151</sup> Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP* (2nd edn, OUP 2015) para 2.0.1.

independent treaty<sup>152</sup> but as I go on to demonstrate, retains several references to the Berne Convention. The WCT highlights ‘the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention’.<sup>153</sup> States parties inserted ‘agreed statements’ clarifying that all existing exceptions under the Berne Convention would remain applicable and extend to the digital environment and that their scope would not be diminished or expanded.<sup>154</sup> The WCT version of the three-step test extends its application from reproduction to *all* uses.<sup>155</sup> Further, the WCT enables states parties to enact new exceptions for the digital environment, but they must be ‘confined’ to the three-step test.<sup>156</sup>

### **3.6.1.2. *Three-step test in the TRIPS Agreement***

TRIPS was concluded specifically to ‘reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights’.<sup>157</sup> Its preamble recognises ‘maximum flexibility’ for the least developed countries in implementing its treaty obligations domestically.<sup>158</sup> Simultaneously, it allows all member states to the WTO to enact more stringent intellectual property laws but does not oblige them to do so.<sup>159</sup> The Agreement makes explicit member states’

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<sup>152</sup> WIPO Copyright Treaty (adopted on 20 December 1996, entered into force 6 March 2002) 2186 UNTS 121.

<sup>153</sup> WCT preamble.

<sup>154</sup> WCT agreed statements on art 1(4), 10(2).

<sup>155</sup> WCT arts 10(1), (2).

<sup>156</sup> WCT arts 10(1), (2).

<sup>157</sup> TRIPS preamble.

<sup>158</sup> TRIPS preamble.

<sup>159</sup> TRIPS art 1(1). But see, for TRIPS Plus measures regarding patents, Cynthia Ho, *Access to Medicine in the Global Economy: International Agreements on Patents and Related Rights* (OUP 2011) 224–251.

sovereignty to determine their international obligations in their particular domestic systems.<sup>160</sup> The discretion must be read consistently with the objects and purposes of TRIPS that the ‘protection and enforcement of intellectual property rights’ should contribute to ‘to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations’.<sup>161</sup> Additionally, in fulfilling their obligations, member states ‘may adopt measures necessary to [...] promote the public interest in sectors of vital importance to their socio-economic and technological development’ as long as these measures are consistent with TRIPS.<sup>162</sup> Further, member states may take appropriate measures to ensure that intellectual property right holders do not abuse their monopoly, as long as these measures are consistent with the Agreement.<sup>163</sup> I return to the importance of these objects.

The three-step test<sup>164</sup> in TRIPS reads as follows:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.<sup>165</sup>

There are several modifications from the three-step test in the Berne Convention.<sup>166</sup> Like the WCT, the TRIPS three-step test extends its application from ‘reproduction’ to all ‘exclusive rights’. It also substitutes ‘permit’ with ‘shall confine’, which arguably places an

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<sup>160</sup> TRIPS art 1(1).

<sup>161</sup> TRIPS art 7.

<sup>162</sup> TRIPS art 8(1).

<sup>163</sup> TRIPS art 8(2).

<sup>164</sup> I analyse the three-step test only in relation to copyright, even though TRIPS includes the same test for patents, trademarks and industrial design in arts 17, 26(2), 30.

<sup>165</sup> TRIPS art 13.

<sup>166</sup> See, for a comparative study of the versions of the three-step test, AF Christie and R Wright, ‘A Comparative Analysis of the Three-Step Tests in International Treaties’ (2014) 45 IIC 409.

obligatory ceiling on the extent of exceptions and limitations. Departing from the WCT and Berne, this version replaces ‘author’ with ‘right holder’ in the third step. Shifting the emphasis from the impact of the exception on authors’ moral and economic interests (in Berne and WCT) to the impact on the right holders’ economic interests includes not just authors but licensees, publishers, intermediaries and corporations.<sup>167</sup> In other words, if the economic interests of publishers are ‘unreasonably prejudiced’, for instance, the third step would not be fulfilled. The standard of review (whether requiring actual or presumptive harm) is a matter for domestic legislation.<sup>168</sup>

The TRIPS three-step test in respect of copyright<sup>169</sup> has been interpreted by a WTO Panel.<sup>170</sup> Although the Panel did not interpret art 10(2) of the Berne Convention,<sup>171</sup> its Report is relevant to understanding the operation of the TRIPS three-step test. The Panel interpreted the test as cumulative and adopted a narrow approach to interpretation.<sup>172</sup> It considered every step in turn.<sup>173</sup> On the first step, the Panel interpreted

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<sup>167</sup> Martin Senftleben, *Copyright, Limitations, and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer 2004) 225. (‘The term ‘right holder’ underlines the repudiation of the concept of moral rights. Art 13 TRIPS is rendered incapable of serving as a means of lending weight to non-economic interests’.)

<sup>168</sup> *ibid* 212.

<sup>169</sup> There are two other panel reports interpreting the respective three-step tests regarding patents (WTO, *Canada–Patent Protection of Pharmaceutical Products* WT/DS114/R (17 March 2000)) and geographical indications (WTO, *EC–Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* WT/DS174/R (15 March 2005)).

<sup>170</sup> I discuss the WTO DSS in Chapter 4, but for the purposes of this Chapter it suffices the DSS consists of a quasi-judicial structure made up of ad-hoc panels and an Appellate Body. Reports adopted by the DSS, as with other international tribunals, are not binding precedent on states other than those involved – but carry persuasive value within the DSS and normative value in terms of influencing the domestic construction of TRIPS obligations. See, on the point of hegemonic norms and adjudication at the WTO, Jason Beckett, ‘Fragmentation, Openness and Hegemony: Adjudication and the WTO’ in Meredith Kolsky Lewis and Susy Frankel (eds), *International Economic Law and National Autonomy* (CUP 2010).

<sup>171</sup> The use in question did not concern educational purposes.

<sup>172</sup> WTO, *EC–Section 110(5) of the US Copyright Act* WT/DS160/R (15 June 2000) [6.97].

<sup>173</sup> *ibid* [6.108]–[6.229].

‘certain special case’ to mean that the exception’s scope and reach should be narrowly targeted.<sup>174</sup> On the second, the Panel interpreted ‘conflict with normal exploitation of the work’, to mean conflict with the exercise of any of the exclusive rights<sup>175</sup> held by the right holder from which they could derive economic value<sup>176</sup> – whether future or present.<sup>177</sup> Economic value could be determined using quantitative revenue derived from the use and any use that would have the effect of depriving the right holder of commercial gains.<sup>178</sup> The third step (‘unreasonably prejudice the legitimate interests of the right holder’) was interpreted thus: first, the interests of the right holders must be defined; second, those interests must be determined to be legitimate; third, the definition of prejudice must be considered; and finally, the reasonableness test must be fulfilled to ensure that such prejudice is not unreasonable.<sup>179</sup> In determining the right holder’s legitimate interests, the Panel focused on the economic interests of right holders as they determined them to be legitimate both in terms of formal legal conferment of exclusive rights and justified by normative policy considerations.<sup>180</sup> Further, the Panel employed an economic analysis to determine what prejudice meant – in that case, an unreasonable loss of income to the right holder constituted prejudice.<sup>181</sup>

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<sup>174</sup> *ibid* [6.108].

<sup>175</sup> *ibid* [6.173]. The Panel considered the impact of each right separately.

<sup>176</sup> *ibid* [6.165].

<sup>177</sup> *ibid* [6.180].

<sup>178</sup> *ibid* [6.183].

<sup>179</sup> *ibid* [6.222].

<sup>180</sup> *ibid* [6.227]. The Panel held that economic interests are not the only interests that can be considered as legitimate.

<sup>181</sup> *ibid* [6.229].

The Panel's interpretation of the TRIPS version of the three-step test has been widely critiqued on several bases,<sup>182</sup> including that it did not take into account the objects and purposes of TRIPS<sup>183</sup> and that it did not engage in a full proportionality analysis. The second and third steps of the three-step test require states to balance the competing rights of right holders and users. The Panel instead defaulted to prioritising the right holder's economic interests.<sup>184</sup> Moreover, commentators have advanced interpretations of the three-step test that do not centre on purely economic considerations.<sup>185</sup> Others have interrogated the assumption that the test be interpreted sequentially, and instead proposed an inverted sequence to enable a balanced approach to the three-step test.<sup>186</sup> An expert group released a joint statement on the interpretation of the three-step test, proposing a 'comprehensive overall assessment' instead of a sequential approach and highlighted the importance of the public interest in assessing 'legitimate interests' of third parties.<sup>187</sup> Before I analyse the impact of the three-step test in TRIPS upon art 10(2) of the Berne Convention in section 3.6.1.4, I discuss a significant interpretation of the test in the MVT, which draws on the human rights of persons living with print disabilities.

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<sup>182</sup> Eg., Annette Kur, 'Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations Under the Three-Step Test?' (2009) 8 RJGLB 287; DJ Brennan, 'The Three-Step Test Frenzy: Why the TRIPS Panel Decision Might Be Considered Per Incuriam' (2002) 2 IPQ 212.

<sup>183</sup> Eg., Christophe Geiger, Daniel Gervais, and Martin Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Law' (2014) 29 AUILR 581, 597.

<sup>184</sup> Eg., Martin Senftleben (n 167) 210–231; Annette Kur (n 182) 305–326.

<sup>185</sup> Eg., S Ricketson and JC Ginsburg (n 27) 771–772; JC Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions' (2001) 187 RIDA 3.

<sup>186</sup> Eg., Daniel Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (2005) 9 MIPLR 1; Christophe Geiger, 'Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions' (2009) 40 IIC 627.

<sup>187</sup> Christophe Geiger and others, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39 IIC 707.

### **3.6.1.3.     *The three-step test and human rights in the MVT***

The MVT was concluded with the purpose of rectifying the ‘book famine’ experienced by persons living with print and visual disabilities due to stringent copyright laws preventing accessible format shifting of materials for approximately 285 million people around the world.<sup>188</sup> Before the Treaty, despite the residual exceptions provision in the major copyright treaties analysed above, only 57 states had enacted exceptions to facilitate accessible copies for persons living with visual and print disabilities.<sup>189</sup> The Treaty obliges states parties to include provisions in their domestic copyright laws to facilitate the creation and sharing of accessible formats of books and other materials.<sup>190</sup>

The preamble frames the MVT as an instance of the Berne Convention’s three-step test.<sup>191</sup> This means that the uses specified in the MVT presumptively fulfil the three-step test. States parties are bound to act consistently with the three-step tests in the WCT and TRIPS when fulfilling its MVT obligations.<sup>192</sup> Importantly, the Treaty acknowledges other obligations states parties have undertaken under *all* other treaties and contains a non-derogation provision in this regard.<sup>193</sup> Reading this provision with the first recital in the preamble,<sup>194</sup> the Treaty can be interpreted to consider states parties’ obligations under the

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<sup>188</sup> ‘Global Initiative for the Elimination of Avoidable Blindness: Action Plan 2006-2011’ (WHO, 2007) <<https://apps.who.int/iris/handle/10665/43754>> accessed 3 May 2019.

<sup>189</sup> LR Helfer and others, ‘Guiding Principles for the Marrakesh Treaty’, *The World Blind Union Guide to the Marrakesh Treaty* (OUP 2017) 9.

<sup>190</sup> MVT arts 4,5,6.

<sup>191</sup> See section 3.4.

<sup>192</sup> MVT art 11.

<sup>193</sup> MVT art 1.

<sup>194</sup> MVT preamble:

*Recalling* the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration

UNCRPD.<sup>195</sup> The UNCRPD mandates states parties to take steps to ensure that intellectual property does not present a barrier to realising the rights of persons living with disabilities to participate in cultural life.<sup>196</sup> In addition, the goals referred to in the preamble of the MVT, of the full development of ‘freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others, including through all forms of communication of their choice, their enjoyment of the right to education, and the opportunity to conduct research’ of persons living with disabilities, are guaranteed in international human rights law.<sup>197</sup> This is substantially different from TRIPS’ non-derogation provision that relates only to obligations under the pre-existing intellectual property treaties. The MVT also enables further exceptions and limitations based on particular socio-economic needs of states parties.<sup>198</sup>

The recognition of states parties’ other obligations carries over into the definition of a ‘certain special case’ in the test’s first step. In defining ‘beneficiary persons’, the following factors are apparent: the particular disadvantage experienced by persons living with visual and print disabilities vis-à-vis persons living without disabilities in accessing materials under copyright; the failure of the market in securing access, through the recognition of the ‘book famine’; acknowledgement of the exacerbated disadvantage for persons living with disabilities in ‘least developed’ and ‘developing countries’;<sup>199</sup> and human rights aims of education, freedom of expression, access to information, participation in

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of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.

<sup>195</sup> See Chapter 2.

<sup>196</sup> UNCRPD art 30(3).

<sup>197</sup> In the ICESCR and ICCPR. See Chapter 2.

<sup>198</sup> MVT art 12.

<sup>199</sup> MVT preamble.

cultural life as public policy reasons for the exception. This has obvious implications for future interpretations of the three-step test.

However, for the argument in this Thesis regarding educational materials, the MVT's *logic* rather than its particular application of the three-step test is significant. In the final section of this Chapter, I argue that the MVT offers a helpful starting point to recognise states' overlapping international human rights obligations in legislating on copyright.<sup>200</sup> I explain how the logic of the MVT can be applied to *existing* obligations incumbent upon states parties without necessarily entering into a new instrument. I discuss the relationship between art 10(2) and the three-step test in TRIPS and WCT, offering an antidote to the dominance of the three-step test.

#### ***3.6.1.4. The three-step test in TRIPS and WCT: relationship with art 10(2) of the Berne Convention***

The three-step test has dominated the literature on exceptions and limitations.<sup>201</sup> Some commentators take the view that 'TRIPS' three-step test applies to all exceptions – including the specific exceptions of the Berne Convention.<sup>202</sup> Commonly advanced reasons include: the language of the three-step test indicates its application to *all* exceptions as it does not explicitly exempt specific exceptions in the Berne Convention; 'TRIPS' non-derogation provision only applies to *obligations* under the Berne Convention, and specific

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<sup>200</sup> See also, MK Land, 'The Marrakesh Treaty as "Bottom Up" Lawmaking: Supporting Local Human Rights Action on IP Policies' (2018) 8 UCILR 513.

<sup>201</sup> See, recognising this dominance, Tanya Aplin and Lionel Bently, 'Displacing the Dominance of the Three-Step Test: The Role of Global Mandatory Fair Use' in Shyamkrishna Balganesh, Ng-Loy Wee Loon, and Haochen Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (1st edn, CUP 2021).

<sup>202</sup> See, applying the three-step test to educational exceptions in Brazil, EB Rodrigues Jr, *The General Exception Clauses of the TRIPS Agreement: Promoting Sustainable Development* (CUP 2012) 295–325. See also, GB Dinwoodie, 'The Development and Incorporation of International Norms in the Formation of Copyright Law' in PS Berman (ed), *The Globalization of International Law* (1st edn, Routledge 2017); JH Reichman, 'Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement' (1995) 29 TIL 345. See also, *EC–Section 110(5) of the US Copyright Act* (n 172) [6.63].

exceptions (other than art 10(1)) are permissions rather than obligations; art 10(2) is a subset of art 9(2), and the three-step test in TRIPS further qualifies art 9(2), so the three-step test *de facto* governs exceptions pursuant to art 10(2). I argue that the better view recognises the significant role played by art 10(2) in enabling states to fulfil their international obligations as a whole, and does not subject it to the three-step test.

I have rebutted the third of those reasons in section 3.3.3.2 above with reference to the structure and history of the Berne Convention. In this section, I examine the first two reasons together and advance a plausible response. Both the WCT and TRIPS explicitly incorporate arts 1-21 of the Berne Convention.<sup>203</sup> States parties to TRIPS and the WCT remain bound by these provisions of the Berne Convention.<sup>204</sup> In respect of applying the three-step test, the Agreed Statement<sup>205</sup> to the relevant provision of the WCT states that the WCT ‘neither reduces nor extends the scope of applicability’ of existing Berne Convention exceptions.<sup>206</sup> This has been interpreted as refraining from imposing the three-step test upon educational exceptions enacted under art 10(2) of the Berne Convention as that would constitute a reduction in its scope.<sup>207</sup>

Regarding TRIPS, it is true that its non-derogation clause explicitly refers to obligations under the Berne Convention and other pre-existing intellectual property

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<sup>203</sup> TRIPS art 9(1) (Moral rights of authors under art 6bis are not incorporated, but member states of the Berne Union remain bound by art 6bis and the other unincorporated provisions of the Berne Convention); WCT, art 1(4).

<sup>204</sup> Silke von Lewinski (n 35) para 24.09.

<sup>205</sup> Agreed statements can be understood as inseparable context under VCLT art 31(2).

<sup>206</sup> See section 3.6.1.1.

<sup>207</sup> Tanya Aplin and Lionel Bently, ‘Displacing the Dominance of the Three-Step Test’ (n 201) 14.. See also, Carlos Maria Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary* (2nd edn, OUP 2020) 43–44.

treaties.<sup>208</sup> This provision has been interpreted as locking in states parties' existing obligations under the Berne Convention even though TRIPS may not explicitly incorporate them.<sup>209</sup> However, I argue that this provision must be read in light of the above provision incorporating the Berne Convention into TRIPS.<sup>210</sup> It reads as follows: '[m]embers shall comply with Arts 1 through 21 of the Berne Convention (1971) and the Appendix thereto'. Member states are thus obliged to 'comply' with arts 1-21 of the Berne Convention, *including art 10(2)*. They must not derogate from their obligations under the Berne Convention in fulfilling obligations under TRIPS.<sup>211</sup> This reading is consistent with the objects and purposes of TRIPS set out earlier.<sup>212</sup> An interpretation that TRIPS' three-step test applies to all exceptions and limitations, including the permissive exceptions and limitations in the Berne Convention, would render art 9(1) of TRIPS redundant.<sup>213</sup> This is contrary to the principle of effectiveness in treaty interpretation. The WTO DSS, in interpreting the relationship between the 'covered agreements', has held that 'an interpreter

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<sup>208</sup> TRIPS art 2(2) reads as follows:

Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the [...] Berne Convention.

<sup>209</sup> Eg., the moral rights of authors under Berne Convention art 6bis are not extinguished just because TRIPS does not explicitly incorporate them. See on this point, WTO, *EC—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU—Decision by the Arbitrators*, WT/DS27/ARB/ECU (9 April 1999) [149].

<sup>210</sup> On the relationship between the copyright treaties see Silke von Lewinski (n 35) para 24.10.

<sup>211</sup> Carlos Maria Correa (n 207) 44–45.

<sup>212</sup> See for a recent application of the objects and purposes of TRIPS to interpreting the limits of exclusive rights in the context of trademarks, WTO, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS467/23 (30 August 2018) [7.2402]–[7.2406].

<sup>213</sup> See Chapter 4 for an alternative *lex specialis* argument that is often advanced as a tool for conflict avoidance.

is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'.<sup>214</sup>

In any event, I argue that the logic of the MVT offers important insights to strengthen the view that art 10(2) of the Berne Convention remains the applicable provision for educational exceptions. As discussed in section 3.6.1.3, the MVT takes states parties' other international obligations seriously. It explicitly recognises that international human rights law governs substantially the same subject matter. In imposing obligations upon states parties to enact domestic copyright exceptions for persons living with disabilities, I argue that far from creating *new* obligations, it recognises existing human rights obligations that *already* bind states to do just that.<sup>215</sup> In doing so, it clarifies the scope of these obligations in respect of copyright. I contend that a new international instrument is not the *only* way in which such recognition can take place. Rather, this recognition is *central* to the VCLT's rules of interpretation – in particular through the principle of systemic integration.<sup>216</sup> In practical terms, this would mean understanding the application of art 10(2) not merely through the lens of its permissive nature in the Berne Convention, but through its role in fulfilling states' international obligations in respect of the right to education. In other words, a systemic view of states parties' international obligations as espoused by the MVT would provide insights into the potentially *obligatory* character of permissive obligations such as art 10(2) of the Berne Convention.<sup>217</sup> This is particularly

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<sup>214</sup> WTO, *US—Standards for Reformulated and Conventional Gasoline, Appellate Body Report WT/DS2/AB/R* (20 May 1996) [23]. See also, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products, Appellate Body Report, WT/DS98/AB/R* (12 January 2000) [81]–[82].

<sup>215</sup> See Chapter 2 for the extent of states' obligations.

<sup>216</sup> See Introduction to the Thesis.

<sup>217</sup> This is reflected in the work of the UNCRPD, recommending that particular states parties ratify the MVT to fulfil their UNCRPD obligations in respect of access to culture and education. Eg., UNCRPD, Concluding Observations, *Bolivia*, 4 November 2016, CRPD/C/BOL/CO/1 [68(c)]; *Bosnia and Herzegovina*, 2 May 2017 CRPD/C/BIH/CO/1 [54]; *Myanmar*, CRPD/C/MMR/CO/1, 22 October 2019 [58]. It has also

important in global South countries that have significant resource constraints. In doing so, this provides an antidote to the blanket application of TRIPS' three-step test. Despite the expansive interpretation of the first step of the three-step test by the MVT, it is important to note that the textual criteria of the three-step test are more restrictive than the tests of 'fair practice' and 'extent justified by the purpose'. Interpreting the three-step test to apply to educational exceptions would constrain the fulfilment of the right to education. I discuss this further in Chapter 4.

### **3.7. Conclusion**

This Chapter focuses on states parties' obligations under the Berne Convention, the oldest multilateral copyright instrument. Art 10(2) of the Berne Convention is the applicable provision regulating the domestic enactment of provisions enabling access to educational materials in states parties' domestic copyright laws. The three conditions set out in art 10(2) include a preliminary proportionality inquiry, an inquiry into the purpose (which, I argue, is determined by the French version of the Berne Convention), and a fairness inquiry. This enables states to fulfil their international human rights obligations set out in Chapter 2.

Post-Berne, the three-step test has become salient and has been argued to impact the interpretation of art 10(2) of the Berne Convention. I analysed the operation of TRIPS and the WCT in relation to the Berne Convention and concluded that the better view considers art 10(2) as remaining applicable. This is supported by the text of the relevant provisions in the Berne Convention and TRIPS, as well as, the logic of the recent MVT. The MVT is an exercise in recognising and clarifying existing international human rights obligations in respect of persons living with print and visual disabilities. Applying this logic,

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recommended that domestic legislative processes be expedited in order for states parties to ratify the MVT. See UNCRPD, Concluding Observations, *Iraq*, 23 October 2019, CRPD/C/IRQ/CO/1 [55],[56].

at its highest, where art 10(2) forms one of the only routes to realise the right of access to educational materials and therefore fulfil state obligations, it takes on an obligatory character. In the next Chapter I explain how the normative environment affects this harmonious interpretation.

## 4. DILUTING ACCESS TO EDUCATIONAL MATERIALS:

### INTERNATIONAL INSTITUTIONAL DESIGN

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#### 4.1. Introduction

Chapters 2 and 3 analysed states parties' obligations in respect of access to educational materials under human rights and copyright and trade treaties. In Chapter 2, I located the right of access to educational materials as a part of the right to education in the core UN human rights treaties, and clarified the content of states parties' duty to respect, protect and fulfil the right. In Chapter 3, I located access to educational materials primarily within the Berne Convention's provisions detailing 'certain free uses', and residually within the exceptions to copyright under the three-step test. I analysed the extent to which states are obliged to create and regulate copyright. I paid particular attention to the overlap between the two sets of obligations, located in treaties with near universal application. I advanced a harmonious interpretation, at the end of Chapter 3, that the permission in art 10(2) of the Berne Convention, at its highest, takes on an obligatory character to the extent that it coincides with common states' parties obligations to realise the right of access to educational materials.

In this Chapter, I widen the lens to consider these obligations in their international institutional context. I argue that the institutional design of quasi-adjudicatory and monitoring bodies set up in respect of the relevant treaties significantly contributes to *diluting* access to educational materials, particularly for those states with resource constraints. I demonstrate the effect of particular institutional features<sup>1</sup> of the WTO DSS

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<sup>1</sup> The features I analyse are constitutive treaties, composition, jurisdiction and standing, applicable law and rules of interpretation, standards of review, remedies and enforcement, and monitoring function. This is not intended to be a comprehensive analysis.

and the CESCR on the interpretations advanced in Chapters 2 and 3. Both bodies have been set up by the key treaties analysed in Chapters 2 and 3 and form a part of the inseparable institutional context. From this comparative analysis, I conclude that the institutional design of these bodies makes it less likely for states to fully avail of the breadth of copyright law's educational exceptions despite the fact that these exceptions are likely key to fulfilling states' human rights obligations. This Chapter sets out a range of reasons – key among these are enforcement facilitated by the WTO DSS, and the non-binding status of recommendations and views of the CESCR.

At its heart, this Chapter analyses an instance of regime-interaction.<sup>2</sup> The existing literature on the interaction of international intellectual property law and human rights has focused on the divergent values of the international, transnational, and private institutions within which international instruments have been concluded and how these may be leveraged;<sup>3</sup> the actors involved in negotiating and drafting treaties and their interests;<sup>4</sup> the substantive norms at issue;<sup>5</sup> and the *travaux préparatoires* of these treaties as well as their

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<sup>2</sup> I understand 'regime' as 'sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases' drawn from a comprehensive analysis of international law and international relations scholarship in Margaret A Young, 'Introduction: The Productive Friction between Regimes' in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 11.

<sup>3</sup> Eg., LR Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 YJIL 1; SK Sell, 'Cat and Mouse: Industries', States' and NGOs' Forum - Shifting in the Battle Over Intellectual Property Enforcement' [2009] SSRN Electronic Journal <<http://www.ssrn.com/abstract=1466156>> accessed 6 January 2021.

<sup>4</sup> Eg., Carolyn Deere, *Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (OUP 2008); SK Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (CUP 2003); DW Drezner, 'The Power and Peril of International Regime Complexity' (2009) 7 PoP 65; Leonhard Dobusch and Sigrid Quack, 'Framing Standards, Mobilizing Users: Copyright versus Fair Use in Transnational Regulation' (2013) 20 RIPE 52; MK Land, 'The Marrakesh Treaty as "Bottom Up" Lawmaking: Supporting Local Human Rights Action on IP Policies' (2018) 8 UCILR 513; Duncan Matthews, *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements* (EE 2011); Alan Story, 'Burn Berne: Why the Leading International Copyright Convention Must Be Repealed' (2003) 40 HouLR 763.

<sup>5</sup> Eg., Margaret Chon, 'Intellectual Property from below: Copyright and Capability for Education' (2006) 40 UCDLR 803; SE Foster, 'The Conflict between the Human Right to Education and Copyright' in P Torremans (ed), *Intellectual property law and human rights* (3rd edn, Kluwer 2015); Aurora Plomer, 'The Human

histories.<sup>6</sup> While the burgeoning ‘intellectual property and human rights’ literature engages the separate development of both sets of norms and advances a range of proposals for a more ‘balanced’ interaction,<sup>7</sup> it does so without locating these proposals within the broader context of international law and its institutional architecture. More specifically, what has received relatively little attention is the law and practice of the international institutions performing monitoring and quasi-adjudicatory functions under both sets of treaties and their direct and indirect roles in influencing the interpretation of competing obligations.<sup>8</sup>

The significant original contribution of this Chapter is to fill this gap, in the context of access to educational materials. The Chapter recognises the inseparability of institutional context to understanding the application of the VCLT. It takes an institutional approach to understanding the constraints on states parties to both sets of treaties, and offers an explanation for the under-realisation of the utilisation of copyright exceptions to realise access. Although a comprehensive answer to this question is impossible, given states’ unique political decision-making processes and other domestic and international imponderables, what *is* possible is an identification of the features of relevant *international*

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Rights Paradox: Intellectual Property Rights and Rights of Access to Science’ (2013) 35 HRQ 143; Lea Shaver and Caterina Sganga, ‘The Right to Take Part in Cultural Life: On Copyright and Human Rights’ (2010) 27 WILJ 637.

<sup>6</sup> Eg., SI Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Brill-Nijhoff 2012); Sara Bannerman, *International Copyright and Access to Knowledge* (CUP 2016); U Butalia, ‘The Issues at Stake: An Indian Perspective on Copyright’ in PG Altbach (ed), *Copyright and development : inequality in the information age* (Bellagio 1995).

<sup>7</sup> Eg., LR Helfer, ‘Toward a Human Rights Framework for Intellectual Property’ (2006) 40 UCCLR 971; LR Helfer, ‘Human Rights and Intellectual Property: Conflict or Coexistence?’ (2003) 5 Minnesota Intellectual Property Review 47; LR Helfer and GW Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (CUP 2011); PK Yu, ‘Intellectual Property and Human Rights 2.0’ (2019) 53 Texas A&M University School of Law Legal Studies Research Paper No. 19-24 80; PK Yu, ‘Ten Common Questions about Intellectual Property and Human Rights’ (2007) 23 GSULR 709; D Vaver, ‘Copyright Defenses as User Rights’, (2013) 60 Journal of the Copyright Society of the USA 661.

<sup>8</sup> See, recently, Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (1st edn, OUP 2017). See also, Joost Pauwelyn, *Conflict of Norms in Public International Law : How WTO Law Relates to Other Rules of International Law* (CUP 2003). Even where this has received attention, it has been in relation to other private law regimes and with a focus on justifying its specificity, see GB Dinwoodie (ed), *Intellectual Property and General Legal Principles: Is IP a Lex Specialis?* (EE 2015).

institutions that make it more or less likely for the right to be realised *domestically*. The analysis in this Chapter considers the nature of the body and the context of the function (is it acting in its capacity as a quasi-adjudicatory or monitoring body); who is centred (if it is a contentious case, who brings the dispute), how the issue is framed (as a dispute or a report; to include or exclude certain actors; what legal norms are applied, and how), what the consequences are of the different types of findings (in terms of enforcement), and how this affects domestic application.<sup>9</sup> I highlight productive possibilities emerging from the interaction across both sets of treaties, and recognise the hegemonic nature of particular norms and institutions that lead to the crowding out of other norms.<sup>10</sup>

To construct this argument, I first disaggregate the competing interests underlying the obligations analysed in Chapters 2 and 3. I explain which interests are legally guaranteed and to what extent in section 4.2. I then set out the tensions across these obligations in section 4.3, demonstrating the existence of an apparent conflict of norms. This, I explain, is an instance of the fragmentation of international law. I analyse the tools available to avoid and resolve conflicts of norms as set out in the ILC's Fragmentation Report in section 4.4. Given that the application of these tools is highly context-specific, I turn to the comparative institutional analysis of the WTO DSS and the CESCR in section 4.5. I conclude by explaining the implications of this analysis for my case studies in Chapters 5 and 6.

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<sup>9</sup> See, literature review undertaken in 2019, stating 'although human rights and intellectual property rights originate from two disparate international regimes, there is a growing need to understand the interplay between these two regimes' in PK Yu, 'Intellectual Property and Human Rights 2.0' (n 7) 1438.

<sup>10</sup> This is based on the 'jurisgenerative' and 'jurispathic' functions of law respectively analysed in Robert Cover, 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative' (1983) 97 HLR 4. This has been applied to international law in PS Berman, 'A Pluralist Approach to International Law' (2007) 32 YJIL 301. See also, in the specific context of regime interaction, JL Dunoff, 'A New Approach to Regime Interaction' in MA Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 144–156.

## 4.2. Disaggregating the interests underlying the obligations

At first blush, it may seem that the only competing interests are those of ‘users’ and authors. However, post-TRIPS, the interests of publishers, the industry and other licensees take centre stage. This exercise is key to setting out the tensions across obligations in section 4.3.

### 4.2.1. Students, teachers, those seeking education: ‘users’

The first set of interests, as detailed in Chapter 2, is that of students, teachers, and all others who seek or impart education, collectively recognised as ‘users’ of materials under copyright.<sup>11</sup> These interests are guaranteed as a *human right* under the right to education.<sup>12</sup> As established in Chapter 2, the right to education includes the equal right of access to educational materials for all without discrimination. This includes the right to educational materials that are meaningfully available, accessible, adaptable and acceptable. States parties to the ICESCR (and other core UN human rights treaties that guarantee this right) undertake corresponding obligations to ensure its realisation. The obligations that are immediately realisable include ensuring free access to textbooks for primary school students and eliminating discrimination in access to educational materials at all levels. that all members of society have substantively equal access to educational materials at all levels of education (including lifelong education). The obligations that are progressively realisable include taking legislative, administrative, executive and other steps to increase access to educational materials – and importantly, to ensure that its existing policies and laws do not hinder appropriate access. States are also bound by the principle of non-retrogression not

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<sup>11</sup> In certain circumstances, agents of users (those engaging in a use on behalf of end-users as will be discussed in Chapter 6) such as librarians and designated photocopy outlets act to fulfil end-users’ interests.

<sup>12</sup> Other interrelated ICESCR rights include freedom of expression, particularly to impart and receive information; the right to participate in cultural life; and the right to science and the benefits of its progress. A full analysis of these rights is outside the scope of the Thesis.

to take steps that reduce existing access. States are free to decide how to implement their obligations – but they must do so *in line* with the principle of non-discrimination.

The same interests are contemplated under the copyright treaties discussed in Chapter 3. The Berne Convention obliges states parties to domestically create and regulate copyright. As an exception to this regime, art 10(2) of the Berne Convention permits states parties to exempt the use of works under copyright for educational purposes through domestic legislation. The use under this provision is subject to ‘the extent justified by its purpose’ and ‘fair practice’. This is notably not an obligation - states parties are permitted to avail of this exception should they wish to domestically legislate to protect these interests.

As discussed in the Introduction to this Thesis, the process of knowledge production is continuous, with no hard lines between authors and users. For instance, in authoring works, authors *are* users to the extent that they build on existing literary materials. In other words, ‘users’ of materials under copyright, in using materials for educational purposes, are either present or future contributors to the further generation of knowledge and scholarship. The interests of ‘users’ and authors overlap significantly.<sup>13</sup>

#### 4.2.2. Authors

Authors’ interests are guaranteed in both copyright and human rights treaties. As discussed in Chapter 2, the ICESCR guarantees the human right of authors to benefit from the moral and material interests emerging from their work.<sup>14</sup> The moral aspects of this right include guaranteeing an enduring ‘personal link’ between the author and their work as well as a link between communities and their cultural heritage; a right of attribution to be identified

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<sup>13</sup> See, recently, James Meese, *Authors, Users, and Pirates: Copyright Law and Subjectivity* (MIT 2018).

<sup>14</sup> ICESCR art 15.

as authors; and to object to distortions.<sup>15</sup> The material aspects of this right include the guarantee of an adequate standard of living for authors with equitable remuneration.<sup>16</sup> As with the right to education, states parties bear obligations to take steps to respect, protect, and fulfil this right without discrimination. However, the steps taken by states parties to realise this right must not impede access to educational materials.<sup>17</sup> These human rights are inalienable.

As discussed in Chapter 3, the Berne Convention's stated object and purpose is to ensure that authors' interests are uniformly protected across the world. It obliges states parties to vest authors with exclusive control over the reproduction, translation, distribution, broadcast, adaptation, performance and communication of their work. It also obliges states parties to guarantee authors the right of attribution to their works and to the integrity of their works. The legal rights under the Berne Convention are assignable, waivable and alienable depending on particular states parties' domestic legislation.

Although the moral interests protected in human rights law appear to overlap with the rights of attribution and integrity in international copyright law, there is one crucial difference. Human rights cannot be alienated; while moral rights under copyright law can, depending on the jurisdiction. The CESCR therefore recognises that 'it is important not to equate intellectual property rights with the human right recognised in art 15, para 1(c)',<sup>18</sup>

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<sup>15</sup> 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 production of which he or she is the author (art 15, para 1(c)) ('GC17'), (2006), E/C12/GC/17 [12]-[14].

<sup>16</sup> *ibid* [2], [15], [16].

<sup>17</sup> *ibid* [35].

<sup>18</sup> *ibid* [3].

and that intellectual property laws primarily protect ‘business and corporate interests and investments’.<sup>19</sup>

As discussed in Chapter 3, TRIPS incorporates all the substantive articles of the Berne Convention except for the provision guaranteeing the moral rights of authors.<sup>20</sup> This *prima facie* excludes breaches of authors’ moral rights from the jurisdiction of the WTO DSS.<sup>21</sup> Normatively, this indicates TRIPS’ focus on economic rights. Further, the language of TRIPS indicates a shift towards recognising the interests of publishers, collecting societies and other ‘right holders’.

#### 4.2.3. Publishers, copyright collectives, the ‘creative industry’ and other licensees

The third set of interests at play are those of assignees or acquirers of copyright. The ‘creative industry’, including publishers and copyright collectives, have an economic interest in acquiring copyright (or an exclusive licence to the work) from authors.<sup>22</sup> Standard contractual terms in this regard seek to acquire a degree of exclusive control over the work and guarantee authors a small percentage of the publishers’ return,<sup>23</sup> and present these terms as non-negotiable.<sup>24</sup> In the academic publishing industry, contributors to

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<sup>19</sup> *ibid* [2].

<sup>20</sup> Berne Convention art 6bis.

<sup>21</sup> See section 4.5.3.1.

<sup>22</sup> See Giuseppina D’Agostino, *Copyright, Contracts, Creators : New Media, New Rules* (EE 2010).

<sup>23</sup> For a comparison between authors’ royalties and the revenues of big publishers, see, Michael Bhaskar, ‘Are Publishers Worth It? Filtering, Amplification and the Value of Publishing’ in Janis Jefferies and Sarah Kember (eds), *Whose Book is it Anyway? a View From Elsewhere on Publishing, Copyright and Creativity* (Open Book Publishers 2019) 91–94. See also, John Charlton, ‘Writing Doesn’t Pay’ (2018) 35 *Information Today* 12.

<sup>24</sup> See L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer 2002). See also, Janis Jefferies, ‘Publishing Industry: A Position Paper’ in Janis Jefferies and Sarah Kember (eds), *Whose Book is it Anyway? a View From Elsewhere on Publishing, Copyright and Creativity* (Open Book Publishers 2019).

journals are usually unremunerated,<sup>25</sup> while publishers charge libraries substantial prices for journal subscriptions.<sup>26</sup> These interests are straightforward – they are primarily, though not exclusively, juristic persons seeking to run their businesses and grow profits.

However, international human rights law does not guarantee corporate interests. In fact, there is a growing move towards crystallising the human rights *obligations* of corporations, recognising their role as major global actors impacting the realisation of human rights.<sup>27</sup> At present, the primary obligation to regulate corporations in order to respect, protect and fulfil human rights lies with the state,<sup>28</sup> an issue I discussed in Chapter 2.

As discussed in Chapter 3, the third step in the Berne Convention’s version of the three-step test maintains the ‘legitimate interests of the author’ as the only interest that must be assessed for prejudice. Although it is common practice for authors to assign or licence their copyright to natural and juristic persons, the latter’s economic interests are not a part of the three-step test analysis. TRIPS significantly transforms this position by introducing corporations’ interests.<sup>29</sup> It replaces ‘author’ with ‘right holder’ thereby including the interests of publishers, copyright collectives, and the industry in the analysis.<sup>30</sup>

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<sup>25</sup> Eg., Vincent Larivière, Stefanie Haustein, and Philippe Mongeon, ‘The Oligopoly of Academic Publishers in the Digital Era’ (2015) 10 PLOS ONE e0127502.

<sup>26</sup> Eg., TC Bergstrom and others, ‘Evaluating Big Deal Journal Bundles’ (2014) 111 PNAS 9425.

<sup>27</sup> See HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, 21 March 2011, A/HRC/17/31. See also, John Knox, ‘The Ruggie Rules: Applying Human Rights Law to Corporations’ in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights* (Brill-Nijhoff 2012).

<sup>28</sup> Eg., CRC, General comment No. 16 on State obligations regarding the impact of the business sector on children’s rights (2013) CRC/C/GC/16. See also, Olivier de Schutter, ‘The Challenge of Imposing Human Rights Norms on Corporate Actors’, *Transnational Corporations and Human Rights* (Bloomsbury 2006).

<sup>29</sup> Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Earthscan 2002) 9–13.

<sup>30</sup> TRIPS art 13.

It also binds states parties to make available enforcement mechanisms for right holders, including provision for damages where the interests of right holders are harmed.<sup>31</sup> There is an assumption of commonality of economic interests between authors and corporations which is not always the case, as Chapter 6 demonstrates. Further, right holders are empowered to trigger reviews of special and preferential trade arrangements created by the global North<sup>32</sup> with significant implications for the global South, as Chapter 5 demonstrates.

### 4.3. Obligations in tension

This Thesis has demonstrated that the obligations outlined in Chapters 2 and 3 can be interpreted harmoniously in a manner that enables states parties to fulfil *all* of their obligations.

However, as discussed in Chapter 3, there is a sizeable amount of literature applying the 'TRIPS' version of the three-step test to *all* exceptions and limitations whether general or specific. This significantly circumscribes the scope for states parties to fulfil their human rights obligations in respect of access to educational materials. This interpretation supplants 'fair practice' and 'extent justified by the purpose' with the narrower three-step test that centres the economic interests of right holders. Even the broadest interpretation of the three-step test is constrained by its text which focuses on 'conflict with normal exploitation of the work' and 'unreasonabl[e] prejudice [to] the legitimate interests of the right holder'. On this reading, it is perfectly possible for a particular type of use to be legally permitted in order to fulfil the right of access to educational materials that meets the test of 'fair practice' and is proportionate to its educational purpose and at the same time cause

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<sup>31</sup> TRIPS arts 42, 50.

<sup>32</sup> Considered a part of the WTO Agreements under the WTO, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 ILM 746 (2002).

a potential loss of revenue for a publisher.<sup>33</sup> This conflict, where a particular use meets the test in art 10(2) of the Berne Convention but not in the TRIPS version of the three-step test, is what this Chapter seeks to address.

More directly, other exceptions regarding access to educational materials – such as exceptions in respect of libraries and archives – that may not fall within art 10(2) of the Berne Convention<sup>34</sup> but are likely to be governed by TRIPS’ three-step test may also come in conflict with human rights obligations to enable access to educational materials. Since access to educational materials in several settings takes place through scanning or photocopying materials from a library, these exceptions are important to expand access beyond physical collections to digital collections across borders.<sup>35</sup> This affects authors *qua* users as well.

These are but two examples of the conflicts that may arise from the obligations outlined in section 4.3. Additionally, states parties are likely to be called upon to weigh the above interests in various legislative, executive or judicial contexts. For instance, authors may invoke their human rights against the state to fulfil its obligations in respect of authors’ right to an adequate standard of living as a part of art 15 of the ICESCR, implicating publishers’ interests on the basis of unfair contractual terms. Publishers and other licensees may invoke their intellectual property guarantees against users (human rights bearers) in respect of copyright infringement – and are likely to argue the applicability of TRIPS’

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<sup>33</sup> See Chapter 3.

<sup>34</sup> This is without prejudice to the fact that some library exceptions may fall within art 10(2) where they relate to educational purposes.

<sup>35</sup> This includes inter-library loans or document supply programmes and copies for preservation. See Kenneth Crews, Study on Limitations and Exceptions for Library and Archives, 2 November 2017, SCCR/35/6. See also ‘The internet is global – but copyright exceptions stop at the border: why we need an international treaty for cross-border access to knowledge’, (EIFL, November 2016) <<https://www.eifl.net/resources/statements-wipo-sccr-how-information-denied-when-copyright-exceptions-stop-border>> accessed 20 March 2021.

three-step test given the centring of their interests. Authors may invoke their intellectual property guarantees against users (human rights bearers) in respect of copyright infringement – but are likely to argue the applicability of the *Berne Convention*'s three-step test given the centring of their interests. Authors may also invoke their human rights in respect of inadequate protection of authors' rights through a copyright statute meeting the test in art 10(2) of the Berne Convention, by invoking the Berne Convention's three-step test as the applicable standard given the centring of their interests. Users (and authors *qua* users) may invoke their human rights against the state in respect of their right of access to educational materials, implicating both authors *and* industry, and so on. The precise contours of the dispute would depend on the specific facts at issue. I now turn the international legal techniques applicable to resolving these tensions.

#### **4.4. Fragmentation of international law: the ILC Fragmentation Report and its techniques**

Competing obligations are hardly unique in international law.<sup>36</sup> Rather, the multiplicity and overlapping nature of state obligations are features of the decentralised international legal system.<sup>37</sup> The horizontal nature of international law and the existence of societies built on different value systems inevitably leads to the generation of varied norms across international institutional contexts, all of which are equally legally binding.<sup>38</sup> This

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<sup>36</sup> See, for illustrations of obligations in tension across contexts, Tomer Broude and Yuval Shany, *Multi-Sourced Equivalent Norms in International Law* (Hart 2011); Marko Milanovic, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) 14 JCSL 459; Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 MJIL 849.

<sup>37</sup> See, for an examination of strategic forum shifting in international law-making thereby creating treaty conflicts, E Benvenisti and GW Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 Stanford Law Review 595; LR Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (n 3); Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (CUP 2014).

<sup>38</sup> ILC, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group', 13 April 2006, A/CN.4/L.682 ('Fragmentation Analysis')

phenomenon has been widely studied in the literature as the ‘fragmentation’ of international law.<sup>39</sup> The ILC, charged with the codification and progressive development of international law,<sup>40</sup> established a Study Group in 2003 to address its implications. Adopted by the ILC in 2006, the Report mapped international legal techniques that can be applied to address the increasing functional, regional, and political differentiation in international law.<sup>41</sup> Importantly, as I demonstrate in Chapters 5 and 6, these competing obligations are resolved at the domestic level in the form of state policy or interpretive choices in adjudication.<sup>42</sup>

The Fragmentation Report outlines a set of techniques by which tensions across obligations may be resolved. In respect of treaty obligations, these techniques are sourced in the VCLT and draw on customary international law and general principles. To determine the relationship between multiple treaty obligations that ‘bear on a single issue’,<sup>43</sup> recourse must first be had to the VCLT’s rules of treaty interpretation.<sup>44</sup> The competing provisions

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[414]. See also, Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 MJIL 999.

<sup>39</sup> Eg., CW Jenks, ‘Conflict of Law-Making Treaties’ (1953) 30 BYIL 401; Martti Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70 MLR 1; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005); Anne-Charlotte Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’ (2009) 22 LJIL 1; Anne Peters, ‘The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization’ (2017) 15 IJCL 671.

<sup>40</sup> UN Charter art 13(1)(a). The work of the ILC is a supplementary source of international law under ICJ Statute art 38(1)(d). Parts of it have been understood to constitute a codification of customary international law under ICJ Statute art 38(1)(b).

<sup>41</sup> Fragmentation Analysis (n 38). See also, ILC, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Conclusions of the work of the Study Group, 13 April 2006, A/CN.4/L.702 (‘Fragmentation Conclusions’).

<sup>42</sup> See generally, for the particular role of domestic actors in addressing fragmentation, E Benvenisti and GW Downs (n 37).

<sup>43</sup> This moves from considering norms within the same *regime* to norms relating to the same subject matter despite their location in different regimes. See, Fragmentation Analysis (n 38) [254]-[256].

<sup>44</sup> Fragmentation Conclusions (n 41) [(a)3].

must be interpreted with the aim of arriving at ‘a single set of compatible obligations’.<sup>45</sup> Through this principle of harmonisation, international law maintains a strong formal presumption against conflicting obligations.<sup>46</sup> The Fragmentation Report thus emphasises the importance of *first* recognising whether multiple norms are in ‘relationships of interpretation’ – i.e., where tensions can be interpreted away.<sup>47</sup>

I applied the VCLT in Chapters 2 and 3 to demonstrate the possibility of arriving at a ‘single set of compatible obligations’ in respect of access to educational materials. In the Introduction to this Thesis, I explained the particular importance of the principle of systemic integration in arriving at this interpretation. At the same time, I recognised the critiques levelled against the principle eg., that its vagueness serves as a vehicle for the legitimisation of *any* interpretation in international law. This, I argue, does not provide enough reason to jettison the concept, given its close relationship with the principle of harmonisation in international law. Rather, it heightens the importance of scrutinising the institutional framework within which these norms are embedded and interpreted. Section 4.5 turns to that exercise.

However, the Fragmentation Report recognises that there are circumstances where it is not possible to arrive at a single set of compatible obligations through the interpretive route advanced above.<sup>48</sup> When the performance of one obligation potentially breaches, limits another obligation, or frustrates its purpose, and where the VCLT’s rules of interpretation fail to provide a harmonious solution, they are considered to be in a

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<sup>45</sup> *ibid* [(a)4].

<sup>46</sup> Fragmentation Analysis (n 38) [37]-[38].

<sup>47</sup> *ibid* [50]; Fragmentation Conclusions (n 41) [(a)2];

<sup>48</sup> Fragmentation Analysis (n 38) [42].

‘relationship of conflict’.<sup>49</sup> The Fragmentation Report identifies three techniques for avoiding or resolving the conflict of norms. They are: specificity through *lex specialis*; temporality through *lex posterior*; and hierarchy through the status of norms.<sup>50</sup> The application of these techniques, on the whole, does not seek to *invalidate* one norm vis-à-vis the other. Rather, it seeks to prioritise one norm over the other, with the de-prioritised norm operating in the background.<sup>51</sup>

The Report notably does not provide guidance as to *when* a particular tool must be used. Rather, it highlights that different techniques acquire salience in different circumstances.<sup>52</sup> To this end, the Report determines the following factors that condition the application of these tools: the will of the parties; the nature, object and purpose of the instrument being interpreted; the reasonableness of the application of a particular technique and the extent to which it fits within the normative environment of its interpretation.<sup>53</sup> These factors are context-dependent, and therefore expose these techniques to the same critique levelled against the principle of systemic integration that I outlined above. An analysis of institutional design of interpreting bodies is thus crucial.

#### 4.4.1. Specificity: *Lex specialis*

The rule of *lex specialis derogare lege generali* indicates a normative priority for the application of a special rule over a general rule, where two norms are concurrently applicable to the

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<sup>49</sup> This interpretation seeks to understand ‘conflict’ in a broad sense. A narrow interpretation of conflict as limited solely to the performance of one obligation breaching another ignores important legal realities. See, *ibid* [24, 25]. See also, Surabhi Ranganathan (n 37) 10–13; CJ Borgen, ‘Resolving Treaty Conflicts’ (2005) 37 GWILR 573, 575–576; Gabrielle Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties’ (2001) 35 JWT 1081, 1082–1086.

<sup>50</sup> Fragmentation Analysis (n 38) [46]–[222]; [223]–[323]; [324]–[409].

<sup>51</sup> *ibid* [411].

<sup>52</sup> *ibid* [325].

<sup>53</sup> *ibid* [410].

same subject matter.<sup>54</sup> These norms may exist in the same treaty or in different treaties.<sup>55</sup> The threshold test is an overlap in subject matter.<sup>56</sup> The general practice of international tribunals indicates that *lex specialis* is applicable in situations where special and general norms point in opposite directions and in the same direction. In the latter case, the special norm plays a clarificatory or modificatory function.<sup>57</sup>

The relational nature of *lex specialis* implies that first, there is no *a priori* understanding of a special norm and a general norm. The interpreter has the power to determine the relationship between the norms at issue and must justify the salience of specificity in the circumstances.<sup>58</sup> The institutional framework within which the interpretation takes place is key. Second, the application of *lex specialis* is to a single set of norms. The determination of specificity cannot be abstracted to the relationship between the regimes as a whole.<sup>59</sup> I turn now to the possible application of *lex specialis* in the context of access to educational materials.

#### **4.4.1.1. Application of *lex specialis* to avoid conflicts**

In Chapter 3, I analysed the treaty provisions regulating copyright and access to educational materials. These overlapping norms overlap give rise to apparent norm conflicts, offering possibilities for the application of *lex specialis*. I outline them briefly.

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<sup>54</sup> For the history of *lex specialis* as a general principle, see Fragmentation Analysis (n 38) 56]. See also Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74 NJIL 27, 35. Sir G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) XXXIII BYIL 237.

<sup>55</sup> Fragmentation Analysis (n 38) [23].

<sup>56</sup> Anja Lindroos (n 54) 44–48.

<sup>57</sup> *ibid* 47.

<sup>58</sup> Fragmentation Analysis (n 38) [225]. See section 4.5.

<sup>59</sup> Marko Milanovic, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 99–100.

Within the Berne Convention, *lex specialis* may find application to determine the applicability of art 10(2) or art 9(2) depending on the fact situation. In Chapter 3, I distinguished between them on the basis of the history and structure of the Berne Convention as well as the fact that they regulate different subject matter – art 10(2) is centrally concerned with educational purposes and art 9(2) is a residual provision. An alternative view, countered in Chapter 3, could be to apply *lex specialis* to understand the three-step test in art 9(2) as clarifying the more general ‘fair practice’ and ‘extent justified by the purpose’ test in art 10(2), therefore limiting the inquiry to the three-step test.

*Lex specialis* may also be applicable in relation to apparent conflicts between the Berne Convention and TRIPS.<sup>60</sup> The expanded language of the TRIPS’ three-step test creates this apparent conflict as it does not clarify whether it applies to specific exceptions already provided for in the Berne Convention or general, residual exceptions that are not explicitly provided for in the Berne Convention. A relationship of specificity may be helpful to determine the applicable provision depending on the context. I argued in Chapter 3 that interpreting the provisions establishing the relationship between the Berne Convention and TRIPS in light of the objects and purposes of TRIPS indicates that art 13 of TRIPS is unlikely to affect the operation of art 10(2) of the Berne Convention in respect of access to educational materials. The same conclusion may also be reached through the application of *lex specialis*.

#### **4.4.1.2. Application of *lex specialis* to resolve conflicts**

While most of the apparently conflicting norms relating to access to educational materials may be resolved through interpretation or conflict avoidance discussed above, there are

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<sup>60</sup> The WTO DSS has applied *lex specialis* in this manner to determine the relationship between ‘covered agreements’. Eg., WTO, *EC—Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report* (‘EC-Bananas III’) WT/DS27/AB/R (15 September 1997) [204].

circumstances where two norms lead to incompatible interpretations and remain in conflict. Importantly, in applying *lex specialis* as a conflict resolution tool, both norms remain applicable but one is given priority over the other on the basis of specificity. The de-prioritised norm continues to operate in the background.

The three-step tests in TRIPS and WCT create an apparent conflict with the three-step test in the Berne Convention. All three provisions notionally apply to the same subject matter: residual exceptions to copyright. As discussed in Chapter 3, the three-step test in TRIPS expands its scope of application to include all types of uses (not limited to reproduction) and substitutes ‘right holder’ for ‘author’ in the third step of the test. This includes publishers and other licensees to whom the author may have assigned or licenced copyright in the analysis. In the circumstances where authors find their interests being subordinated to those of the industry in this inquiry, *lex specialis* may find application to determine the applicable version of the test. TRIPS explicitly incorporates the Berne Convention except for the provision on authors’ moral rights. Both versions of the three-step test regulate the same subject matter, albeit to a limited extent: the material interests arising from copyright. The WCT does not exclude moral rights. Its subject matter overlaps with the Berne Convention in the digital environment. In addition, both TRIPS and the WCT have explicit provisions stating that parties undertake not to derogate from their obligations under the Berne Convention. These factors indicate the concurrent application of norms. The interpreting body will have to justify whether the specificity of interests (economic interests in the case of TRIPS) or field of application (digital environment in the case of WCT) are salient in a fact-specific dispute.

Further, in the context of international human rights treaties, the identity of the rights-bearer may be relevant in determining whether the ICESCR is applicable or if the applicable provision is the right to education in the UNCPRD, UNCRC or UNCEDAW.

These provisions overlap with one another in terms of substantive content but the nature and extent of obligations may differ. *Lex specialis* may operate to clarify the extent of states' obligations based on the context.

#### **4.4.1.3. 'Self-contained regimes', *lex specialis*, and trade and human rights**

A third application of *lex specialis* is its role in constructing structurally and functionally differentiated 'self-contained regimes'.<sup>61</sup> The Fragmentation Report defines 'self-contained regimes' in three ways:<sup>62</sup> first, as a treaty-based system with its own set of secondary rules distinct from the general Articles of State Responsibility<sup>63</sup> governing consequences of breach of a primary rule;<sup>64</sup> second, as 'interrelated wholes of primary and secondary rules' where the specificity of the primary rules lends the regime its 'self-contained' character;<sup>65</sup> and third where a 'special branch' of international law is denoted by subject-matter and functional categorisation.<sup>66</sup> Both the WTO system and international human rights law fall squarely within this definition.<sup>67</sup>

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<sup>61</sup> 'Self-contained regimes' was coined in *SS Wimbledon (Britain v Germany)* [1923] PCIJ Ser A No 1 [23]. See also, Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 EJIL 483.

<sup>62</sup> Fragmentation Conclusions (n 41) [12].

<sup>63</sup> ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' annexed to UNGA Res 56/83 (12 December 2001) A/Res/56/83 ('ASR').

<sup>64</sup> Fragmentation Analysis (n 38) [128]; *United States Diplomatic and Consular Staff in Tehran (USA v Iran)* [1980] ICJ Reports 41[86].

<sup>65</sup> Fragmentation Analysis (n 38) [127]; *Exchange of Greek and Turkish Populations*, Advisory opinion [1925] PCIJ Ser B No 10 [20].

<sup>66</sup> Fragmentation Analysis (n 38) [129]-[133].

<sup>67</sup> *ibid* [161]-[164; [165]-[171]; Bruno Simma and Dirk Pulkowski (n 61) 511-512.

However, this does not mean that international law outside of these regimes is inapplicable. The relationship between international law in general and the law applicable in ‘self-contained regimes’ can be summed up as follows

Jurists need to acknowledge the particular logic of special regimes [...] At the same time, however, general international law provides a systemic fabric from which no special legal regime is completely decoupled. And by framing a prescription in legal terms, states have opted to subordinate a particular issue to the logic of international law as a whole.<sup>68</sup>

In the same vein, the Fragmentation Report distils the following principles on ‘self-contained regimes’:<sup>69</sup> First, interpreters within ‘self-contained regimes’ may use *lex specialis* to ‘apply, clarify, update or modify, as well as set aside general law’<sup>70</sup> as contextually required. The extent to which such application may take place is not *a priori* determinable.<sup>71</sup> This extends the application of *lex specialis* as a tool for conflict avoidance and resolution discussed in sections 4.4.1. and 4.4.1.3 to self-contained regimes. ‘Self-contained regimes’, like all other norms of international law, may not derogate from *jus cogens* norms.<sup>72</sup> Where they are created by treaties and/or require interpretation, the VCLT applies, as in the case of the WTO system and the international human rights system.<sup>73</sup>

Second, within a ‘self-contained regime’, the application of *lex specialis* does not lead to the extinguishment of the general law. General international law *continues* to operate: (1) regarding structure of the ‘self-contained regime’, thereby maintaining its validity (eg.,

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<sup>68</sup> *ibid* 529.

<sup>69</sup> I apply these principles in section 4.5.

<sup>70</sup> Fragmentation Conclusions (n 41) [8].

<sup>71</sup> *ibid* [6].

<sup>72</sup> *ibid* [10].

<sup>73</sup> *ibid* [3].

through applying the VCLT to interpret treaties constructing ‘self-contained regimes’),<sup>74</sup> (2) as part of the applicable law where there are gaps in regulation within the special law established by the ‘self-contained regime’,<sup>75</sup> (3) when the special law has failed to achieve its objective (eg., persistent non-performance of obligations).<sup>76</sup> Importantly, the ILC further clarifies that there is no requirement for a special provision enabling the application of international law in general to a ‘self-contained regime’. Rather, the continued application of international law in general, alongside *lex specialis*, is required by the principle of harmonisation.<sup>77</sup>

Finally, *lex specialis* is unlikely to be helpful where both norms operate at the same level of specificity, eg., when the norms in conflict are from separate ‘self-contained’ regimes.<sup>78</sup> As demonstrated, the application of *lex specialis* in the context of access to educational materials is most appropriate to resolve or avoid norm conflict *within* the international copyright and trade regime, or separately, within the international human rights regime.

#### 4.4.2. Temporality: *Lex posterior* and its exceptions

The rule of *lex posterior derogat lege prior* entails that where a particular subject matter is already regulated by a norm and another norm regulating the same subject matter comes into being

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<sup>74</sup> Fragmentation Analysis (n 38) [194(1)].

<sup>75</sup> Fragmentation Conclusions (n 41) [15].

<sup>76</sup> *ibid* [16].

<sup>77</sup> *ibid* [4].

<sup>78</sup> See, central argument in Anja Lindroos (n 54) 66.

at a later date, the later norm supersedes the earlier norm.<sup>79</sup> Similar to *lex specialis*, this principle does not have automatic operation – the interpreter must justify its relevance.<sup>80</sup>

The VCLT codifies conditions for the application of *lex posterior*.<sup>81</sup> It requires that both norms in question are of the same hierarchical status.<sup>82</sup> I discuss norm hierarchies in section 4.4.3. Further, where a treaty includes a provision specifying that that treaty shall not be interpreted to be incompatible with an earlier or a later treaty, the specified treaty (whether earlier or later) will be given priority in resolving or avoiding conflict.<sup>83</sup> Importantly, this provision need not specify that the *later* treaty will prevail – rather, it may instead specify that the *earlier* treaty prevails (or indeed, that the earlier treaty *must not be derogated from*).<sup>84</sup> As discussed in Chapter 3, provisions of this nature are evident in the WCT and TRIPS, specifying the relationship with the Berne Convention. I address this below.

In circumstances where *all* parties to *all* treaties at issue are *identical*, the VCLT favours harmonisation through interpretive methods and both provisions remain applicable to the extent possible.<sup>85</sup> Where the parties to *all* treaties at issue are *non-identical*, the VCLT provides for priority to be determined as follows: The interpreter is required to determine the commonality of treaties in respect of the parties to the dispute.<sup>86</sup> Only those

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<sup>79</sup> Fragmentation Analysis (n 38) [225]-[226]. See also, VCLT arts 30, 41.

<sup>80</sup> Fragmentation Conclusions (n 41) [(b)(6)]; Fragmentation Analysis (n 38) [225]-[226].

<sup>81</sup> As a general principle of international law. See, ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill-Nijhoff 2009) 21.

<sup>82</sup> VCLT art 30(1).

<sup>83</sup> VCLT art 30(2).

<sup>84</sup> This is an application of *lex prior*, an exception to the general application of *lex posterior*. See Fragmentation Analysis (n 38) [227].

<sup>85</sup> *ibid* [234-5]; VCLT art 30(3).

<sup>86</sup> VCLT art 30(4)(a).

treaties that all relevant states are party to in that particular dispute would determine the rights and obligations at issue.<sup>87</sup> However, in either case, where one treaty cannot be fulfilled without breaching or leading to the breach of the other, the earlier treaty may be suspended to that limited extent, depending on the nature of the obligations.<sup>88</sup> I return to the nature of obligations in section 4.4.3.

#### **4.4.2.1. Application of *Lex posterior* (and its exceptions) to resolve conflicts**

*Lex posterior* finds application in determining the relationship between copyright and trade treaties, but is unlikely to find application in the core UN human rights treaties given the related but differing subject matter. The Fragmentation Report notes that it is unlikely to apply across *different* regimes.<sup>89</sup> As I demonstrate, *lex posterior* is unhelpful in resolving the ICESCR and TRIPS cross-regime conflicts discussed in section 4.3, but assists with understanding how TRIPS and the WCT relate to the Berne Convention.

In Chapter 3, I advanced an interpretation that arts 9(1)<sup>90</sup> and 2(2)<sup>91</sup> of TRIPS must be read together to determine the relationship of TRIPS with the Berne Convention. I explained that the ordinary meaning of both provisions entail that member states of the WTO (and therefore TRIPS) not only undertake to fulfil their *obligations* under the Berne

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<sup>87</sup> VCLT arts 30(4)(b); 34.

<sup>88</sup> VCLT art 59(1)(b).

<sup>89</sup> Fragmentation Conclusions (n 41) [(e)26].

<sup>90</sup> TRIPS art 9(1) provides:

Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.

<sup>91</sup> TRIPS art 2(2) provides:

Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the [...] Berne Convention.

Convention, but also to act consistently with arts 1-21 of the Berne Convention (including art 10(2) of the Berne Convention). An interpretation restricted to fulfilment of obligations, I argued, would render art 9(1) of TRIPS redundant.

Applying the VCLT, arts 9(1) and 2(2) of TRIPS explain the relationship between the Berne Convention and TRIPS. These textual provisions preclude an application of the general *lex posterior* principle.<sup>92</sup> Further, the WCT contains an identical non-derogation provision to art 2(2) TRIPS,<sup>93</sup> as well as a provision for states parties to act consistently with arts 1-21 and the Appendix of the Berne Convention, similar to art 9(1) of TRIPS.<sup>94</sup> Where there is an apparent conflict between art 10(2) of the Berne Convention and the three-step test in TRIPS (or in the WCT); or between the three-step tests of the Berne Convention and TRIPS; or between the WCT and TRIPS, the provisions governing the relationship between the treaties become salient.<sup>95</sup> The explicit inclusion of these provisions considerably limits the general application of *lex posterior*.<sup>96</sup>

Notwithstanding the interpretation advanced in Chapter 3 and above, the permissive nature of art 10(2) of the Berne Convention may give rise to questions regarding the application of *lex posterior*, particularly if an interpretation that only Berne ‘obligations’ are incorporated by TRIPS is adopted. Does this mean that existing exceptions for educational materials enacted under art 10(2) are circumscribed by the TRIPS’ three-step

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<sup>92</sup> This reasoning is implicit in much of the literature cited in Chapter 3 that seeks to apply TRIPS’ three-step test on all exceptions and limitations including art 10(2) of the Berne Convention.

<sup>93</sup> WCT art 1(2).

<sup>94</sup> WCT art 1(4).

<sup>95</sup> WTO, *EC–Section 110(5) of the US Copyright Act*, (15 June 2000) WT/DS160/R [6.17-6.18] holding:

We note that through their incorporation, the substantive rules of the Berne Convention (1971) [...] have become part of the TRIPS Agreement and as provisions of that Agreement have to be read as applying to WTO Members.

<sup>96</sup> *ibid* [6.41].

test? It is unlikely as the effect of such an interpretation on states parties' performance of other related obligations must be considered. Where states are party to both the ICESCR and TRIPS, this interpretation would likely create a genuine conflict between the ICESCR obligations on states parties to realise the right of access to educational materials and the application of the three-step test in TRIPS.

It is important to note that neither of the tools discussed in sections 4.4.1 and 4.4.2 have automatic operation. The actual application of these tools is dependent on a contextual determination of salience of temporality or specificity *by the interpreter*.<sup>97</sup> I now turn to the third tool outlined in the ILC's toolbox: normative status, or hierarchy.

#### 4.4.3. Hierarchy: obligations *erga omnes partes*

Despite its decentralisation, international law recognises certain hierarchical norm relationships.<sup>98</sup> They are: obligations under art 103 of the UN Charter, *jus cogens*, and obligations *erga omnes*.<sup>99</sup> I focus on obligations *erga omnes* as it is relevant to understanding inter-regime conflicts regarding access to educational materials.

Traditionally, obligations *erga omnes* have been recognised as primarily having procedural consequences.<sup>100</sup> In general, they expand the legal standing of non-injured states to hold a defaulting state accountable for breaching a norm owed to 'the international community as a whole'.<sup>101</sup> Although the concept of obligations *erga omnes* does not explicitly

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<sup>97</sup> Fragmentation Analysis (n 38) [325].

<sup>98</sup> *ibid* [327].

<sup>99</sup> *ibid* [333-334]; [361-363].

<sup>100</sup> *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Reports 32 [33].

<sup>101</sup> Fragmentation Analysis (n 38) [380], [389]. See also, CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (1st edn, CUP 2005) 99–116.

create *substantive* hierarchical relationships between norms,<sup>102</sup> in the following section I explain how its procedural consequences *pre-suppose* the relative importance of norms owed to ‘the international community as a whole’ *vis-à-vis* norms that are not in the nature of obligations *erga omnes*. In section 4.4.3.1, I analyse a particular category of *erga omnes*: obligations *erga omnes partes*.

#### **4.4.3.1. Obligations *erga omnes partes* and reciprocal obligations**

Obligations *erga omnes partes* are treaty obligations collectively owed to the community of States parties to a particular treaty, that extends beyond individual states’ interests.<sup>103</sup> They have been variously categorised as ‘integral obligations’<sup>104</sup> or ‘interdependent obligations’.<sup>105</sup> This is in contrast to ‘bilateral obligations’ or ‘reciprocal obligations’,<sup>106</sup> that are owed *not* to the community of states as a whole, but to each of the other states parties in a reciprocal, contractual manner.<sup>107</sup>

At the outset, both integral (*erga omnes partes*) and reciprocal obligations are binding treaty obligations,<sup>108</sup> and may originate from multilateral treaties.<sup>109</sup> It is fairly uncontested

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<sup>102</sup> As opposed to *jus cogens* and UN Charter art 103.

<sup>103</sup> Fragmentation Analysis (n 38) [403]; Giorgio Gaja, ‘Obligations and Rights *Erga Omnes* in International Law’, Institut de Droit International, *Annuaire de l’Institut de Droit International* (Krakow, 27 April 2005) art 1.

<sup>104</sup> Sir Gerald Fitzmaurice, Second Report on the Law of Treaties, 28 June 1957, A/CN.4/107 [16], [54]; James Crawford, Third Report on State Responsibility, 10 March 2000, A/CN.4/507 [99]–[108].

<sup>105</sup> *ibid* (Fitzmaurice, Second Report) art 19.1(ii)(b); Joost Pauwelyn, *Conflict of Norms* (n 8) 58–59; Linos-Alexander Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13 EJIL 1127, 1135.

<sup>106</sup> Sir Gerald Fitzmaurice, Third Report on the Law of Treaties, 4 July 1958, A/CN.4/115 art 18(2).

<sup>107</sup> Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 RdC 217, 335–340.

<sup>108</sup> States must perform their obligations in good faith under VCLT art 26. The breach of both types of obligations gives rise to international responsibility and its ensuing legal consequences.

<sup>109</sup> Joost Pauwelyn, *Conflict of Norms* (n 8) 67–69.

that obligations emerging from international human rights law, particularly the ICCPR and ICESCR, are in the nature of *erga omnes partes*.<sup>110</sup> What is less settled is the nature of copyright obligations in international intellectual property treaties. There are good reasons to understand copyright obligations as reciprocal, that I discuss below. But, as discussed above, the interpreter must make this contextual determination.

The following features are indicative of the nature of obligations as integral or reciprocal: the interest injured in breaching the obligation; the actors empowered to bring a claim against the defaulting state; and the possibility of suspending the obligation.<sup>111</sup>

If breach leads to the injury of another state party's interest, the obligation is likely to be reciprocal,<sup>112</sup> whereas, if it is against a community interest as a whole, the obligation is likely to be integral.<sup>113</sup> Although the Berne Convention was concluded to aggregate bilateral obligations regarding copyright,<sup>114</sup> the establishment of the Berne *Union* has been interpreted as creating an 'overall obligation existing between all Union countries'.<sup>115</sup> However, the Convention itself clarifies that it is up to a particular member of the Union

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<sup>110</sup> Eg., Crawford, Third Report (n 104) [88]; ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries', (12 December 2001) A/Res/56/83, 320-1 [7]; Fragmentation Analysis (n 38)[312]; Erika De Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51, 55; Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28 EJIL 819, 822; Erika de Wet, 'Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments since Barcelona Traction' (2013) 38 SAYIL 1, 4.

<sup>111</sup> See, generally, Pierre-Marie Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility' (2002) 13 EJIL 1053; Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907.

<sup>112</sup> Draft ASR Commentary (n 110) 297.

<sup>113</sup> Joost Pauwelyn, *Conflict of Norms* (n 8) 65–67.

<sup>114</sup> WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (WIPO 1978) para 1.4.

<sup>115</sup> See, stating 'there is only one Union and the relations of all [member] states towards each other is based on their common membership of the Union' S Ricketson and JC Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn, OUP 2006) 227, 1143.

(states parties to any Act of the Berne Convention across its stages of revision) to limit their obligations *vis-à-vis* other members to the Acts of the Berne Convention that they have in common.<sup>116</sup> This textually indicates the reciprocal nature of the obligations of the Berne Convention.<sup>117</sup> Regarding TRIPS, international trade, by definition, is bilateral,<sup>118</sup> and conducted for the ‘mutual advantage of producers and users’.<sup>119</sup> The WTO multilateral trading system aggregates these bilateral relationships under a ‘single undertaking’.<sup>120</sup> However, it has been argued that WTO obligations are collective because they not only relate to trade but also to the ‘protection of expectations about trade-related behaviour’.<sup>121</sup> This community of interest, if adjudged to exist, would have to be assessed by the interpreter in light of the other factors to determine the nature of the obligation.

Further, it is likely that the obligation is reciprocal when *only* the injured state may bring a claim against the defaulting state,<sup>122</sup> and integral when states other than the injured state may do so.<sup>123</sup> The particular provisions on jurisdiction and standing within the relevant dispute resolution mechanisms are key to making this determination. With the incorporation of the Berne Convention into TRIPS, the WTO DSS is likely to exercise

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<sup>116</sup> Berne Convention art 32(2).

<sup>117</sup> Henning Grosse Ruse-Khan (n 8) para 4.11-4.12. See also, ‘there may be no single text to which all states are party and there may be states that are not formally bound by treaty relations with each other, although both are members of the Union’ in S Ricketson and JC Ginsburg (n 115) 227.

<sup>118</sup> Joost Pauwelyn, ‘A Typology of Multilateral Treaty Obligations’ (n 111) 930.

<sup>119</sup> TRIPS art 7.

<sup>120</sup> Joost Pauwelyn, ‘A Typology of Multilateral Treaty Obligations’ (n 111) 928–941. See also Tarcisio Gazzini, ‘The Legal Nature of WTO Obligations and the Consequences of Their Violation’ (2006) 17 European Journal of International Law 723.

<sup>121</sup> Chios Carmody, ‘WTO Obligations as Collective’ (2006) 17 European Journal of International Law 419, 440.

<sup>122</sup> ASR art 42.

<sup>123</sup> ASR art 48.

exclusive compulsory jurisdiction over copyright.<sup>124</sup> The general rules of standing at the DSS, as I discuss in section 4.5.3.1, require the complainant to have a particular interest in the compliance of a provision of TRIPS that is alleged to have been breached.<sup>125</sup> However, some Panels have decided claims brought by complainant states that are not directly injured.<sup>126</sup> This leaves it open.

Finally, integral obligations in the nature of ‘fundamental human rights’ cannot be suspended,<sup>127</sup> while reciprocal obligations can. The WTO DSU provides for complainant states to adopt countermeasures against defaulting states if the latter does not comply with DSS rulings.<sup>128</sup> These countermeasures may take the form of suspension of obligations under the ‘covered agreements’ including TRIPS.<sup>129</sup> Thus, while an interpreter may determine the existence of a community interest or the possibility of non-injured states holding the defaulting state accountable under the WTO, it is clear that due to the possibility of suspension of obligations under TRIPS, the TRIPS Agreement does not fall within the category of a treaty protecting ‘fundamental human rights’.

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<sup>124</sup> This is notwithstanding Berne Convention art 33(1).

<sup>125</sup> *EC—Bananas III* (n 60) [136]. Although commonly cited to show the expansion of standing, the finding on standing in this case relies on the particular interest that the US has in bananas as a producer and potential exporter. See also, Joost Pauwelyn, ‘A Typology of Multilateral Treaty Obligations’ (n 111) 941–942.

<sup>126</sup> Eg., WTO, *US—Section 211 Omnibus Appropriations Act*, Appellate Body Report (2 January 2002) WT/DS176/AB/R [275]–[281], [309]; *US—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Appellate Body Report (8 March 2002) WT/DS202/AB/R [120]–[122], [130]–[133].

<sup>127</sup> ASR art 50. Further, if a state materially breaches a provision of a multilateral treaty, another state party may elect to suspend the operation of the treaty or terminate it on that basis. However, where the treaty relates to ‘the protection of the human person contained in treaties of a humanitarian character’, states parties are prohibited from suspending or terminating it as a response to material breach. See VCLT art 60(5).

<sup>128</sup> DSU art 22.2. See section 4.5.6.1.

<sup>129</sup> See, authorising the suspension of TRIPS obligations, WTO, *EC—Regime for the importation, sale and distribution of Bananas—EC Recourse to Arbitration under art 22.6 (Ecuador)*, (24 March 2000) WT/DS27/ARB/ECU [151], [153].

The determination of the nature of an obligation as *erga omnes partes* or reciprocal has implications for establishing the norm relationship between states parties obligations under ICESCR and their obligations under TRIPS. While much remains unsettled, what is clear from the above analysis is that international law recognises the particular importance of ‘fundamental human rights’ as obligations *erga omnes partes*. It creates particular mechanisms to enable state accountability outside of reciprocal relations; prevents suspension of such obligations; and recognises the ‘high ideals’<sup>130</sup> of community interest behind them. There is an underlying assumption of the well-being of the international community as a whole being promoted by these obligations.

What substantive weight, if any, should be given to such norms when in conflict with reciprocal obligations? The Fragmentation Report highlights this as an area for future study.<sup>131</sup> The above analysis provides good reasons for the following conclusion – that obligations *erga omnes partes that are in the nature of human rights* cannot be limited by the performance of reciprocal obligations.<sup>132</sup> To the extent that it is arguable that obligations under TRIPS are in the nature of reciprocal obligations, this would offer one possible tool for the resolution of conflicts described in section 4.3.

As noted in the case of all the above tools, much turns on the interpreter and the institutional context in which they are interpreting the relevant treaty provisions. The interpreter decides the salience of specificity and temporality, and makes a determination as to the nature of the obligation. The Fragmentation Report notes:<sup>133</sup>

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<sup>130</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion [1951] ICJ Reports 15 [23].

<sup>131</sup> Fragmentation Analysis (n 38) 251(d), (e); 253(f).

<sup>132</sup> *ibid* [313]. For a similar principle applied to *inter se* treaty modifications see VCLT art 41(1)(b)(ii). See also, Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (OUP 2011) 50.

<sup>133</sup> Fragmentation Analysis (n 38) [488].

The world is irreducibly pluralistic. The law cannot resolve in an abstract way any possible conflict that may arise between economic and environmental regimes, between human rights and diplomatic immunity or between a universal law of the sea regime and a regional fisheries treaty. Each has its experts and its ethos, its priorities and preferences, its structural bias. Such regimes are institutionally “programmed” to prioritise particular concerns over others.

The various tensions outlined in section 4.3 cannot be resolved in the abstract.<sup>134</sup> For this reason, I turn to the normative environment of the competing obligations at issue.

#### **4.5. Institutional features contributing to ‘structural bias’: comparing the WTO DSS and CESC**

In this section, I advance a comparative analysis of select institutional features of the WTO DSS and the CESC.<sup>135</sup> I argue that these features condition the application of the techniques analysed in section 4.4, and influence states’ domestic construction of the harmonious interpretation advanced in Chapters 2 and 3. I compare these bodies as they are specifically prescribed in the relevant treaties discussed in Chapters 2 and 3.

The norms analysed in Chapters 2 and 3 cannot be separated from their normative environment – particularly when comprised of adjudicatory bodies that have the power to enforce particular interpretations.<sup>136</sup> This approach exposes the hollowness of international law’s false equivalence of treaty obligations by analysing the institutional features attracting the fulfilment of one set of norms over the other.<sup>137</sup> Finally, this approach provides an

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<sup>134</sup> See, Alexandra Khrebtukova, ‘A Call to Freedom: Towards a Philosophy of International Law in an Era of Fragmentation’ (2008) 4 JILIR 51, 68.

<sup>135</sup> For a similar study on the right to health but *only* analysing the WTO DSS, see Holger Hestermeyer, *Human Rights and the WTO* (OUP 2008).

<sup>136</sup> PS Berman, ‘Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism’ (2013) 20 Indiana Journal of Global Legal Studies 665, 679.

<sup>137</sup> See, for the claim that ‘fears of the human rights community are directly traceable to the strengthening of the trade regime’s dispute settlement system’, CM Vazquez, ‘Trade Sanctions and Human Rights - Past, Present, and Future’ (2003) 6 JIEL 797, 804.

insight into the value system on which the WTO DSS and CESCRR are based and lays bare its ‘structural bias’ that ‘prefers some outcomes or distributive choices to others’.<sup>138</sup> I argue that this impacts the domestic effect given to these norms.

The features analysed in the next section do not constitute an exhaustive list. I selected them on the basis that they are likely to be present in most, if not all, international (and indeed, domestic) institutions tasked with adjudicating this issue. This analysis is thus replicable in respect of other relevant institutions, such as other human rights treaty bodies. The features analysed below are: (1) the constitutive instruments; (2) composition of the bodies; (3) jurisdiction and standing; (4) applicable law and rules of interpretation; (5) standard of review; (6) remedies and enforcement and (7) monitoring functions. Where the institutional framework is established by treaty, the interpretation of these procedures is *also* subject to the VCLT. This will become apparent in the comparison below.

#### 4.5.1. Constitutive Instruments

##### **4.5.1.1. WTO DSS**

The WTO was founded in 1995, after the conclusion of the Uruguay Round of multilateral trade negotiations.<sup>139</sup> The WTO Agreement states that the WTO forms a ‘common institutional framework’ for the purpose of ‘conduct[ing] trade relations among its members,’ through ‘reciprocal and mutually advantageous arrangements’.<sup>140</sup> The Agreement establishes a General Council that consists of representatives of all member

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<sup>138</sup> Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 39) 607, 569.

<sup>139</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (adopted 15 April 1994) 1867 UNTS 14.

<sup>140</sup> WTO Agreement preamble, art II.

states.<sup>141</sup> The General Council also sits as the Dispute Settlement Body (DSB) as well as the Trade Policy Review Body (TPRB).<sup>142</sup> I discuss the Trade Policy Review Mechanism (TPRM) in section 4.5.7.1.

The WTO DSU, concluded in the form of an agreement annexed to the WTO Agreement,<sup>143</sup> describes the DSS as ‘providing security and predictability to the multilateral trading system’.<sup>144</sup> Its objectives are: first seeking a mutually agreeable solution to both parties to the dispute; if this is not possible, then to ‘secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements’; and as a last resort, suspension of obligations in the form of authorised sanctions.<sup>145</sup> The DSB functions in three capacities – establishing Panels; adopting the reports of Panels and the Appellate Body; and monitoring the implementation of rulings and authorising sanctions for non-compliance.<sup>146</sup> These founding values permeate through the system and structure interpretive choices. As discussed in section 4.4, given this regime is constructed by treaty law, the WTO DSU, and all the other agreements that form a part of the WTO Agreement, requires the application of the VCLT to interpret its provisions and determine its validity. I return to the object and purpose of the DSU below.

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<sup>141</sup> WTO Agreement art IV.2.

<sup>142</sup> WTO Agreement arts IV.3, IV.4.

<sup>143</sup> WTO Agreement annex 2. See also, Peter-Tobias Stoll, ‘Article 3 DSU General Provisions’ in Karen Kaiser, Peter-Tobias Stoll, and Rüdiger Wolfrum (eds), *WTO - Institutions and Dispute Settlement* (Brill-Nijhoff 2006) 308.

<sup>144</sup> WTO DSU art 3.2.

<sup>145</sup> WTO DSU art 3.7.

<sup>146</sup> WTO DSU art 2.1.

#### **4.5.1.2. CESCR**

The CESCR forms part of the UN human rights treaty body system.<sup>147</sup> The CESCR was established by a resolution of the Economic and Social Council (ECOSOC), transforming its Sessional Working Group on the Implementation of the International Covenant on Economic, Social and Cultural Rights,<sup>148</sup> to fulfil the task of monitoring the implementation of the ICESCR.<sup>149</sup> The Optional Protocol to the ICESCR (OPICESCR)<sup>150</sup> further expanded the role of the CESCR to include a quasi-judicial function – the examination of individual and group communications regarding violations of the ICESCR.<sup>151</sup> States parties may make declarations accepting the competence of the CESCR to hear inter-state disputes<sup>152</sup> and conduct inquiries into grave and systemic human rights violations.<sup>153</sup> The stated purpose of the OPICESCR is ‘to achieve the purposes of the [ICESCR] and the implementation of its provisions’.<sup>154</sup> Although I focus on CESCR, I draw on common procedures and practices adopted by other treaty bodies where

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<sup>147</sup> For the history of the CESCR and its antecedents, see Catarina de Albuquerque, ‘Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights—The Missing Piece of the International Bill of Human Rights’ (2010) 32 HRQ 144.

<sup>148</sup> ECOSOC, Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, (28 May 1985) E/Res/1985/17.

<sup>149</sup> ICESCR arts 21-22.

<sup>150</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, came into force 5 May 2013) 2922 UNTS 29.

<sup>151</sup> OPICESCR arts 1, 2.

<sup>152</sup> OPICESCR art 10.

<sup>153</sup> OPICESCR art 11.

<sup>154</sup> OPICESCR preamble.

appropriate.<sup>155</sup> Since the OPICESCR and the ICESCR are treaties, the VCLT is applicable to interpret the meaning of their provisions.

#### 4.5.2. Composition

##### **4.5.2.1. WTO DSS**

The DSB is charged with establishing Panels to adjudicate upon disputes between member states of the WTO.<sup>156</sup> Upon mutual agreement of states party to the dispute, panellists act as adjudicators in resolving the dispute before them.<sup>157</sup> If the states parties to the dispute are unable to agree on panellists, the Director General in consultation with the Chair of the DSB and the Chair of the relevant council makes the final decision.<sup>158</sup> Panellists are nominated by member states and collated into a list maintained by the WTO Secretariat wherein their knowledge of ‘international trade and of the sectors or subject matter of the covered agreements’ is recorded.<sup>159</sup> Panellists must be experts in trade law.<sup>160</sup>

The DSB also appoints members to the standing Appellate Body, which is the DSS’ appellate authority.<sup>161</sup> The Appellate Body consists of seven persons composed into Panels of three on a rotational basis.<sup>162</sup> They must be ‘persons of recognised authority, with

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<sup>155</sup> See UNGA, Resolution on Strengthening and enhancing the effective functioning of the human rights treaty body system, 9 April 2014, A/RES/68/268; Measures to improve further the effectiveness, harmonisation and reform of the treaty body system, Report of the Secretary-General, 7 September 2011 A/66/344 [36],[43]-[44].

<sup>156</sup> WTO DSU art 6.

<sup>157</sup> WTO DSU art 8.5.

<sup>158</sup> WTO DSU art 8.7.

<sup>159</sup> WTO DSU art 8.4.

<sup>160</sup> WTO DSU art 8.1.

<sup>161</sup> WTO DSU art 17.

<sup>162</sup> WTO DSU art 17.1.

demonstrated expertise in law, international trade and the subject matter of the covered agreements generally’ and be unaffiliated with any government.<sup>163</sup> These are the interpreters who are charged with interpreting the relevant treaty provisions within the DSS.<sup>164</sup>

#### **4.5.2.2. CESCR**

The CESCR is comprised of eighteen experts, acting in their personal capacity and representing equitable geographical distribution, as well as diverse social and legal systems.<sup>165</sup>

States parties to the ICESCR are empowered to nominate persons to the ECOSOC. The member states of the ECOSOC then elect persons to the CESCR on a four yearly basis.<sup>166</sup> The members of the CESCR carry out their monitoring and adjudicatory functions through Working Groups and Rapporteurs established according to internal rules of procedure.<sup>167</sup> However, the final decision on a communication is taken by the Committee as a whole.<sup>168</sup> These are the interpreters who are charged with

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<sup>163</sup> WTO DSU art 17.3.

<sup>164</sup> For a critique of the composition of panels, see S Narayanan, ‘Dispute Settlement Understanding of the WTO: Need for Improvement and Clarification’ (2003) Working paper no 117 Indian Council for Research on Economic Relations 14.

<sup>165</sup> E/Res/1985/17 (n 148) [b].

<sup>166</sup> *ibid* [c].

<sup>167</sup> CESCR, Provisional rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the Committee at its forty-ninth session (12-30 November 2012), E/C.12/49/3 rules 6, 9, 10. (‘OPICESCR Rules of Procedure’)

<sup>168</sup> OPICESCR Rules of Procedure rule 14.

interpreting the relevant treaty provisions within the normative environment of the UN human rights treaty body system.<sup>169</sup>

### 4.5.3. Jurisdiction and standing

#### **4.5.3.1. WTO DSS**

The DSU provides that its rules and procedures apply to the ‘covered agreements’, including the TRIPS Agreement.<sup>170</sup> Claims may be brought in respect of measures taken by member states that lead to the nullification or impairment of any benefit emerging from any provision of a ‘covered agreement’ or an impediment to its achievement – whether couched as a violation of a provision of a ‘covered agreement’, non-violations or situations.<sup>171</sup> The WTO DSU provides for three stages of a dispute:<sup>172</sup> first, bilateral consultations between the parties to arrive at a mutually agreed solution pursuant to the DSU;<sup>173</sup> second, if consultations fail,<sup>174</sup> the parties to the dispute may file a request for a panel to be constituted to adjudicate upon the dispute,<sup>175</sup> and following receipt of the panel report parties may appeal to the Appellate Body to review the decision;<sup>176</sup> and third, the

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<sup>169</sup> See, for a critical comment on the normative legitimacy of the composition of CESCR, Sandra Liebenberg, ‘Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol’ (2020) 42 HRQ 48, 55.

<sup>170</sup> WTO Agreement annex 1C, appendix 1. A preliminary search on the WTO cases database as on 30 March 2021 indicated that the DSS has resolved 42 disputes regarding TRIPS.

<sup>171</sup> WTO Secretariat, *A Handbook on the WTO Dispute Settlement System: Prepared by the Legal Affairs Division and the Rules Division of the WTO Secretariat, and the Appellate Body Secretariat* (2nd edn, CUP 2017) 48.

<sup>172</sup> *ibid* 49, 190.

<sup>173</sup> WTO DSU arts 3.7, 4.

<sup>174</sup> Consultations are legally required before the composition of a panel. Eg., WTO, US—*Continued Existence and Application of Zeroing Methodology*, *Appellate Body Report* (19 February 2009) WT/DS350/AB/R [222].

<sup>175</sup> WTO DSU art 3.7, 6.

<sup>176</sup> WTO DSU arts 16.4, 17.

adoption of the reports by the DSB to bind the parties, and subsequent implementation proceedings if any.<sup>177</sup>

Importantly, the DSS has exclusive compulsory jurisdiction over the members of the WTO.<sup>178</sup> In other words, member states are *obliged* to approach the DSS to redress perceived inconsistencies with any of the ‘covered agreements’, upon failure of consultations.<sup>179</sup> The DSU prioritises the DSS, for the determination of TRIPS-related matters, to the exclusion of other available adjudicatory mechanisms.<sup>180</sup> In the context of a claim related to access to educational materials under copyright, where a state is party to the treaties analysed in Chapters 2 and 3 *and* TRIPS (which incorporates the Berne Convention), the exclusive compulsory jurisdiction will operate to suck the dispute into the DSS.<sup>181</sup> Given the near-universal application of the ICESCR and its overlap in states parties with member states of the WTO, it is highly likely that disputes related to access to educational materials under copyright will be decided in this normative environment.

In constituting a Panel, the DSB drafts ‘terms of reference’ that effectively forms a statement of jurisdiction for that Panel.<sup>182</sup> Panels’ standard terms of reference limit their jurisdiction to the ‘covered agreements’.<sup>183</sup> However, members may choose to establish

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<sup>177</sup> WTO DSU arts 17.14, 21, 22.

<sup>178</sup> WTO DSU art 23.

<sup>179</sup> Unless they opt for arbitration under WTO DSU art 25. See, WTO Secretariat (n 171) 175.

<sup>180</sup> Eg., WTO, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report, (16 January 1998) WT/DS50/AB/R [29]; *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, Appellate Body Report (14 November 2008) WT/DS321/AB/R [371].

<sup>181</sup> This is notwithstanding Berne Convention art 33 that stipulates the ICJ as the forum of choice for dispute resolution. The ICJ has never been approached in this regard.

<sup>182</sup> WTO DSU art 7.

<sup>183</sup> WTO DSU art 7.1.

‘non-standard’ terms of reference.<sup>184</sup> Parties to the dispute may consensually expand the jurisdictional limitation provided for in the standard terms of reference.<sup>185</sup> However, WTO members have the right to *object* to non-standard terms of reference agreed by the parties.<sup>186</sup> Panels also have the competence to independently determine whether they have jurisdiction in a particular case.<sup>187</sup> On one interpretation, within its normative environment, art 7.3 only enables the inclusion of other sources of international law outside of the ‘covered agreements’ where referred to by ‘covered agreements’ or to interpret ‘covered agreements’, in light of the object and purpose of DSS to ‘preserve the rights and obligations of Members under the “covered agreements”, and to clarify the existing provisions of those agreements’.<sup>188</sup> However, on an integrationist interpretation<sup>189</sup> such as the one advanced in Chapter 3, it is arguable that the operation of international human rights law is key to clarifying the scope of the existing provisions of TRIPS in a dispute concerning access to educational materials. Other member states’ right to object, as well

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<sup>184</sup> WTO DSU art 7.3.

<sup>185</sup> Non-standard terms of reference were authorised in WTO, *Brazil—Measures Affecting Desiccated Coconut*, (17 October 1996) WT/DS22/R. See also, arguing for jurisdiction to extend to indispensable incidental issues in the context of general defences, Anna Ventouratou, ‘The WTO Security Exceptions and Defences under the Law of State Responsibility’, International Economic Law and Security Interests Conference, Amsterdam Centre for International Law and European Society for International Law Interest Group International Economic Law (November 2019).

<sup>186</sup> Petros Mavroidis, ‘Article 7 DSU Terms of Reference of Panels’ in Karen Kaiser, Peter-Tobias Stoll, and Rüdiger Wolfrum (eds), *WTO - Institutions and Dispute Settlement* (Brill-Nijhoff 2006) 356. Although, as of 2006, no member state has exercised this right.

<sup>187</sup> WTO, *US—Anti-Dumping Act of 1916, Appellate Body Report*, (26 September 2000) WT/DS136/AB/R [54, fn 30].

<sup>188</sup> Eg., Petros Mavroidis (n 186) 355–356; David Palmeter and Petros Mavroidis, ‘The WTO Legal System: Sources of Law’ (1998) 92 AJIL 398, 405.

<sup>189</sup> Eg., Lorand Bartels, ‘Applicable Law in WTO Dispute Settlement Proceedings’ (2001) 35 JWT 499, 505; Joost Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95 AJIL 535.

as Panels' own interpretation of their terms,<sup>190</sup> however, act as deterrents to broad terms of reference.

In terms of standing, any member state of the WTO can bring a complaint that 'any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member.'<sup>191</sup> On one interpretation, the presumption is that the complainant state has been adversely affected.<sup>192</sup> Rather than the complainant, the respondent state bears the burden of proof to demonstrate compliance with the 'covered agreement'.<sup>193</sup> On a different interpretation, in the context of exceptions to TRIPS, it has been argued that a mere assertion of inconsistency of a measure with the three-step test, for instance, is insufficient to claim a *prima facie* violation.<sup>194</sup> The complainant state must adduce evidence and demonstrate the failure of fulfilment of all three steps of the test by the respondent state for its claim to be valid.<sup>195</sup> The latter interpretation would limit unsubstantiated claims to a certain degree. On the third step of the test, it could also lead to argument on the *reasonableness* of the prejudice that the right holder has faced, if at all, and enable potential right to education justifications to enter the enquiry at that early stage.

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<sup>190</sup> Eg., WTO, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, Appellate Body Report (24 March 2006) WT/DS308/AB/R [56] stating 'we see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes'.

<sup>191</sup> WTO DSU art 3.3. See also, WTO DSU art 3.8, 3.1.

<sup>192</sup> Peter-Tobias Stoll (n 143) 310.

<sup>193</sup> WTO, *Argentina—Definitive Anti-Dumping Measures on Carton-Board Imports from Germany and Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy* (5 November 2001) WT/DS189/R [6.105].

<sup>194</sup> The fact that an exception is being interpreted is irrelevant to determining the burden of proof. See WTO, *EC—Trade Description of Sardines*, Appellate Body Report (23 October 2002) WT/DS231/AB/R [275].

<sup>195</sup> WTO, *Canada—Patent Protection of Pharmaceutical Products* (7 April 2000) WT/DS114/R [7.60]. See also, Matthew Kennedy, *WTO Dispute Settlement and the TRIPS Agreement: Applying Intellectual Property Standards in a Trade Law Framework* (CUP 2016) 141–147.

Further, Panels have required the complainant to demonstrate a particular interest in the compliance the provision that has been alleged to be breached. At the same time, some Panels have decided claims brought by complainant states that were not directly injured.<sup>196</sup> In the context of educational materials under copyright, this means that if domestic legislation enacted by one member state, making use of the ‘fair practice’ in art 10(2) of the Berne Convention to realise the right of access to educational materials, is perceived by another member state to have impaired the protection of its authors’ copyright under TRIPS, it may bring a claim before the DSS. On one interpretation, the presumption of impairment would act in favour of the complainant state – while on the other, it would have to demonstrate impairment. Moreover, given the recent practice, even if the complainant state’s authors’ copyright was not directly in issue, it could still potentially bring a claim against the respondent state. This, I argue, increases the omnipresent shadow of the WTO DSS over any domestic measure in respect of copyright.<sup>197</sup>

#### **4.5.3.2. CESC**

The CESC has subject-matter jurisdiction over the rights in the ICESC.<sup>198</sup> However, the inter-state communications mechanism within the CESC has not been extensively

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<sup>196</sup> See section 4.4.3.1.

<sup>197</sup> See, stating ‘[WTO DSU art 3] strongly supports actions by Members against violations of agreements, because it renders it easier to establish standing in the proceedings,’ Peter-Tobias Stoll (n 143) 310.

<sup>198</sup> Christian Courtis and Julieta Rossi, ‘Individual Complaints Procedure’ in Malcolm Langford and others (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (PULP 2016) 39–42.

utilised.<sup>199</sup> Rather, inter-state disputes have tended to be brought to international courts,<sup>200</sup> even when they have dealt with issues relating to the application or interpretation of the ICESCR and other human rights treaties. This indicates that the jurisdiction of CESCR and other treaty bodies is non-exclusive and non-compulsory – the existence of treaty body procedures does not prevent states, individuals and groups from resorting to an alternative means of dispute settlement.<sup>201</sup>

In the first instance, ‘individuals and groups of individuals’ who are ‘victims of a violation’ and within the ‘jurisdiction’ of states party to the ICESCR have the standing to bring claims.<sup>202</sup> The jurisdictional limit differs from the text of the ICESCR, which explicitly imposes obligations not only on states parties in respect of persons within their jurisdiction but also to provide international assistance and cooperation in the nature of *extra-territorial* obligations.<sup>203</sup> For instance, a complaint that the activities of publishers based in a particular state party violate the right of access to educational materials (as a part of the right to education under the ICESCR) of persons based within another state party’s jurisdiction would trigger a violation of the ICESCR (to the extent that it can be shown that eg., the original state party failed to take steps to regulate the activities of such

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<sup>199</sup> At the time of writing, there have been no inter-state complaints at the CESCR. In terms of the individual communications procedure, the CESCR has adopted views in respect of 6 communications; declared 16 communications inadmissible; 18 communications were withdrawn or discontinued; and 122 communications were not yet concluded. See CESCR, Report on the sixty fifth and sixty sixth sessions, Official Records 2020, supplement 2, 67<sup>th</sup> session 2020, E/2020/22 and E/C12/2019/3 [76].

<sup>200</sup> Eg., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v Russian Federation*), Preliminary Objections, [2011] ICJ Reports 70; Armed Activities on the Territory of the Congo, (*DRC v Uganda*), Merits, [2005] ICJ Reports 168.

<sup>201</sup> Regarding CERD, *ibid* (*Georgia v Russian Federation*) [115]-[147].

<sup>202</sup> OPICESCR art 2.

<sup>203</sup> See Christian Courtis and Julieta Rossi (n 198) 49–51.

publishers under its duty to respect, protect and fulfil the right to education) but would not be within the jurisdiction of the CDESCR complaints procedure.<sup>204</sup>

Claims may also be brought on behalf of affected persons, in which case, their consent must be demonstrated or there must be a reasonable justification for acting without consent.<sup>205</sup> Further, there are certain circumstances where a communication to the CDESCR is inadmissible. These are: non-exhaustion of local remedies (unless these remedies are prolonged and likely to be futile);<sup>206</sup> a time limit of one year has passed since local remedies have been exhausted;<sup>207</sup> non-retroactive application unless the violation continues after the OPICESCR came into force;<sup>208</sup> the communication is incompatible with the ICESCR;<sup>209</sup> the communication is a mere assertion or it is ‘ill-founded’;<sup>210</sup> it is an abuse of process;<sup>211</sup> when it is not submitted in writing;<sup>212</sup> and when it is anonymous.<sup>213</sup> Moreover, where the CDESCR or another international dispute settlement mechanism is already seized

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<sup>204</sup> It has been argued that disputes related to extra-territorial obligations can be brought to the CDESCR through the inter-state mechanism or the inquiry procedure if the relevant states parties have consented to them. See M Sepúlveda Carmona and Christian Courtis, ‘Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR?’ (2009) 27 NJHR 54.

<sup>205</sup> OPICESCR art 2; OPICESCR Rules of Procedure rule 4. Christian Courtis and Julieta Rossi (n 198) 46–48.

<sup>206</sup> OPICESCR art 3(1). Eg., on inadmissibility due to non-exhaustion of local administrative remedies, CDESCR, *AMB v Ecuador*, Communication No 3/2014, E/C12/58/D/3/2014 (2016) [7.5]-[7.6].

<sup>207</sup> OPICESCR art 3(2)(a).

<sup>208</sup> OPICESCR art 3(2)(b). Eg., CDESCR, *Flores v Ecuador*, Communication No 14/2016 E/C12/62/D/14/2016 (2017) [9.7]. See, for a continuing violation declared admissible, CDESCR, *Rodríguez v Spain*, Communication No 1/2013 E/C12/57/D/1/2013 (2016) [8.4]. See, Sandra Liebenberg (n 169) 58–59.

<sup>209</sup> OPICESCR art 3(2)(d).

<sup>210</sup> OPICESCR art 3(2)(e).

<sup>211</sup> OPICESCR art 3(2)(f).

<sup>212</sup> OPICESCR art 3(2)(g).

<sup>213</sup> *ibid.*

of the matter,<sup>214</sup> it is inadmissible. Given that the framing of the dispute under the WTO DSS would likely be framed as an inconsistency of a measure with ‘covered agreements’, and a complaint under the CESCER framed as a violation of the ICESCR, it is likely that both bodies function at the same time to determine the particular dispute and would not be hit by *litispendence*. This is a paradigmatic example of the fragmentation of international adjudication outlined in section 4.4. Further, where the communication does not indicate any clear disadvantage faced by the complainant, the CESCER *may* decline to consider it unless it raises ‘a serious issue of general importance’.<sup>215</sup> This provision has been interpreted both by CESCER<sup>216</sup> and the literature<sup>217</sup> as an optional provision at the discretion of the CESCER whether to consider the lack of a clear disadvantage as a grounds for inadmissibility bearing in mind the nature of the rights in question, the gravity of the violation, and the effect of the violation on the complainant.<sup>218</sup> This is significantly different from the WTO DSS presumption of impairment on part of the complainant state.

#### 4.5.4. Applicable law<sup>219</sup> and rules of interpretation

##### **4.5.4.1. WTO DSS**

Since the WTO DSS is established by a treaty, and acts as the interpreter of treaties, it remains squarely a part of the international legal system. International law continues to

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<sup>214</sup> OPICESCR art 3(2)(c).

<sup>215</sup> OPICESCR art 4.

<sup>216</sup> CESCER, *Djazia and Bellili v. Spain*, Communication No 5/2015, E/C12/61/D/5/2015, (2017) [11.5]

<sup>217</sup> Christian Courtis and Julieta Rossi (n 198) 59; Sandra Liebenberg (n 169) 62–63.

<sup>218</sup> *Djazia and Bellili v Spain* (n 216) [11.5].

<sup>219</sup> The line between application and interpretation is a fine one. See Isabelle Van Damme, ‘Jurisdiction, Applicable Law, and Interpretation’ in Daniel Bethlehem, Donald Mcrae, and Rodney Neufeld (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 318–322.

apply to resolving disputes within the DSS unless the WTO DSU explicitly ‘contracts out of it’.<sup>220</sup> However, the question of the *extent* to which Panels may apply international law outside the ‘covered agreements’ is an open one.<sup>221</sup> This is relevant to understanding the extent to which the WTO DSS’ institutional design even enables it to acknowledge the existence of the inter-regime conflicts outlined in section 4.3.

There are good reasons to prefer an integrationist interpretation that affirms the competence of Panels to apply international law outside the ‘covered agreements’.<sup>222</sup> In addition to the harmonisation imperative discussed throughout this Chapter, the text of the DSU and its functions and purposes can be interpreted to support such an interpretation.<sup>223</sup> The DSU provides that Panels must undertake an ‘objective assessment’ of the matter at hand including of the facts and the ‘covered agreements’ and are enabled to ‘make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements’.<sup>224</sup> Panels are also empowered to apply *suo moto* international law that it considers relevant that may not have been quoted in the legal claims made by the members.<sup>225</sup> Thus, in carrying out its ‘objective assessment’,

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<sup>220</sup> Fragmentation Analysis (n 38) [221]; WTO, *Korea–Measures Affecting Government Procurement*, (1 May 2000) WT/DS163/R [7.96].

<sup>221</sup> Joost Pauwelyn, ‘Sources of International Trade Law’ in Samantha Besson and Jean d’Aspremont (eds), *Oxford Handbook of the Sources of International Law*, vol 1 (OUP 2018) 1034–1038. However, the practice so far has limited remedial powers of Panels to the provisions in the ‘covered agreements’. See also section 4.5.6.1.

<sup>222</sup> WTO, *US–Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R [17] stating famously that the WTO must not operate in ‘clinical isolation’ from the rest of the international legal system.

<sup>223</sup> Joost Pauwelyn, *Conflict of Norms* (n 8) 468.; See generally Lorand Bartels (n 189).

<sup>224</sup> WTO DSU art 11.

<sup>225</sup> WTO DSU art 6.2 ; WTO, *Argentina — Safeguard Measures on Imports of Footwear (EC)*, *Appellate Body Report*, (12 January 2000) WT/DS121/AB/R [74].

Panels have applied international law in order to develop its own reasoning.<sup>226</sup> What is the scope of ‘international law’ applied in this manner? It is settled that customary international law is applicable as a part of this function to the extent that it assists with determination of evidentiary standards, or burden of proof, for instance.<sup>227</sup> It is also settled that where the treaty that is sought to be applied is referred to by a ‘covered agreement’, it forms part of the applicable law.<sup>228</sup> There is a degree of consensus in the literature up to this point.<sup>229</sup> The debate arises regarding treaties that are not a part of the ‘covered agreements’ nor referred to by a ‘covered agreement’ but are sought to either be relied on by the DSS in its chain of reasoning, or brought up by one of the respondent parties in response to a complaint.

Some commentators adopt an interpretation of the ‘assistive findings’ that Panels are empowered to make in its ‘objective assessment’ as limited to findings of fact.<sup>230</sup> This is on the basis that expanding the applicable law beyond the ‘covered agreements’ would make them non-uniform across members and would fail to ‘preserve the balance of rights and obligations’ in the single undertaking.<sup>231</sup> Others argue that these findings include international law outside the ‘covered agreements’ to the extent relevant in the chain of

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<sup>226</sup> Eg., WTO, *Brazil—Certain Measures Concerning Taxation and Charges*, *Appellate Body Report*, (11 January 2019) WT/DS472/AB/R [5.171]; *Indonesia—Safeguard on Certain Iron or Steel Products*, *Appellate Body Report*, (27 August 2018) WT/DS496/AB/R [5.32]-[5.33].

<sup>227</sup> Isabelle Van Damme (n 219) 315.

<sup>228</sup> See, *EC—Bananas III* (n 60) [167]. See, referring to the Berne Convention as part of TRIPS, see *EC—Section 110(5) US Copyright Act* (n 95) [6.17-6.18].

<sup>229</sup> Eg., Joost Pauwelyn, *Conflict of Norms* (n 8) 472–3; Peter-Tobias Stoll (n 143) 292; JP Trachtman, ‘The Jurisdiction of the World Trade Organisation’ (2004) 98 *Proceedings of the ASIL Annual Meeting* 135, 141.

<sup>230</sup> JP Trachtman (n 229) 141.

<sup>231</sup> WTO DSU arts 3.2, 19.2. See, advancing this argument, JP Trachtman, ‘The Domain of WTO Dispute Resolution’ (1999) 40 *HILJ* 333, 342; PJ Kuijper, ‘A Legal Drafting Group for the Doha Round: A Modest Proposal’ (2003) 37 *JWT* 1031, 1032.

reasoning.<sup>232</sup> Still others have observed, as of 2015, that parties have failed to raise human rights treaties and the WTO DSS has failed to *suo moto* take them into account, even in disputes related to human rights.<sup>233</sup>

However, recent WTO practice indicates that where a member state has adopted a measure in fulfilment of its obligations under a treaty outside of the ‘covered agreements’, and the purpose of that treaty is reflected in the ‘preamble objectives’ of the ‘covered agreement’ being examined, the treaty plays a confirmatory role in interpreting the importance of those objects.<sup>234</sup> In the same case, although the WTO DSS did not directly consider the use of treaties outside the ‘covered agreements’ acting as a legal defence to non-fulfilment of obligations under the ‘covered agreements’, it took the interpretive route to arrive at a similar conclusion.<sup>235</sup> This is relevant to access to educational materials. Using similar logic, it is arguable that where an educational exception pursuant to art 10(2) is challenged as not fulfilling the three-step test in TRIPS, the respondent state may advance an argument sourced in the objects and purposes of TRIPS to justify the breadth of the measure. This would be along the lines that the measure ‘promote[s] the public interest in sectors of vital importance to their socio-economic and technological development’,<sup>236</sup> and

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<sup>232</sup> Joost Pauwelyn, ‘The Jurisdiction of the World Trade Organisation’ (2004) 98 Proceedings of the ASIL Annual Meeting 135, 136; Lorand Bartels (n 189) 507.

<sup>233</sup> Henrik Andersen, ‘Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions’ (2015) 18 JIEL 383, 394.

<sup>234</sup> WTO, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Appellate Body Report (29 June 2020) WT/DS435/AB/R [7.243]-[7.244] identifying public health as a ‘legitimate objective’ under the Agreement on Technical Barriers to Trade and TRIPS). This included setting out the relevant provisions of the Framework Convention on Tobacco Control (‘FCTC’) [2.4]-[2.4.5]. Australia (the respondent state) raised fulfilling the FCTC as one of the reasons for the measure [7.204]-[7.207].

<sup>235</sup> *ibid.* The Appellate Body determined that the measure in question was indeed trade restrictive, but that the alternatives available [7.1362]-[7.1723] were no less trade restrictive in relation to fulfilling the public health objective of the measure [7.12550]. Further, the non-fulfilment of the public health objective of the measure was particularly grave [7.1317], [7.1310], and this outweighed the loss of imports [7.1725].

<sup>236</sup> TRIPS art 8(1).

therefore the prejudice (if any) to the interests of the right holder would be *reasonable* on this basis. In employing the interpretive route, the WTO DSS does not explicitly acknowledge the existence of an apparent conflict and harmonisation takes place through existing provisions of the ‘covered agreements’.

Further, the DSU explicitly provides for the applicability of ‘customary rules of interpretation of public international law’ to interpret the ‘covered agreements’.<sup>237</sup> This entails the application of arts 31 and 32 of the VCLT as described in the Introduction to this Thesis.<sup>238</sup> In the same provision as the rules of interpretation, the DSU states the purpose of the DSS as a whole as one that ‘*preserve[s]* the rights and obligations of Members under the covered agreements’ and ‘*clarif[ies]* the existing provisions of those agreements’ and that ‘*cannot add to or diminish* the rights and obligations provided in the covered agreements’.<sup>239</sup> The italicised words indicate a strong emphasis on an approach to interpretation that seeks to maintain the *status quo*. In light of this, it is unsurprising that the approach taken by the WTO DSS has been largely textual,<sup>240</sup> relying almost exclusively on art 31(1) of the VCLT.<sup>241</sup> The WTO DSS has, in some cases, drawn on the presumption

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<sup>237</sup> WTO DSU art 3.2. See also, Peter-Tobias Stoll (n 143) 287–302.

<sup>238</sup> Eg., *US–Gasoline* (n 222) [17].

<sup>239</sup> WTO DSU art 3.2 (emphasis added).

<sup>240</sup> Eg., WTO, *EC— Measures Concerning Meat and Meat Products (Hormones)*, (13 February 1998) WT/DS26/AB/R, WT/DS48/AB/R [181]; *Japan—Taxes on Alcoholic Beverages II*, (1 November 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R [D]. See, for a critique of the frequency with which the WTO resorts to the dictionary to the exclusion of applying other rules of international law to interpret treaties, Isabelle Van Damme, ‘On ‘Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding’--A Reply to Professor Chang-Fa Lo’ (2011) 2 JIDS 231.

<sup>241</sup> Eg., WTO, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *Appellate Body Report* (6 November 1998) WT/DS58/AB/R [114].

against conflict,<sup>242</sup> the principle of good faith,<sup>243</sup> subsequent practice,<sup>244</sup> and other relevant rules of international law.<sup>245</sup> In applying these rules of interpretation, where the DSS considers that the rights and obligations of member states under the ‘covered agreements’ are modified in any way by a particular interpretation, it is likely to avoid such an interpretation. Moreover, it has been argued in the literature that interpreting provisions of TRIPS requires an approach that takes into account its particular objectives as opposed to the general objectives of trade liberalisation, and understand the differences between intellectual property and trade law. The existing application of the VCLT within the DSS has been critiqued on that basis.<sup>246</sup>

In terms of application of the ILC tools discussed in section 4.4, given the reluctance of the WTO DSS to recognise applicable law outside of the ‘covered agreements’ it is unlikely for the DSS to make decisions on the basis of the character of the norm. In other words, arguments that human rights law is *erga omnes partes* and the relevant TRIPS obligation is reciprocal are unlikely to be raised at all. This precludes a recognition and resolution of genuine conflicts with the right to education on the basis of the character of the norm.

#### **4.5.4.2. CESC**

The CESC, although established by a soft-law instrument, has jurisdiction over the ICESCR – a treaty. To exercise its monitoring and quasi-adjudicatory functions, the

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<sup>242</sup> But only within ‘covered agreements’. See WTO, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, (12 January 2000), WT/DS98/AB/R [81].

<sup>243</sup> But only where all parties to the dispute were also parties to the other treaty taken into account. See *US—Shrimp* (n 241) [132], [158].

<sup>244</sup> But only to the extent that it is consistent and uniform. See, *Japan—Alcoholic Beverages II* (n 240) [12]–[13].

<sup>245</sup> *EC—Hormones* (n 240) [124].

<sup>246</sup> Matthew Kennedy (n 195) 158–225.

CESCR is centrally charged with interpreting the ICESCR. The OPICESCR, detailing the communications procedure, is also a treaty that requires interpretation. Although parties must couch their claims in terms of violations of the ICESCR, they may refer to other legal instruments to substantiate their claims.<sup>247</sup>

This becomes salient for treaty bodies that address the right to education in their constitutive treaties on the basis of specific disadvantage. For instance, if an individual approaches the CRPD to address a violation of their right to access educational materials by the state, for their claim to fall within the jurisdiction of the treaty body it must be articulated as a violation of art 24 of the UNCRPD. However, in order to describe the *content* of the right of access to educational materials, the complainant may refer to the CESCR's jurisprudence as well as general comments and recommendations emerging from its monitoring function, as well as the MVT recognising the existence of a 'book famine'.

Further, to interpret UN human rights treaties, parties have invoked other UN human rights treaties,<sup>248</sup> the practice<sup>249</sup> and decisions<sup>250</sup> of other treaty bodies, as well as regional human rights conventions<sup>251</sup> and decisions of regional human rights courts,<sup>252</sup>

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<sup>247</sup> Eg., CESCR, *IDG v Spain*, Communication No 002/2014, E/C12/55/D/2/2014 (2015); *Djazia and Bellili v Spain* (n 216).

<sup>248</sup> CERD, *Murat Er v Denmark*, Communication No 40/2007, CERD/C/71/D/40/2007 (2007).

<sup>249</sup> CERD, *Stephen Hagan v Australia*, Communication No 26/2002, CERD/C/62/D/26/2002 (2003); *ZUBS v Australia*, Merits, Communication No 6/1995, CERD/C/55/D/6/1995, (2000).

<sup>250</sup> HRC, *Sanila v Finland*, Communication No 2668/2015, CCPR/C/119/D/2668/2015 (2018); CERD, *Abmed Farah Jama v Denmark*, Communication No 41/2008, CERD/C/75/D/41/2008 (2009).

<sup>251</sup> CERD, *BJ v Denmark*, Communication No 17/1999, CERD/C/56/D/17/1999 (2000).

<sup>252</sup> CERD, *Dragan Durmic v. Serbia and Montenegro*, Communication No 29/2003, CERD/C/68/D/29/2003 (2006); *The Jewish community of Oslo v Norway*, Communication No 30/2003, CERD/C/67/D/30/2003 (2005).

recommendations and concluding observations by treaty bodies.<sup>253</sup> Moreover, treaties outside of the UN human rights treaty system have been referred to in some cases.<sup>254</sup>

The UN human rights treaty bodies must apply arts 31-33 of the VCLT in interpreting the treaty provisions before them.<sup>255</sup> As discussed, there need not be an explicit provision extending the application of the VCLT to the treaty bodies.<sup>256</sup> A teleological interpretation is often adopted in interpreting human rights treaties on the basis that the open-textured terms require context-specific interpretation.<sup>257</sup> Further, good faith in interpreting human rights instruments has been interpreted to mean that the guarantees must be interpreted to be effective.<sup>258</sup> This includes adopting an evolutionary<sup>259</sup> and *pro homine*<sup>260</sup> approach where necessary.

In applying the tools described in section 4.4, until the time of writing, the CESCR has not asserted the obligations *erga omnes partes* character of the ICESCR to establish a hierarchical norm relationship in a communication before it.<sup>261</sup> This is related to its

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<sup>253</sup> CERD, *Ziad Ben Ahmed Habassi v Denmark* Communication No 10/97, CERD/C/54/D/10/1997 (1997).

<sup>254</sup> CERD, *BMS v Australia*, Communication No 8/1996, CERD/C/54/D/8/1996 (1999).

<sup>255</sup> Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 VJTL 905, 919.

<sup>256</sup> Başak Çali, 'Human Rights' in Duncan B. Hollis (ed), *The Oxford guide to treaties* (1st ed, OUP 2012) 526. See, section 4.4.

<sup>257</sup> *ibid* 531.

<sup>258</sup> *Case of the Mapiripan Massacre v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005) [104]–[108]; *Airey v Ireland* (App no 6289/73) (1981) 3 EHRR 305 [24].

<sup>259</sup> CEDAW, General Recommendation No 25: Temporary Social Measures, HRI/ Gen/1/Rev7 270 [3]; *Tyrer v United Kingdom* (App no 5856/72) (1978) 2 EHRR 1, 15–16 [31]; *Loizidou v Turkey* (App no 15318/89) 23 EHRR 513 [71].

<sup>260</sup> Drawing on the African Charter of Human and Peoples Rights and the Inter-American Convention on Human Rights, see, Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 756.

<sup>261</sup> See, for the recognition of the *erga omnes* character of the ICCPR, HRC, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant May 2004, CCPR/C/21/Rev1/Add 1326 [2].

approach in respect of placing ‘burdens of justification’ upon states parties to demonstrate that the measure in question is reasonable.<sup>262</sup> Human rights treaty bodies have been particularly cognisant of the principle of subsidiarity in interpretation.<sup>263</sup> I turn to this in my next section on standards of review.

#### 4.5.5. Standards of review

##### **4.5.5.1. WTO DSS**

Although neither TRIPS nor the DSU articulate a clear standard of review in its text,<sup>264</sup> the Appellate Body has interpreted art 11 of the DSU (‘a panel should make an objective assessment of the matter before it’) as detailing the DSS’ general standard of review as follows: ‘the applicable standard is neither *de novo* review as such, nor “total deference”’.<sup>265</sup> This does not provide much clarity.<sup>266</sup>

Interpreting the practice of the WTO DSU, commentators have argued that Panels should respect the discretion of the domestic authority in making determinations on facts.<sup>267</sup> However, in respect of legal determinations, it has been argued that Panels are required to conduct a *de novo* review in interpreting the relevant legal provisions in light of

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<sup>262</sup> Sandra Liebenberg (n 169) 54.

<sup>263</sup> For instance, the ‘margin of appreciation’ doctrine in the ECtHR, discussed in HRC, *Lämsman v Finland*, Communication No 511/1992, CCPR/C/52/D/511/1992 (1994) [9.4]; *Hertzberg v Finland*, Communication No R14/61 (1982)[10.3]. See also, the ‘denial of justice’ doctrine applied in HRC, *Ángela Poma Poma v Peru*, Communication No 1457/2006, CCPR/C/95/D/1457/2006 (2009) [7.4]; *Vavidel Sathasivam and Paratbesi Saraswathi v Sri Lanka*, Communication No 1436/2005 (2008) [6.4].

<sup>264</sup> Matthew Kennedy (n 195) 134.

<sup>265</sup> *EC—Hormones* (n 240) [117].

<sup>266</sup> Claus-Dieter Ehlermann and Nicolas Lockhart, ‘Standard of Review in WTO Law’ (2004) 7 JIEL 491, 495. See also, stating that ‘the AB appears to vary the intensity of review dependent on the concrete circumstances of a dispute, without providing general indicators of how it determines this intensity’, JH Fahner, *Judicial Deference in International Adjudication: A Comparative Analysis* (1st edn, Hart 2020) 58–70.

<sup>267</sup> Claus-Dieter Ehlermann and Nicolas Lockhart (n 266) 502. See, WTO, *US—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (5 November 2001) WT/DS192/AB/R [78].

the objects of the DSU to maintain ‘security and predictability of the multilateral trading system’.<sup>268</sup> This position in respect of legal determinations does not take into account the pursuing of ‘non-trade policy choices’,<sup>269</sup> such as those mentioned in the objects and purposes of TRIPS.<sup>270</sup> The better view, therefore, is that the degree of the intensity of review varies according to the treaty being interpreted by the DSS, rather than the same approach to all ‘covered agreements’. Commentators, having comprehensively analysed the WTO DSU’s practice in the first eight years of its existence, have noted the trend of increased scrutiny and intrusion into domestic decisions and reduced deference to domestic decision-makers.<sup>271</sup>

The standard of review applied is particularly important in respect of disputes relating to access to educational materials. For instance, where a member state enacts a domestic copyright law including exceptions for educational purposes that it believes to be compatible with its obligations under the Berne Convention and TRIPS as well as the ICESCR, it is unclear as to whether the DSS would apply a standard of review in its ‘objective assessment’ that accepts that this is one of many *reasonable* interpretations of the state’s obligations; or whether it would resort to a stricter standard of review where it undertakes a *de novo* interpretation of the obligations at issue and determine for itself the

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<sup>268</sup> *ibid* 498. Stating that ‘the [Panel] cannot set aside what it considers is the ordinary meaning of the text even in the event that, for example, the national authorities’ decision is based on an alternative reading of the text’.

<sup>269</sup> Matthew Kennedy (n 195) 134.

<sup>270</sup> TRIPS arts 7, 8. See also, for a similar critique based on the particular policy objectives of intellectual property, LR Helfer, ‘Adjudicating Copyright Claims under the TRIPs Agreement: The Case for a European Human Rights Analogy’ (1998) 39 *HILJ* 357, 388.

<sup>271</sup> Tomer Broude, ‘Selective Subsidiarity and Dialectic Deference in the World Trade Organisation’ (2016) 79 *LCP* 53, 70; Matthias Oesch, ‘Standards of Review in WTO Dispute Resolution’ (2003) 6 *JIEL* 635, 658–659.

‘correct’ interpretation. Given the literature discussed above, the latter appears to be more likely.<sup>272</sup>

#### **4.5.5.2. CESCR**

The OPICESCR contains a clear standard of review in its text.<sup>273</sup> Art 8(4) provides for the CESCR to analyse the ‘reasonableness of the steps taken by the state party’.<sup>274</sup> Further, it requires the CESCR to ‘bear in mind that the state party may adopt a range of possible policy measures for the implementation of rights’.<sup>275</sup> This is in line with the general approach outlined in section 4.5.4.2 on interpretation in respect of subsidiarity or a degree of deference to states in domestically constructing their human rights obligations.<sup>276</sup> However, this is distinct from deference as traditionally understood in respect of decisions of domestic adjudicatory bodies given that the CESCR does not function as a court of appeal.<sup>277</sup>

In practice, the reasonableness standard includes within it a particular priority for the needs of disadvantaged groups from the perspective of substantive equality.<sup>278</sup> The

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<sup>272</sup> But see, the approach taken in WTO, *EC—Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R (12 March 2001) [16].

<sup>273</sup> OPICESCR art 8(4). Although other treaty bodies do not have the same provision, HRC has developed certain factors in relation to reasonableness review. See eg., HRC, *Sandra Lovelace v Canada*, Communication No R6/24, A/36/40 (1981). Treaty bodies may draw on the jurisprudence of the CESCR and vice-versa in developing their reasonableness review. See, Andrea Broderick, ‘Harmonisation and Cross-Fertilisation of Socio-Economic Rights in the Human Rights Treaty Bodies: Disability and the Reasonableness Review Case Study’ (2016) 5 *Laws* 38.

<sup>274</sup> For its drafting history, see Bruce Porter, ‘Reasonableness and Article 8(4)’ in Malcolm Langford and others (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (PULP 2016) 177–187.

<sup>275</sup> OPICESCR art 8(4).

<sup>276</sup> See generally, Andreas Føllesdal, ‘Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights—Or Neither?’ (2016) 79 *LCP* 147. See also, comparing the standards of review in the ECtHR, IACHR, and AfCHPR, JH Fahner (n 266) 31–57.

<sup>277</sup> Bruce Porter (n 274) 190.

<sup>278</sup> *ibid* 195.

CESCR has required states parties to justify their non-fulfilment of procedural obligations;<sup>279</sup> non-fulfilment of the principle of non-discrimination;<sup>280</sup> retrogressive steps;<sup>281</sup> and legislative steps unjustifiably limiting rights under the ICESCR.<sup>282</sup> The standard of justification takes the form of a proportionality analysis with differing degrees of intensity.<sup>283</sup> For instance, regarding communications on retrogressive steps and legislative steps that limit rights under the ICESCR, the CESCR applied a strict form of proportionality analysis requiring the state party to demonstrate the availability of less restrictive means.<sup>284</sup> It has been noted that the CESCR is more likely to engage in a strict proportionality review where the group in question is particularly vulnerable and greatly affected by the impact of the measure.<sup>285</sup> Where a state party *prima facie* appears to have failed to discharge its immediately realisable obligations under the ICESCR (including the minimum core and non-discrimination obligations), or where a state party takes *prima facie* retrogressive measures, the burden of justification is on the state to demonstrate otherwise.<sup>286</sup>

In respect of a complaint brought regarding a particular domestic measure failing to realise the right of access to educational materials (eg., if the state party enacts a copyright statute without a provision for accessible format shifting limiting persons living with disabilities' right of access to educational materials), particularly if brought by

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<sup>279</sup> *IDG v Spain* (n 247) [6.4], [11.2].

<sup>280</sup> *Rodríguez v Spain* (n 208) [9.5], [14.1]

<sup>281</sup> *Djazia and Bellili v Spain* [17.5]-[17.6].

<sup>282</sup> CESCR, *Calero v Ecuador*, Communication No 10/2015 E/C.12/63/D/10/2015 (2018) [16.1]-[17.1].

<sup>283</sup> Sandra Liebenberg (n 169) 82.

<sup>284</sup> *ibid* 83.

<sup>285</sup> *ibid* 83–84.

<sup>286</sup> *ibid* 84.

disadvantaged groups such as persons living with disabilities or persons living with poverty or alternatively if it is a *prima facie* retrogressive measure (eg., if the state party enacts a stricter copyright law that reduces educational exceptions that were previously broad enough to enable the realisation of the right of access to educational materials), the burden of justification lies with the state party to demonstrate that the measure is reasonable and that it is the least restrictive means. This offers states a degree of latitude wider than the WTO DSU's standard of review.

#### 4.5.6. Remedies and enforcement

##### **4.5.6.1. WTO DSS**

The binding rulings and recommendations made by the DSS must be based on the 'covered agreements'.<sup>287</sup> This is related to its jurisdiction in section 4.5.3.1. A ruling is issued in the case of inconsistency with the 'covered agreements'. The DSS must also make recommendations for member states to 'bring the measure in conformity' with the relevant provision of the 'covered agreement'.<sup>288</sup> The DSS may also offer non-binding suggestions on implementation that are presumptively consistent with the 'covered agreement' at issue.<sup>289</sup> The DSU provides for time frames within which the respondent state is required to implement the recommendations.<sup>290</sup>

Where the DSS' recommendations are not implemented within 'a reasonable time', the DSB is empowered to request the complainant state to enter into negotiations with the

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<sup>287</sup> WTO DSU arts 3.4, 7.1, 11, 19.1.

<sup>288</sup> WTO DSU art 19. See also, WTO Secretariat (n 171) 48.

<sup>289</sup> Petros Mavroidis, 'Article 19 DSU Panel and Appellate Body Recommendations' in Karen Kaiser, Peter-Tobias Stoll, and Rüdiger Wolfrum (eds), *WTO - Institutions and Dispute Settlement* (Brill-Nijhoff 2006) 485–490.

<sup>290</sup> WTO DSU arts 20, 21.

respondent state to arrive at satisfactory compensation.<sup>291</sup> Where that fails, the DSB, at the request of the complainant state, can authorise the temporary suspension of concessions or other obligations under the covered agreements.<sup>292</sup> These are the countermeasures referred to in section 4.5.6.1.

The DSU does not explicitly state the purpose of these sanctions.<sup>293</sup> However, it provides for the following considerations to be taken into account: the sector in which the violation took place, the instrument that was violated, the effectiveness of suspending a selected provision, the economic consequences of such countermeasures, whether the covered agreement in question prohibits suspending a particular provision, and finally that the level of suspension must be equivalent to the level of the violation.<sup>294</sup> This is the most ‘threatening’ aspect of the WTO DSS in respect of securing compliance with the ‘covered agreements’.<sup>295</sup> In other words, member states of the WTO in their adoption of domestic copyright laws are aware of the possibility of countermeasures being taken against them,<sup>296</sup> should they fail to comply with recommendations that require a narrowing of their copyright laws. Global South countries seeking to craft copyright laws to fulfil their

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<sup>291</sup> WTO DSU art 22.2.

<sup>292</sup> WTO DSU arts 22.1, 22.8.

<sup>293</sup> J Pauwelyn, ‘The Calculation and Design of Trade Retaliation in Context: What Is the Goal of Suspending WTO Obligations?’ in CP Bown and J Pauwelyn (eds), *The law, economics and politics of retaliation in WTO dispute settlement* (CUP 2010).

<sup>294</sup> WTO DSU arts 22.3, 22.4, 22.5. The interpretation and application of these factors has been debated heavily in the literature. See, for an overview of the debate, Steve Charnovitz, ‘The WTO’s Problematic “Last Resort” Against Non-Compliance’ in Steve Charnovitz, *The Path of World Trade Law in the 21st Century*, vol 37 (World Scientific 2014).

<sup>295</sup> P Mavroidis, ‘Remedies in the WTO Legal System: Between a Rock and a Hard Place’ (2000) 11 EJIL 763. See also, CM Vazquez (n 137) 837.

<sup>296</sup> See, on the asymmetry in use of sanctions against developing countries, James Harrison, *The Human Rights Impact of the World Trade Organisation* (Hart 2007) 177.

international human rights obligations are particularly at risk of a ‘chilling effect’.<sup>297</sup> I will discuss this further in Chapter 5. This serves to *de facto* impose the DSS’ interpretation of the ‘covered agreements’ upon all member states, rather than acknowledging the principle of subsidiarity in implementation of international obligations.<sup>298</sup> This imposition is not just notional – the possibility and, indeed frequent recourse to such countermeasures,<sup>299</sup> make it an enforced imposition. Further, if a recommendation by the DSS requires the respondent state to amend its copyright laws to reduce the scope of its educational exception, and the state fails to do so, the complainant state may move the DSB to take coercive trade sanctions against the respondent state. This significantly reduces the latitude available to member states to domestically construct their international copyright obligations. Moreover, it also reduces interpretive room for harmonisation of other international obligations.

#### **4.5.6.2. CESC**

Treaty bodies’ decisions (views and recommendations) on individual communications are famously *not* binding upon states parties.<sup>300</sup> There are no coercive legal consequences for

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<sup>297</sup> See, generally, Daniel Damásio Borges, ‘Countermeasures in the WTO Law and the Principle of Proportionality: A Developing Country’s Perspective’ in Alberto do Amaral Júnior, Luciana Maria de Oliveira Sá Pires, and Cristiane Lucena Carneiro (eds), *The WTO Dispute Settlement Mechanism: A Developing Country Perspective* (Springer International Publishing 2019).

<sup>298</sup> See, for the emergence of a general principle of subsidiarity in international law, Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’ (2005) 16 EJIL 907.

<sup>299</sup> Joost Pauwelyn, ‘Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach’ (2000) 94 AJIL 335.

<sup>300</sup> Eg., Rosanne van Alebeek and André Nollkaemper, ‘The Legal Status of Decisions by Human Rights Treaty Bodies in National Law’ in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (CUP 2012). MG Schmidt, ‘Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond’ in AF Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (Kluwer 2000) 233. Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, OUP 2014) 220.

non-implementation of Recommendations, leading several states to refuse to implement them.<sup>301</sup>

However, that does not mean that states parties may ignore decisions of the CESCR. The OPICESCR *obliges* states parties to give ‘due consideration’ to the decision, and provide a written response on the steps they will take within six months of having received them.<sup>302</sup> This is for the purpose of engaging in a dialogue with the state party in order to understand contextual factors hindering the realisation of the right in question.<sup>303</sup> Since Recommendations follow the determination of violations of the ICESCR,<sup>304</sup> a state party seeking to interpret its obligations under the ICESCR for the purposes of domestically fulfilling them in good faith<sup>305</sup> must take these recommendations into account. Further, whilst ‘taking into account’ cannot rise to the level of binding states to implement recommendations as is, it imposes a different type of obligation: that states must take steps to enable their domestic framework to address the concerns raised by the recommendations. This could mean promoting a culture of human rights and ensuring that effective justice systems are available for enforcement of human rights domestically, among other things.<sup>306</sup> Thus, in a dispute regarding access to educational materials, if the

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<sup>301</sup> Russia’s refusal to implement the decision of the HRC in *Gridin v Russian Federation*, Communication No 770/1997, CCPR/C/69/D/770/1997 (2000); Ireland’s refusal to implement the decision of the HRC in *Kavanagh v Ireland*, Communication No 819/1998, CCPR/C/76/D/1114/2002/Rev1 (2001) as articulated in the Irish Supreme Court’s judgment of *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 13(2002) (Fennelly J).

<sup>302</sup> OPICESCR art 9(2).

<sup>303</sup> Viviana Krsticevic and Brian Griffey, ‘Remedial Recommendations’ in Malcolm Langford and others (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (PULP 2016) 352–353.

<sup>304</sup> See, drawing on the work of other treaty bodies for the range of recommendations that the CESCR may make, *ibid* 338–346.

<sup>305</sup> CESCR, General Comment No. 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights (2009) CCPR/C/GC/33 [11]–[15].

<sup>306</sup> Rosanne van Alebeek and André Nollkaemper (n 300) 391–4.

CESCR finds that a state party has violated the complainant's right of access to educational materials by say, enacting a restrictive copyright statute, it may recommend that the state party amend its laws to include a broader educational exception and follow-up with the state party to monitor progress. But, should the state party fail to do so, there are no mechanisms for coercive action.

#### 4.5.7. Monitoring functions

##### **4.5.7.1. WTO**

In addition to its adjudicatory function discussed above, the WTO General Council also sits in its capacity as the Trade Policy Review Body (TPRB). The purpose of the TPRM is to 'contribute to improved adherence by all members to rules, disciplines and commitments made under the Multilateral Trade Agreements'<sup>307</sup> and its function is to 'examine the impact of a member's trade policies and practices on the multilateral trading system.'<sup>308</sup> Annex 3 imposes a reporting obligation upon member states to participate in a comprehensive periodic review of its trade policies.<sup>309</sup> For instance, TPRs identify particular policies of the state under review that in its opinion are *prima facie* inconsistent with TRIPS and other 'covered agreements'.<sup>310</sup> Given the mandate of the TPRM focusing solely on trade related policies for the purpose of 'adherence' with 'covered agreements', it is possible that a country having enacted broad educational exceptions gets flagged in its TPR for *prima facie* inconsistency with TRIPS, irrespective of whether it is a reasonable interpretation of its obligations. Further, Annex 3 explicitly states that the TPRM is '*not*

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<sup>307</sup> WTO Agreement annex 3 A(i).

<sup>308</sup> WTO Agreement annex 3 A(ii).

<sup>309</sup> WTO Agreement annex 3 C.

<sup>310</sup> Sam Laird and Raymundo Valdés, 'The Trade Policy Review Mechanism' in M Daunton, A Narlikar, and RM Stern (eds), *The Oxford Handbook on The World Trade Organization* (OUP 2012) 467.

[...] intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures'.<sup>311</sup> However, one study notes that out of 172 disputes analysed, more than half of these disputes were launched on the basis of 'contentious' policies set out in TPRs.<sup>312</sup> This leaves open the possibility of TPRs leading to states triggering the DSS.

#### **4.5.7.2. CESC**

The CESC's key function is to monitor states' parties domestic implementation of their ICESCR obligations.<sup>313</sup> The ICESCR imposes a reporting obligation upon states parties.<sup>314</sup> This is to ensure that states parties review their domestic legal framework regularly to facilitate the fulfilment the ICESCR; that states parties are aware of the extent to which these rights are realised and ground realities of disadvantaged groups; make targeted policies for the realisation of these rights; enable public comment on states' reports in order to facilitate participation and dialogue; to create a record for evaluation of progress through indicators or benchmarks; and to enable the dissemination of information for international cooperation.<sup>315</sup> After considering these reports, the CESC formulates its concluding observations, which take the form of noting the particular situation, and making recommendations for states to take particular steps in that context to fulfil their

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<sup>311</sup> WTO Agreement annex 3A(i) (emphasis added).

<sup>312</sup> Arunabha Ghosh, 'Developing Countries in the WTO Trade Policy Review Mechanism' (2010) 9 WTR 419, 441.

<sup>313</sup> Suzanne Egan, *The United Nations Human Rights Treaty System: Law and Procedure* (Bloomsbury 2011) 141; Meghan Campbell, 'Monitoring Women's Socio-Economic Equality under the ICESCR' (2018) 30 CJWL 82, 85.

<sup>314</sup> ICESCR arts 16,17. Walter Kalin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (CUP 2012) 35.

<sup>315</sup> These objectives are set out in CESC, General Comment No 1: Reporting by States Parties, (1981) E/1989/22.

obligations under the ICESCR.<sup>316</sup> Further, the CESCR issues General Comments, which interpret the open-textured terms of the ICESCR and provide guidance on state obligations in respect of particular issues. They have been variously understood as ‘authoritative interpretations’<sup>317</sup> of the relevant treaty and ‘carrying considerable legal weight’.<sup>318</sup>

#### 4.6. Conclusion

The features studied above significantly condition the application of the Fragmentation Report’s techniques discussed in this Chapter. Whilst the CESCR, given its reasonableness review and commitment to subsidiarity, enables states parties to adopt the integrationist interpretation of competing obligations advanced in Chapters 2 and 3, the WTO DSS’ narrow field of applicable law, textualist approach to interpretation and objects and purposes significantly constrain this possibility. I conclude this Chapter by summarising the totalising effect of the WTO DSS on conflict resolution as evinced through its features and its implications for the interests analysed in section 4.2.

Despite the character of the right to education as *erga omnes partes*, it is highly unlikely that the WTO DSS would recognise it as such. It is also unlikely that the DSS would recognise trade and copyright obligations as reciprocal,<sup>319</sup> given the exclusively trade-based composition of Panels. In any event, even if it does, it is equally unlikely for

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<sup>316</sup> See Chapter 2. But see, CESCR, Annual Report (n 199) [12]

<sup>317</sup> HJ Steiner, P Alston, and R Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd edn, OUP 2008) 265.

<sup>318</sup> MCR Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon 2002) 91.

<sup>319</sup> See, for the couching of intellectual property claims in human rights terms in order to leverage the normative force of human rights in a regional context, Thom Snijders and Stijn van Deursen, ‘The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions’ (2019) 50 IIC 1176.

the DSS to prioritise the right to education over obligations imposed by its ‘covered agreements’ – let alone recognise it as a part of applicable law. This precludes the recognition of an apparent conflict, leading to the concurrent but separate operation of the WTO DSS and CESC. This assessment is made on the basis of the objects of the DSU and the manner in which it has applied the VCLT’s rules of interpretation.

However, recent practice of the WTO DSS offers one way for it to recognise the normative significance of the right of access to educational materials – and for states to fulfil both sets of obligations. Should a member state’s domestic educational exception to copyright be challenged at the DSS, it could follow the route in *Plain Packaging* to characterise the measure as fulfilling the objects and purposes of TRIPS.<sup>320</sup> At its highest, this provides a ‘human rights check’ of sorts to states parties’ fulfilment of obligations in TRIPS (and the Berne Convention).

Despite this route to interpretively resolve conflicts in respect of the right to education and TRIPS in particular cases, the TPRM acts as a deterrent. Whilst a particular Panel may be convinced of the argument, *all* the member states of the WTO may be less so when conducting a TPR. Further, the ‘economic surveillance’<sup>321</sup> conducted through the TPRM leads to a ‘chilling effect’ on states seeking to adopt reasonable interpretations of TRIPS that depart from the DSS’ interpretation on the basis that such measures may be flagged during TPRs and subsequently form the basis for a dispute at the DSS.

The capacity of the DSB to authorise retaliatory measures in the form of trade sanctions for non-compliance with rulings and recommendations of the DSS significantly contributes to this ‘chilling effect’. The CESC and other treaty bodies and indeed any

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<sup>320</sup> See section 4.5.4.1. See also, Tania Voon, ‘Flexibilities in WTO Law to Support Tobacco Control Regulation’ (2013) 39 AJLM 199.

<sup>321</sup> K Ball, KD Haggerty, and D Lyon (eds), *Routledge Handbook of Surveillance Studies* (Routledge 2014) 335.

other dispute resolution mechanism in public international law simply cannot counter the totalising effect of the enforcement of non-compliance with WTO DSS rulings. This permeates through to the domestic implementation of international obligations as discussed in Chapter 5.

The implications of states adopting a ‘cautious’ approach as described above are significant. In terms of interests, this approach entails according priority to the economic and business interests of publishers, copyright collectives and the creative industry. As discussed, these interests are *not* guaranteed in any of the rights (whether legal rights or human rights) discussed above. This priority comes at the cost of the interests of those seeking education, which *are* guaranteed in international human rights law and impose obligations on states parties. In other words, the institutional features analysed above lead to potentially punitive consequences in respect of states that seek to realise their human rights obligations. This is particularly acute in respect of global South countries who cannot afford to pay for access. Authors fade into the background of the legal inquiry – and are often omitted despite copyright law being crafted in their name.

In Part II of this Thesis, I investigate how two countries belonging to the global South have sought to reconcile their competing obligations. In Chapter 5, I focus on South Africa’s recent legislative process seeking to amend its domestic copyright regime; and in Chapter 6, I discuss a recent case where Indian courts were charged with interpreting educational exceptions to copyright.

## **PART II**

## 5. LEGISLATING ACCESS TO EDUCATIONAL MATERIALS:

### SOUTH AFRICA

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#### 5.1. Introduction

In Part I of this Thesis, I set out the international legal framework guaranteeing access to educational materials. Chapter 2 analysed states' parties obligations under the core human rights treaties, while Chapter 3 analysed the educational 'exceptions' to copyright. I demonstrated that states parties to both sets of treaties *can* adopt a harmonious interpretation giving full effect to both sets of obligations. Chapter 4 then examined the institutional context inseparable from these obligations. Part I concluded that the WTO DSS' institutional design, in comparison with the CESC, constrains states' adoption of the harmonious interpretation advanced in Chapters 2 and 3. These features entail a trade-focused interpretation of states' competing obligations, significantly limiting the fulfilment of the human right of access to educational materials. This is contrary to international law's avowedly pluralistic foundations.

In this Part of the Thesis, I analyse the legal framework in South Africa and India in respect of access to educational materials. By focusing on the latitude that states have in domestically constructing the international obligations within their domestic legal framework and socio-economic conditions, I demonstrate the important role that domestic jurisdictions play in interpreting international law harmoniously. In this Chapter, I focus on South Africa's recent legislative process to amend its Copyright Act 98 of 1978 ('Copyright Act'). I discuss how the Copyright Amendment Bill B13-2017 ('CAB') is an instance of harmonious interpretation of South Africa's international obligations as set out in Chapters 2 and 3. Additionally, I argue that the CAB seeks to bring the *prima facie* unconstitutional Copyright Act in line with the Bill of Rights. Despite its constitutional

aims, I argue that the trade-focused interpretation adopted by powerful international actors has contributed to substantial delays in the CAB coming into force, illustrating the conclusions in Part I. This is the Chapter's significant original contribution to knowledge as it is one of the only works setting out the likely unconstitutionality of the Act and its Regulations. Given the possibility of litigation around the CAB, the Chapter provides legal analysis on pressing contemporary issues.

I first set out South Africa's bouquet of treaty obligations regarding the right to education and copyright in section 5.2. Second, I discuss how the Constitution of South Africa, 1996 ('Constitution') governs the relationship between international and domestic law in section 5.3. This is crucial to understanding how South Africa gives domestic effect to its international obligations. I identify the 'magnetic effect' of the Bill of Rights in structuring the domestic application of South Africa's international obligations. I then set out the extent to which the right of access to educational materials is constitutionally guaranteed under the right to education in section 5.4. Fourth, I analyse the relevant provisions of the Copyright Act affecting access in section 5.6. I argue that the relevant regulations are *ultra vires* the Act, and in any event, unjustifiably limit the right of access to educational materials. Moreover, I highlight how the Act unfairly discriminates against persons living with disabilities seeking to access educational materials and is likely unconstitutional. Finally, I discuss how the CAB seeks to remedy the ongoing unconstitutional situation in section 5.7. I respond to industry arguments against CAB in section 5.7.3. I highlight how the President's referral of the CAB to Parliament bears hallmarks of the hegemonic trade-focused interpretation of copyright despite South Africa's strong constitutional commitments to realising the right of access to educational materials in section 5.7.4.

## 5.2. South Africa's international treaty obligations

South Africa has deposited its consent to be bound by several international and regional instruments relating to the right to education and copyright, respectively. In doing so, South Africa undertakes to fulfil its obligations under these treaties in good faith.<sup>1</sup> I provide an overview of these obligations in this section.

### 5.2.1. International human rights treaties

South Africa is party to the core UN human rights treaties that guarantee the right to education set out in Chapter 2. Although South Africa signed the ICESCR in 1994,<sup>2</sup> it only ratified it in 2015,<sup>3</sup> upon the approval of Parliament.<sup>4</sup> At the time of ratification, South Africa deposited a declaration stating:

[T]he Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in art 13(2)(a) and art 14, within the framework of its National Education Policy and available resources.

On the face of it, the declaration's references to 'progressive effect' and 'available resources' read as inconsistent with s 29 of the Constitution, which has been interpreted as immediately realisable.<sup>5</sup> On a narrow reading, the declaration might be understood to

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<sup>1</sup> The extent of the obligation varies depending on whether South Africa has signed, ratified or acceded to the relevant treaties. See VCLT, arts 2(1)(b), 10, 14(1), 16, 18.

<sup>2</sup> For reasons regarding the 20 year delay, see 'National Assembly Portfolio Committee on Justice and Correctional Services, Magistrates Commission on suspension of J van Schalkwyk, UN Covenant on Economic, Social and Cultural Rights: Departmental briefing, Correction of reference in Protection of Personal Information Bill' (PMG, 20 August 2013). See also, Jackie Dugard and John Dugard, 'Human Rights' in John Dugard and others (eds), *Dugard's International Law: A South African Perspective* (5th ed, JUTA 2019) 470–471.

<sup>3</sup> 'South Africa' (OHCHR) <<https://www.ohchr.org/EN/Countries/AfricaRegion/Pages/ZAIndex.aspx>> accessed 21 March 2021.

<sup>4</sup> See 'National Committee of Provinces Legacy Report of the Select Committee on Security and Constitutional Development (June 2009–March 2014)' (PMG, March 2014).

<sup>5</sup> *Governing Body of the Juma Musjid Primary School v Essay NO* [2011] ZACC 13 [37] ('Juma Musjid'). See section 5.4.

relate only to universal fee-free primary education, which is the one respect in which s 29 diverges from the ICESCR. If this were the government's intention, however, it ought to have referred specifically to the 'available free to all' aspect of art 13(2)(a) and 14.<sup>6</sup> To the extent that it seeks to introduce progressive realisation and resource considerations in relation to basic education more broadly, the declaration would be inconsistent with the Constitution.<sup>7</sup> Similar objections to the declaration were raised in the parliamentary process approving the ICESCR for ratification<sup>8</sup> and by the CESCR itself in its Concluding Observations on South Africa's initial report, which recommended that South Africa withdraw the declaration.<sup>9</sup>

At this stage, South Africa has neither signed nor ratified the OPICESCR and therefore individual communications cannot be brought to the CESCR.<sup>10</sup> In any event, to the extent that the declaration is operative, which is doubtful, it cannot circumscribe the scope of the Bill of Rights.<sup>11</sup> The Constitution cannot be amended by a declaration or reservation on the international plane.<sup>12</sup>

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<sup>6</sup> See Chapter 2.

<sup>7</sup> Faranaaz Veriava, *Realising the Right to Basic Education: The Role of the Courts and Civil Society* (1st edition, JUTA 2019) 48.

<sup>8</sup> See 'SA Human Rights Commission Bill: adopted; Committee Report on International Covenant on Economic, Social and Cultural Rights; State Attorney Amendment Bill: Department's preliminary briefing' (PMG, 11 November 2013).

<sup>9</sup> CESCR, Concluding Observations, *South Africa*, 29 November 2018, E/C12/ZAF/CO/1 [6]-[7].

<sup>10</sup> See also, Campaign for South Africa's Ratification of the ICESCR and its Optional Protocol, 'Socio-economic rights optional protocol heralds a new dawn in the enforcement of these rights' (*Dullah Omar Institute*, 13 May 2013) <<https://dullahomarininstitute.org.za/socio-economic-rights/international-covenant-on-economic-social-and-cultural-rights-icescr/ICESCR%20Campaign%20-%20MEDIA%20STATEMENT%20-final-%203%20May%202013.pdf>> accessed 21 March 2021.

<sup>11</sup> A version of this argument appears in Sanya Samtani, 'The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill' [2020] PIJIP/TLS Research Paper Series no. 61. See section 5.3.3 in this Chapter.

<sup>12</sup> Constitution, s 74.

South Africa ratified the UNCRC and UNCEDAW in 1995, ICERD in 1998, and the UNCRPD in 2007.<sup>13</sup> In terms of individual communications under the above treaties, South Africa ratified the OPCEDAW in 2005, the OPCRPD in 2007, and declared its acceptance of the CERD's individual communications procedures under art 14 of ICERD in 1998.<sup>14</sup> Individuals and groups within South Africa's jurisdiction may file complaints under the above instruments for the violation of their right to education within the UNCEDAW, UNCRPD and ICERD.<sup>15</sup> South Africa is a member of UNESCO, having ratified the UNESCO Convention in 1946.<sup>16</sup> South Africa also ratified the UNESCO Convention against Discrimination in Education, one of the first international conventions imposing obligations of non-discrimination in education upon states parties.<sup>17</sup>

South Africa's regional obligations reinforce its commitment to the right to education. South Africa ratified the Banjul Charter in 1996,<sup>18</sup> which requires states parties to ensure that all persons have access to education and, through teaching and education, for everyone to know their rights and assert them. In doing so, South Africa enables individuals, groups, and other states parties to refer communications to the African Commission on Human and Peoples' Rights, although its views are non-binding.<sup>19</sup> South

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<sup>13</sup> OHCHR (n 2). See, 'National Assembly Hansard: Second Reading debate: Government Immovable Asset Management Bill [B1 – 2006]' (*PMG*, 29 March 2007).

<sup>14</sup> *ibid.*

<sup>15</sup> The procedure under each of these bodies is largely analogous to CESCR described in Chapter 4.

<sup>16</sup> Constitution of the United Nations Educational, Scientific and Cultural Organisation (signed 16 November 1945, came into force 4 November 1946) 4 UNTS 275.

<sup>17</sup> Convention against discrimination in education (adopted 14 December 1960) 429 UNTS 93; 'National Assembly Convention Against Discrimination in Education; SA-US Commission for Educational Exchanges' (*PMG*, 13 October 1999).

<sup>18</sup> Banjul Charter arts 17, 25.

<sup>19</sup> Banjul Charter arts 45-63; African Commission, 'Rules of Procedure of the African Commission on Human and Peoples' Rights of 2020', 27<sup>th</sup> extra-ordinary session, Banjul, The Gambia (19 February-04 March, 2020).

Africa acceded to the Protocol to the Banjul Charter which established the African Court on Human and Peoples' Rights (now the African Court of Justice and Human Rights),<sup>20</sup> enabling other states parties, the African Commission, as well as inter-governmental bodies to bring human rights disputes against South Africa for the violation of, *inter alia*, the right to education.<sup>21</sup> South Africa has not deposited a declaration under art 5(3) of the Protocol consenting to individual jurisdiction.<sup>22</sup> Further, South Africa ratified the African Charter on the Rights and Welfare of the Child ('Children's Charter') in 2000.<sup>23</sup> The Children's Charter provides for a comprehensive right to education for children and obliges states parties to take positive steps to ensuring access to education for all sectors of society, particularly to those who have been structurally disadvantaged.<sup>24</sup> South Africa ratified the African Youth Charter in 2009, mandating states parties to take steps to ensure that education is of good quality irrespective of its varied forms and to minimise the 'indirect costs' of education.<sup>25</sup> In addition, South Africa is a member of the Southern African Development Community (SADC), a regional inter-governmental organisation. South

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<sup>20</sup> Protocol to the African Charter on Human and Peoples' Rights (came into force 25 January 2004) OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

<sup>21</sup> 'Status List' (AU, 15 June 2017), <[https://au.int/sites/default/files/treaties/36393-sl-protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoplesrights\\_on\\_the\\_estab.pdf](https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf)> accessed 21 March 2021.

<sup>22</sup> Individuals and groups cannot approach the ACtHPR but they may approach the Commission.

<sup>23</sup> African Charter on the Rights and Welfare of the Child (adopted July 1990, came into force 29 November 1999) OAU/CAB/LEG/24.9/49 (1990); 'Status List' (AU, 28 June 2019), <<https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf>> accessed 21 March 2021.

<sup>24</sup> Children's Charter art 11(3) employs identical language to the ICESCR. It also provides for the creation of the African Committee of Experts on the Rights and Welfare of the Child, empowered to hear complaints from individuals and non-governmental organisations regarding violations of children's rights.

<sup>25</sup> African Youth Charter art 13. See 'List of Countries which have signed/ratified/acceded to the African Youth Charter' (AU, 28 June 2019) <<https://au.int/sites/default/files/treaties/7789-sl-AFRICAN%20YOUTH%20CHARTER.pdf>> accessed 21 March 2021.

Africa is party to its constitutive Treaty and the Protocol on the Tribunal in the SADC<sup>26</sup> which established the SADC Tribunal as a forum for the settlement of inter-state (and historically, individual communications) disputes related to human rights.<sup>27</sup>

Although I have focused on South Africa's international obligations in respect of the right of access to educational materials as a facet of the right to education, there are other connected human rights which may also impose obligations on South Africa in respect of access to educational materials.<sup>28</sup> A full exposition is outside the scope of this Thesis.

### 5.2.2. International copyright treaties

South Africa is party to the key international copyright treaties set out in Chapter 3 (with some exceptions, discussed below).

As a former British colony, the Berne Convention initially applied to the territory of present-day South Africa through the United Kingdom's ratification in 1887.<sup>29</sup> The erstwhile Union of South Africa deposited an instrument of continued application of the Berne Convention in 1928. The Berne Convention underwent several revisions, of which the erstwhile Union of South Africa ratified the Brussels Act in 1950, and the succeeding Republic of South Africa (the apartheid state) acceded to the Paris Act in 1974. Although apartheid South Africa made certain reservations to the Paris Act, by virtue of its continued

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<sup>26</sup> Consolidated Text of the Treaty of the SADC (signed 21 October 2015) <[https://www.sadc.int/files/5314/4559/5701/Consolidated\\_Text\\_of\\_the\\_SADC\\_Treaty\\_-\\_scanned\\_21\\_October\\_2015.pdf](https://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf)> accessed 21 March 2021.

<sup>27</sup> See, for the current status of the SADC Tribunal and recent developments around it, Sanya Samtani, 'International Law, Access to Courts and Non-Retrogression: Law Society v President of the Republic of South Africa' [2020] CCR 197.

<sup>28</sup> I have briefly analysed them in Sanya Samtani (n 11) 15–17.

<sup>29</sup> See, Lionel Bently and Brad Sherman, 'Great Britain and the Signing of the Berne Convention in 1886' (2001) 48 Journal of the Copyright Society of USA 311.

membership of the WTO and automatic accession to TRIPS, the substantive provisions of the Paris Act of the Berne Convention are applicable to present-day South Africa except for South Africa's reservation to the ICJ's jurisdiction regarding the Berne Convention.<sup>30</sup> South Africa is not bound by the Berne Appendix as it has not deposited the relevant notification with WIPO.

South Africa (the apartheid state) ratified the World Intellectual Property Organisation Convention in 1974, thereby becoming a member of WIPO in 1975.<sup>31</sup> In the constitutional era, South Africa signed the WCT<sup>32</sup> and the Performances and Phonograms Treaty (WPPT) in 1997.<sup>33</sup> The Parliament of South Africa tabled and approved the WCT, WPPT, and the Beijing Treaty on Audiovisual Performances<sup>34</sup> under s 231(2) of the Constitution in March 2019.<sup>35</sup> South Africa has not yet deposited its instrument of accession in respect of any of these treaties. I return to this issue as the reasons for the delay concern the CAB.

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<sup>30</sup> See for this history, 'South Africa, Berne Convention: Treaties and Contracting Parties' (*WIPO*) <[https://www.wipo.int/treaties/en/remarks.jsp?cnty\\_id=1026C](https://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1026C)> accessed 21 March 2021.

<sup>31</sup> 'WIPO Convention' (*WIPO*) <<https://wipolex.wipo.int/en/treaties/parties/remarks/ZA/1>> accessed 21 March 2021.

<sup>32</sup> 'Contracting Parties, WCT' (*WIPO*) <[https://wipolex.wipo.int/en/treaties/ShowResults?start\\_year=ANY&end\\_year=ANY&search\\_what=C&code=ALL&treaty\\_id=16](https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=16)> accessed 21 March 2021.

<sup>33</sup> 'Contracting Parties, WPPT' (*WIPO*) <[https://wipolex.wipo.int/en/treaties/ShowResults?start\\_year=ANY&end\\_year=ANY&search\\_what=C&code=ALL&treaty\\_id=20](https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=20)> accessed 21 March 2021.

<sup>34</sup> 'Beijing Treaty on Audiovisual Performances' (*WIPO*) <<https://wipolex.wipo.int/en/text/295837>> accessed 21 March 2021.

<sup>35</sup> 'Parliament Passes 11 Bills' (*Parliament of South Africa*, 28 March 2019).

As a member of GATT,<sup>36</sup> South Africa participated in the negotiations that culminated in the founding of the WTO.<sup>37</sup> In consenting to be bound by the Marrakesh Agreement,<sup>38</sup> the apartheid state consented to be bound by the ‘covered agreements’ which include TRIPS and the DSU.<sup>39</sup> It is thus a member state of the WTO.

Most recently, although South Africa played a key role in negotiating the MVT, South Africa has not consented to be bound by it. The delegate for South Africa clarified that

[t]his treaty will have a meaningful impact on the lives of millions of blind and visually impaired persons both in the developed and developing world [...] South Africa is embarking on the process of reviewing its copyright legislation and will accede to the Treaty when all internal processes are concluded.<sup>40</sup>

As discussed in Chapter 3, the MVT seeks to reverse historical neglect of persons living with visual and print disabilities in respect of accessing works under copyright. The delay in ratifying the MVT also concerns the CAB.

Further, South Africa entered into preferential trade arrangements with several countries including the US and Russia.<sup>41</sup> It has also entered into regional trade

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<sup>36</sup> ‘Member Information: South Africa and the WTO’ (WTO) <[https://www.wto.org/english/thewto\\_e/countries\\_e/south\\_africa\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm)> accessed 21 March 2021.

<sup>37</sup> Akiko Yanai, ‘South African Trade Policy: Interactions between Trade Policy and the WTO Negotiations’ in Kumiko Makino and Chizuko Satō, *Public policy and transformation in South Africa after democratisation* (Institute of Developing Economies, Jetro 2013) 70–74.

<sup>38</sup> *ibid.* South Africa deposited its consent to be bound by the WTO Agreement in 1994, before the transition to democracy was complete. See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6 (‘SCAW’) [25]. See also, Dot Keet, *South Africa’s Official Position and Role in Promoting the World Trade Organisation* (Alternative Information and Development Centre 2002).

<sup>39</sup> WTO Agreement annex 1C.

<sup>40</sup> As cited in ‘Briefing Paper, Marrakesh Treaty Implementation Guide South Africa’ (UCT IP Unit, May 2015).

<sup>41</sup> ‘Preferential Trade Arrangements, South Africa’ (WTO) <<http://ptadb.wto.org/Country.aspx?code=710>> accessed 21 March 2021.

agreements,<sup>42</sup> most recently, the Agreement establishing the African Continental Free Trade Area (AfCFTA), ratified in 2019.<sup>43</sup> These instruments are relevant as they include intellectual property clauses – in particular, phase II of the AfCFTA negotiations aims at including a Protocol on intellectual property and may affect South Africa’s copyright obligations in future.

The variegated obligations emerging from these treaties bind South Africa to realise the right of access to educational materials and to create and regulate copyright. Part I of the Thesis details the key obligations at issue. However, at every level, when organs of state in South Africa make decisions about domestically applying these international obligations, their necessary first step must be to *interpret* the international law at issue.<sup>44</sup> For instance, when Parliament is tasked with deciding how to implement an international treaty signed by the national executive, its necessary first step is to determine the *meaning* of that treaty. Only then can it go on to determining its domestic legal effect. This ‘auto interpretation’ of international obligations at every stage recognises that states are *actors* both on the international and domestic plane in constructing international law by determining its domestic legal effect.<sup>45</sup> In this Part of the Thesis, I am directly concerned

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<sup>42</sup> ‘Regional Trade Arrangements, South Africa’ (WTO) <<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=710&lang=1&redirect=1>> accessed 21 March 2021.

<sup>43</sup> Agreement Establishing the African Continental Free Trade Area (AU), <<https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>> accessed 21 March 2021; See, ‘National Council of Provinces Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour, African Continental Free Trade Area Agreement; SADC Protocol on Finance & Investment amendment; DTI Annual Report’ (PMG, 7 November 2018).

<sup>44</sup> Dire Tladi, ‘Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga’ (2016) 16 AHRLJ 310, 311.

<sup>45</sup> André Nollkaemper, ‘Grounds for the Application of International Rules of Interpretation in National Courts’ in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts* (OUP 2016) 35.

with this domestic legal effect. I have already advanced a harmonious interpretation of the competing international obligations in Part I.

### **5.3. The domestic effect of South Africa's treaty obligations**

To understand how South Africa constructs its treaty obligations on the domestic plane, and how these obligations interact with existing domestic constitutional and statutory provisions, it is necessary to turn to the Constitution. The Constitution indicates that South Africa follows a hybrid system – partly monist and partly dualist.<sup>46</sup> The monist features, treating international and domestic legal systems as part of the same normative order, are evinced by the provisions affirming the direct application of customary international law as law in South Africa.<sup>47</sup> The dualist features, requiring the translation of international law into domestic law for it to have domestic effect, are evinced by the provisions on domestication of treaties, discussed below.

The Constitution classifies treaties for the purpose of giving different types of treaties differential domestic effect. This does not modify South Africa's international obligations on the international plane – all ratified treaties are equally binding and South Africa must perform the sum of its obligations in good faith or risk international responsibility. But the range of possible steps that South Africa may take to perform these obligations is within its domestic jurisdiction and governed by the Constitution.<sup>48</sup> When enacting legislation to give effect to the right of access to educational materials and South

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<sup>46</sup> G Ferreira and A Ferreira-Snyman, 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism' (2015) 17 PELJ/PER 1471.

<sup>47</sup> Constitution, s 232. The domestic application of customary international law is still subject to the Constitution.

<sup>48</sup> See, L Chenwi, 'Using International Human Rights Law to Promote Constitutional Rights: The (Potential) Role of the South African Parliament' (2011) 15 LDD 1.

Africa's copyright obligations, for instance, Parliament operates in this realm. There are three ways in which South Africa's treaty obligations in respect of access to educational materials can create domestic legal effects in South Africa: first, through legislation;<sup>49</sup> second, directly, through self-executing provisions of treaties approved by Parliament;<sup>50</sup> and third, through the application of interpretive injunctions guiding courts and other organs of state to (1) prefer a reasonable interpretation of domestic legislation that is compatible with binding international law<sup>51</sup> (including treaties approved by Parliament and those that predated the Constitution)<sup>52</sup> as well as the injunction to (2) take into account international law (binding and non-binding) in interpreting the Bill of Rights.<sup>53</sup> I first discuss the domestic application of treaties in section 5.3.1 and then go on to discuss the interpretive injunctions in section 5.3.2.

### 5.3.1. Domestic application of international treaty obligations

In this section, I argue that the substantive provisions of the relevant treaties set out in Chapters 2 and 3 are unlikely to have domestic effect in South Africa without additional legislative steps. I explain that only treaty provisions relating to international dispute resolution and monitoring mechanisms are likely to have direct effect under current parliamentary practice and constitutional jurisprudence.

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<sup>49</sup> Constitution, s 231(4).

<sup>50</sup> Constitution, s 231(4).

<sup>51</sup> Constitution, s 233.

<sup>52</sup> Constitution, s 231(2), 231(5).

<sup>53</sup> Constitution, s 39(1)(b).

Section 231 of the Constitution empowers the executive to negotiate and sign treaties on the international plane.<sup>54</sup> However, where the executive seeks to ratify or accede to a treaty, the Constitution imposes a domestic pre-condition. It first requires Parliament to approve the treaty by resolution.<sup>55</sup> Once that has taken place, Parliament authorises the executive to deposit an instrument of ratification or accession with the treaty depositary thus binding South Africa on the international plane.<sup>56</sup> Therefore, *all* the treaties that South Africa has ratified (or sought to ratify) in the constitutional era have been approved by Parliament pursuant to this process. But for the circumstances analysed below, these treaties do not form a direct source of domestic rights and obligations.<sup>57</sup> However, they have interpretive effect, which I discuss in section 5.3.2.

#### ***5.3.1.1.1. Domestication of treaties through legislation***

During the process of parliamentary approval, the Constitution empowers Parliament to decide whether changes are required in domestic law in order to give domestic effect to the treaty at issue.<sup>58</sup> Parliament thus plays a key role in domestically constructing South Africa's international obligations. Domestication takes place in the form of an entirely new statute or subordinate legislation; the amendment of an existing statute; identifying old-

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<sup>54</sup> Constitution, s 231(1).

<sup>55</sup> Constitution, s 231(2).

<sup>56</sup> *Democratic Alliance v Minister of International Relations and Cooperation (CASAC Intervening)* [2017] ZAGPPHC 53 [51]-[55].

<sup>57</sup> *Glenister v President of the Republic of South Africa* [2011] ZACC 6 ('*Glenister II*') [92] (Ngcobo J), [181] (Moseneke DCJ and Cameron J).

<sup>58</sup> Constitution, s 231(4) 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.

order legislation;<sup>59</sup> or an enabling statutory provision may allow the executive to bring a treaty into effect through notice in the Government Gazette.<sup>60</sup> The piece of legislation giving effect to the treaty must be interpreted in the same manner as all other statutes.<sup>61</sup> Importantly, it must be interpreted to further the spirit, purport, and objects of the Bill of Rights, and can only limit the Bill of Rights if it passes muster under a limitations analysis. I return to this point in section 5.3.3.3. The key effect of domestication is this: once legislation is enacted to ‘domesticate’ a treaty, that legislation becomes the source of domestic rights and obligations.<sup>62</sup> The Copyright Act is an instance of old-order domestication of South Africa’s obligations under the Berne Convention and TRIPS. Further, Parliament has considered the CAB necessary as an instance of domestication required for South Africa to accede to the WCT, WPPT, and the MVT.<sup>63</sup>

#### **5.3.1.1.2.      *Direct effect: self-executing provisions of approved treaties***

An exception to the general rule, provisions of treaties approved by Parliament that are self-executing have *direct* effect as long as they are consonant with existing statutes and the Constitution. They do not require legislative steps for them to create domestically enforceable rights and obligations.<sup>64</sup> Courts (and indeed other organs of state) have been

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<sup>59</sup> Constitution, Schedule 6, s 1(2). See also, Constitution, s 231(5) stating that:

The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

<sup>60</sup> John Dugard and Andreas Coutsoudis, ‘The Place of International Law in South African Municipal Law’ in John Dugard and others (eds), *Dugard’s International Law: A South African Perspective* (5th ed, JUTA 2019) 79–80. See also, Constitution, s 239.

<sup>61</sup> See, for instance, the treatment of the legislative regime enacted to give effect to the Anti-Dumping Agreement (WTO Agreement on Implementation of Article VI of GATT) in *SCAW* (n 38).

<sup>62</sup> *AZAPO v President of the Republic of South Africa* [1996] ZACC 16 [26].

<sup>63</sup> ‘National Council of Provinces Unrevised Hansard’ (PMG, 28 March 2019).

<sup>64</sup> Yuji Iwasawa, ‘Domestic Application of International Law’ (2016) 378 RdC 65–91, 100–129.

notoriously cautious about classifying treaty provisions as self-executing,<sup>65</sup> and have been criticised in the literature<sup>66</sup> and by treaty bodies<sup>67</sup> for not doing so. Even when treaty provisions *prima facie* fit the definition of self-executing,<sup>68</sup> courts have employed other modes of legal reasoning to arrive at the same outcome of direct effect.<sup>69</sup>

Treaty provisions in instruments enabling access to international dispute resolution mechanisms do not require nor presuppose any legislation by South Africa for individuals or the state itself to access appropriate mechanisms in practice. They are arguably self-executing.<sup>70</sup> These include the OPCEDAW, OPCRPD as well as the SADC Treaty and its attendant Protocol, the Protocol to the African Charter and the WTO DSU. This is based on recent jurisprudence of the Constitutional Court, holding that where an individual is deprived of accessing an appropriate mechanism established by a binding treaty obligation, they may enforce their right of access to that mechanism in domestic courts.<sup>71</sup> In terms of substantive provisions, the question remains open. In relation to human rights guarantees,

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<sup>65</sup> *President of the Republic of South Africa v Quaglini*, *President of the Republic of South Africa v Van Rooyen*; *Goodwin v Director-General, Department of Justice and Constitutional Development* [2009] ZACC 1; *Claassen v Minister of Justice and Constitutional Development* [2009] ZAWCHC 190 [36], cursorily dismissing the contention that the ICCPR is self-executing.

<sup>66</sup> Eg., Neville Botha, 'Rewriting the Constitution : The "strange Alchemy" of Justice Sachs, Indeed!' (2009) 34 SAYIL 253; Gerrit Ferreira and Werner Scholtz, 'Has the Constitutional Court Found the Lost Ball in the High Weeds? The Interpretation of Section 231 of the South African Constitution' (2009) 42 CILSA 264.

<sup>67</sup> HRC, Concluding Observations, *South Africa*, 27 April 2016 CCPR/C/ZAF/CO/1 [6-7] noting 'the apparent inconsistency between the text of the Constitution, which provides that a self-executing provision of an international agreement approved by Parliament is considered to be part of domestic law, and the information contained in the [country report] which states that provision of an international treaty cannot be invoked before or directly enforced by the courts,' and recommending that '[South Africa] should consider taking measures to give full legal effect to the [ICCPR] under domestic law'.

<sup>68</sup> The term 'self-executing' has been criticised for imprecision. See Neville Botha, 'Treaties After 1996: More Questions than Answers' [1997] SAYIL 95, 99; AO Enabulele and E Okojie, 'Myths and Realities in "Self-Executing Treaties"' (2016) 10 MizLR 1, 10–11.

<sup>69</sup> Eg., in *Krok v Commissioner SARS* [2015] ZASCA 107 [24]. See also, Sanya Samtani (n 27) 214–216.

<sup>70</sup> See, in the context of the SADC Tribunal, *ibid* 221–225.

<sup>71</sup> See generally, *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51 ('*Law Society*').

the CDESCR has urged states parties not to assume that the ICESCR is non-self-executing on two separate occasions.<sup>72</sup> Further, it has highlighted that the right to free and compulsory primary education, amongst others, is likely to be self-executing.<sup>73</sup> However, South African organs of state are yet to recognise the ICESCR as containing self-executing guarantees.<sup>74</sup> I now turn to the constitutional provisions setting out the interpretive effect of international obligations.

### 5.3.2. The interpretive functions of international obligations

The Constitution provides two interpretive injunctions in respect of international law. First, courts are obliged to prefer a reasonable interpretation of legislation that is consistent with South Africa's binding international obligations.<sup>75</sup> These binding obligations include customary international law<sup>76</sup> and South Africa's sum of treaty obligations under s 231.<sup>77</sup> Thus, an interpreter must select a reasonable interpretation of the Copyright Act that is consistent with the treaties set out in section 5.2.

Second, when interpreting the Bill of Rights, courts are obliged to use international law as a 'tool for interpretation'.<sup>78</sup> The Constitutional Court has interpreted the relevant

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<sup>72</sup> CESCR, General Comment No 9: The domestic application of the Covenant, 3 December 1998, E/C12/1998/24 [11]; CESCR, General Comment No 3: The nature of States parties' obligations (art 2(1)) E/1991/23 [5].

<sup>73</sup> *ibid* (GC3) [5].

<sup>74</sup> In section 5.3.2, I discuss how recent jurisprudence has used the interpretive route to lead to the same effect.

<sup>75</sup> Constitution, s 233. See also *S v Okoh* [2018] ZACC 3 [38]; *SCAW* (n 38) [43].

<sup>76</sup> Constitution, s 232. See *Minister of Justice and Constitutional Development v SALC* [2016] ZASCA 17 [74].

<sup>77</sup> Andreas Coutsooudis and Max du Plessis, 'We Are All International Lawyers Now: The Constitution's International Law Trifecta Comes of Age' (2019) 136 SALJ 433, 438.

<sup>78</sup> Constitution, s 39(1)(b); *S v Makwanyane* [1995] ZACC 3 [35] ('*Makwanyane*').

provision to include all sources of international law in art 38(1) of the ICJ statute,<sup>79</sup> including non-binding international law.<sup>80</sup> In relation right of access to educational materials, this would include all the human rights and copyright treaties outlined in the previous sections as well as non-binding declarations, such as the UDHR, and the work of UN human rights treaty bodies and special rapporteurs.<sup>81</sup> It would also include WIPO SCCR reports.<sup>82</sup>

In applying these injunctions, the interpreter must first engage in ‘auto interpretation’ to identify the international law sought to be used and its meaning. Further, although both these injunctions refer to ‘courts’, the interpretation of constitutional provisions is a shared meaning-making exercise across the organs of state as well as those seeking to interpret the Constitution in law schools and the legal profession, amongst others.<sup>83</sup> Put differently, it would be absurd for courts to construe the content of a right in the Bill of Rights substantially differently from Parliament or the national executive.<sup>84</sup> Before applying these injunctions, I discuss the role of an overarching constitutional constraint: the Bill of Rights.

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<sup>79</sup> *ibid* (*Makwanyane*) [35] fn 46.

<sup>80</sup> *Glenister II* (n 57) [178] fn 155.

<sup>81</sup> For examples of the use of non-binding human rights instruments see, *SATAWU v Garvas* [2012] ZACC 13 [30]; *Motswagae v Rustenburg Local Municipality* [2013] ZACC 1 fn 6; *Jaftha v Schoeman, Van Rooyen v Stoltz* [2004] ZACC 25 [24]; *Garric v Refugee Status Determination Officer, Cape Town* [2018] ZACC 38 fns 15, 20, 30-40.

<sup>82</sup> For an example of the use of a non-binding instrument outside of the international human rights monitoring bodies see, *Glenister II* (n 57) [187]; *Helen Suzman Foundation v President of the Republic of South Africa* [2014] ZACC 32 [160].

<sup>83</sup> *S v Mhlungu* [1995] ZACC 4 [81]; *NEHAWU v University of Cape Town* [2002] ZACC 27 [14] (‘NEHAWU’).

<sup>84</sup> See section 5.3.3.1.

### 5.3.3. The Bill of Rights as a ‘magnet’ for interpreting international law and statutes

The interpretive injunctions discussed above are constrained by the Bill of Rights. In this section, I set out the constitutional scheme relevant to interpreting South Africa’s international obligations in relation to statutes and the Bill of Rights. If it is possible for an interpreter to reasonably interpret South Africa’s international copyright obligations and human rights obligations in a manner that accords with the Bill of Rights, I argue in this section that the Constitution requires that this interpretation be selected. In section 5.7, I argue that the CAB is an instance of such an interpretation.

#### ***5.3.3.1. All organs of state must ‘respect, protect, promote and fulfil’ Bill of Rights***

The Constitution binds all organs of state<sup>85</sup> to ‘respect, protect, promote and fulfil’ the rights in the Bill of Rights.<sup>86</sup> This obligation applies to all functions discharged by all organs of state, both domestically and internationally.<sup>87</sup> This includes Parliament’s core legislative function, which Parliament must discharge according to the Constitution.<sup>88</sup> As long as Parliament acts to ‘respect, protect, promote and fulfil’ the Bill of Rights in its law-making process and legislation, it has a wide array of policy choices available before it.<sup>89</sup> The Bill of Rights provides an outer limit and conditions Parliament’s exercise of its function in

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<sup>85</sup> Constitution, s 8(1).

<sup>86</sup> Constitution, s 7(2).

<sup>87</sup> *Law Society* (n 71) [78]; *J v Director General, Department of Home Affairs* [2003] ZACC 3 [25]; But see, *Kaunda v President of the Republic of South Africa* [2004] ZACC 5 [32].

<sup>88</sup> Constitution, s 44(4).

<sup>89</sup> Eg., *S v Baloyi* [1999] ZACC 19 [30]; *Minister of Home Affairs v NICRO* [2004] ZACC 10 2005 [35] (‘NICRO’).

‘giving life to constitutional rights’.<sup>90</sup> If a policy choice of Parliament, manifested in legislation or otherwise, breaches or threatens to breach a right in the Bill of Rights,<sup>91</sup> it can be challenged as unconstitutional in a competent court.<sup>92</sup> If the policy choice is in the form of a statutory instrument and appears to limit rights, for it to be valid, it will need to pass muster under s 36 of the Constitution.

**5.3.3.2. A law of general application can only limit the Bill of Rights if it passes s 36**

The Constitution provides for rights in the Bill of Rights to be limited solely by a ‘law of general application’,<sup>93</sup> provided that the law passes muster under s 36 of the Constitution.<sup>94</sup> In other words, a statute may only limit a right in the Bill of Rights if it passes the test in s 36 – there is no other way in which the rights in the Bill of Rights may be limited.<sup>95</sup> Importantly, international law cannot form an independent constraint on the Bill of Rights. At the most, the phrase ‘open and democratic society’ in s 36 enables recourse to

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<sup>90</sup> *NEHAWU* (n 83) [14].

<sup>91</sup> Constitution, s 38; See also, *Ferreira v Levin NO*; *Vryenhoek v Powell NO* [1995] ZACC 13 [35].

<sup>92</sup> See, for a recent example, *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25.

<sup>93</sup> See also, Constitution, s 7(3).

<sup>94</sup> Constitution, s 36(1) provides:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose.

<sup>95</sup> Constitution, s 36(2).

comparative and international law as interpretive aids.<sup>96</sup> Section 36 is key to analysing the Copyright Act. I return to it in section 5.6.3.

### ***5.3.3.3. Statutes must be interpreted to give effect to the objects of the Bill of Rights***

The Constitution requires that all legislation be interpreted to ‘promote the spirit, purport and objects’ of the Bill of Rights.<sup>97</sup> This obligation is greater than simply ensuring consistency of statutes with the Bill of Rights. It has been interpreted as advancing a shift from narrow literalism to a teleological interpretation with the Constitution at its heart.<sup>98</sup> Courts have interpreted this to mean that they are enjoined to prefer the interpretation of the law that ‘better promotes’ the ‘spirit, purport and objects’ of the Bill of Rights.<sup>99</sup> However, where there is evidence of an intention by the legislature to statutorily limit the rights in the Bill of Rights, *and* the law passes muster under s 36, the Constitutional Court has held that this principle cannot be applied to interpret away that limitation.<sup>100</sup> Since the Copyright Act is a statutory regime, it must be interpreted in the first instance to promote the objects in the Bill of Rights. If it cannot be interpreted to do so, or is interpreted to

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<sup>96</sup> *Makwanyane* (n 78) [34]-[35].

<sup>97</sup> Constitution, s 39(2).

<sup>98</sup> See *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1 [17]. See also, Wessel le Roux, ‘Directory Provisions, Section 39(2) of the Constitution and the Ontology of Statutory Law: African Christian Democratic Party v Electoral Commission 2006 (3) SA 305 (CC)’ (2006) 21 SAPL 382, 386.

<sup>99</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO [2000] ZACC 12 [22] (*‘Hyundai’*); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12 [45]; *Fraser v Absa Bank Ltd* [2006] ZACC 24 [43]. See generally, Michael Bishop and Jason Brickhill, ‘In the Beginning Was the Word’: The Role of Text in the Interpretation of Statutes’ (2012) 129 SALJ 681. But see, for a discussion on the jurisprudential distinction between ‘spirit, purport and objects of the Bill of Rights’ and the ‘Bill of Rights’, Anton Fagan, ‘The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law’s Development’ (2010) 127 SALJ 611.

<sup>100</sup> *NUMSA v Bader Bop (Pty) Ltd* [2002] ZACC 30 [37].

limit the right, it must pass muster under s 36, failing which it is inconsistent with the Constitution.

#### ***5.3.3.4. Magnetic effect of the Bill of Rights on South Africa's international obligations***

International law is not an independent constraint on domestic law-making. However, it plays an important interpretive role regarding the Bill of Rights. Further, in interpreting statutes, an interpreter must prefer, *where it is reasonably possible*, an interpretation that is compatible with South Africa's binding international obligations; *and* prefer an interpretation that promotes the spirit, purport, and objects of the Bill of Rights. Where a statute fails to give effect to the spirit, purport, and objects of the Bill of Rights *and* fails to pass muster under s 36, it is inconsistent with the Constitution. Notably, this is *not* the case where it is not reasonably possible for a statute to be interpreted compatibly with South Africa's binding international obligations. The statute remains constitutionally valid.

A different way of reading the above propositions is this: where a binding international obligation has the same subject matter or purpose as a right in the Bill of Rights, it is normatively prioritised under South African law. Interpreters are under a dual constitutional imperative to select a reasonable interpretation of a statute that accords with the obligation *qua* international law and prefer an interpretation that gives effect to the objects of the obligation *qua* Bill of Rights. This, I argue, is the magnetic effect of the Bill of Rights in attracting obligations with the same subject matter or purpose to fill out its content vis-à-vis obligations that do not have the same subject matter or purpose.<sup>101</sup> This

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<sup>101</sup> The drafters of the Constitution relied significantly on international human rights law to draft the Bill of Rights. See *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26 [29] ('Certification'). See also, Jackie Dugard and John Dugard (n 2); J Dugard, 'The Influence of International Human Rights Law on the South African Constitution' (1996) 49 Current Legal Problems 305.

has application in respect of the right of access to educational materials, as I demonstrate below.

This reading is also compatible with recent jurisprudence of the Constitutional Court. In *Glenister II*, the Court held that binding international obligations approved by Parliament,<sup>102</sup> to the extent to which they give effect to the Bill of Rights (whether in respect of a particular right or the Bill of Rights as a whole), collectively trigger the obligation under ss 7(2) and 8(1).<sup>103</sup> Although the majority and minority differed on the outcome, extent, and specificity of the obligation,<sup>104</sup> they agreed that the effect of reading ss 39(1)(b), 233, 7(2) and 8(1) together<sup>105</sup> imposed an obligation on all organs of state to give direct effect to South Africa's binding treaty obligations.<sup>106</sup> Implicit in the reasoning was an overlap in the underlying purpose in the Bill of Rights and the international obligations at issue.<sup>107</sup> More recently, in *Law Society*, the Court applied the same reasoning to hold that the right of access to courts in s 34 of the Constitution extends to international dispute resolution mechanisms.<sup>108</sup> The treaties at issue were not domesticated. Both majority and minority judgments agreed that s 7(2) was the basis for the obligation that had been violated by the President in acting to withdraw access to the Tribunal. However, the reasoning of the Court enables an *interpretive* route to give domestic effect to South

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<sup>102</sup> Excluding those treaties that have been domesticated under s 231(4).

<sup>103</sup> *Glenister II* (n 57) [163] (Moseneke DCJ and Cameron J).

<sup>104</sup> *ibid* [84] (Ncgobo J).

<sup>105</sup> The provisions I have analysed above.

<sup>106</sup> *Glenister II* (n 57) [97] (Ncgobo J), [189]-[202] (Moseneke DCJ and Cameron J).

<sup>107</sup> *ibid* [175]-[177], [189], [194] (Moseneke DCJ and Cameron J).

<sup>108</sup> Legality was the other significant ground on which the Court based its decision, since it determined that international law was violated by the President in using an alternative means to amend the Protocol to what was provided for in the Treaty. An analysis of this ground is outside the scope of the Thesis.

Africa's international obligations outside legislation.<sup>109</sup> This, I argue, is nothing but an application of s 231(4) in respect of self-executing provisions of treaties by another name.<sup>110</sup>

The magnetic effect of the Bill of Rights has an interpretive pull on South Africa's international obligations. In the next section, I demonstrate the effect of this pull on the right of access to educational materials.

#### **5.4. The right to education and educational materials**

In the South African context, the right to education has been described as an 'empowerment right',<sup>111</sup> 'a key to a better life',<sup>112</sup> and 'the cornerstone of any modern, democratic society that aims to give all citizens a fair start in life and equal opportunities as adults'.<sup>113</sup> In the Introduction to this Thesis, I described the socio-economic inequality perpetuated by apartheid-era discriminatory education policy. Courts have consistently affirmed and upheld the various aspects of this right in order to redress this systemic disadvantage.<sup>114</sup>

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<sup>109</sup> Edwin Cameron, 'Constitutionalism, Rights, and International Law: The Glenister Decision' (2013) 23 DJCIL 389, 398–406. See, for critiques, Bonita Meyersfeld, 'Domesticating International Standards: The Direction of International Human Rights Law in South Africa' [2013] CCR 399; Juha Tuovinen, 'The Role of International Law in Constitutional Adjudication : Glenister v President of the Republic of South Africa : Notes' (2013) 130 SALJ 661.

<sup>110</sup> I have explained the reasoning in Sanya Samtani (n 27). See also, Dire Tladi, 'The Constitutional Court's Judgment in the SADC Tribunal Case : International Law Continues to Befuddle' [2020] CCR 129; Andreas Coutsoudis and Max du Plessis, 'We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law' [2020] CCR 155.

<sup>111</sup> *Juma Musjid* (n 5) [41] quoting GC13.

<sup>112</sup> *AB v Pridwin Preparatory School* [2020] ZACC 12 [1] ('*Pridwin*').

<sup>113</sup> GN 196 in GG 16312 of 15 March 1995 (White Paper on Education and Training).

<sup>114</sup> *MEC for Education: KwaZulu-Natal v Pillay* [2007] ZACC 21 [121]–[124]; *Juma Musjid* (n 5) [42].

It is against this backdrop that the Bill of Rights guarantees the right to education for all.<sup>115</sup> The Constitution protects the right at two levels – basic and further education.<sup>116</sup> Both include the right to educational materials. It is only the extent of the state's obligations that differs. I analyse the right of access to educational materials and its corresponding obligations at the level of basic education in section 5.4.1 and then further education in section 5.4.2.

#### 5.4.1. Basic education

In this section I analyse the scope, content and obligations flowing from the right to basic education in respect of the right of access to educational materials. In terms of scope, the South African Schools Act 84 of 1996 ('Schools Act') and the Adult Basic Education and Training Act 52 of 2000 were enacted to give effect to the right to basic education. The Schools Act mandates compulsory schooling between the ages of 7 and 15,<sup>117</sup> while the Adult Basic Education and Training Act provides for the equivalent quality of education for adults who have been historically deprived of education.<sup>118</sup> This overlaps with the right to primary education under the ICESCR as discussed in Chapter 2 – with one important difference. The right to basic education in South Africa is *not* guaranteed to all for free.<sup>119</sup>

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<sup>115</sup> *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32 [45]-[46] ('*Hoërskool Ermelo*').

<sup>116</sup> Constitution, s 29(1) provides:

Everyone has the right - (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

<sup>117</sup> Schools Act, s 3.

<sup>118</sup> Adult Basic Education and Training Act, s 1.

<sup>119</sup> See section 5.4.1.1.

Rather, bearing in mind entrenched societal inequalities,<sup>120</sup> the Department of Basic Education promulgated education funding norms<sup>121</sup> establishing a national quintile system based on ‘a distributional approach favouring the poor’.<sup>122</sup> Public schools are ranked in quintiles on the basis of the socio-economic conditions where they are located.<sup>123</sup> This determines governmental budgetary allocations.<sup>124</sup> Under this scheme, better off schools (quintiles 4-5) are permitted to charge fees to supplement government funding while the two lowest quintiles (1-3) are designated ‘no-fee schools’.<sup>125</sup> The latter are not permitted to charge fees but receive higher government funding.<sup>126</sup> The Schools Act also provides for exemptions from fees in the higher quintile schools on the basis of particular socio-economic circumstances.<sup>127</sup>

#### **5.4.1.1. Content: textbooks and other educational materials**

The right to basic education has been extensively litigated.<sup>128</sup> Much of the litigation has centred around overcoming barriers to the realisation of the right to education and

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<sup>120</sup> See generally, EB Fiske and HF Ladd, *Elusive Equity: Education Reform in Post-Apartheid South Africa* (HSRC 2005).

<sup>121</sup> Schools Act, s 35.

<sup>122</sup> GN 869 GG 29179 of 31 August 2006 (‘Funding norms’) [89].

<sup>123</sup> *ibid* [111], [157]. See, Daniel McLaren, ‘Funding Basic Education’ in Faranaaz Veriava, Anso Thom, and Tim Fish Hodgson, *Basic education rights handbook: education rights in South Africa* (SECTION27 2017) 62–67.

<sup>124</sup> Funding norms [87], [113], [109]. See also, Faranaaz Veriava, *Realising the Right to Basic Education* (n 7) 15.

<sup>125</sup> Funding norms chapter 6; Schools Act, s 1.

<sup>126</sup> Schools Act, s 39(7)-(16).

<sup>127</sup> Schools Act, s 39(1)(b). But see, for a critique, Faranaaz Veriava, ‘The Amended Legal Framework for School Fees and School Funding: A Boon or a Barrier?’ (2007) 23 SAJHR 180, 188–193.

<sup>128</sup> For an overview of the litigation, see Cameron McConnachie and Samantha Brener, ‘Litigating the Right to Basic Education’ in Jason Brickhill, *Public Interest Litigation in South Africa* (JUTA 2018) 281–306. See also, Jason Brickhill and Yana van Leeve, ‘From the Classroom to the Courtroom: Litigating Education Rights in South Africa’ in Sandra Fredman, Meghan Campbell, and Helen Taylor (eds), *Human Rights and Equality in Education* (Policy Press 2018).

mandating the state to fulfil its constitutional obligations,<sup>129</sup> including in relation to textbooks.<sup>130</sup>

Although the right of access to educational materials is not expressly mentioned in the text of the right to basic education, the High Court affirmed that it is

an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks.<sup>131</sup>

The SCA affirmed this position by declaring textbooks a part of the right under s 29(1)(a), and the provision of textbooks to *every* learner in public schools a part of the state's duty flowing from the right.<sup>132</sup> The SCA held that it was insufficient for 97% of the learners in the province to have textbooks if 3% of learners in the province were deprived of textbooks.<sup>133</sup> This, the Court found, amounted to unfair discrimination on the basis of poverty.<sup>134</sup> Thus, the right to a basic education includes educational materials.<sup>135</sup> Applying the interpretive framework in section 5.3.3, the right of access to educational materials in

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<sup>129</sup> Eg., *Madzodzo v Minister of Basic Education* [2014] ZAECHC 5; *Linkside v Minister of Basic Education* [2015] ZAECHC 36; *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* [2010] ZAWCHC 544; *Komape v Minister of Basic Education* [2018] ZALMPPHC 18; *MEC for Education in Gauteng v Governing Body of Rivonia Primary* [2013] ZACC 34; See, for the barriers, Faranaaz Veriava, *Realising the Right to Basic Education* (n 7) 103–109.

<sup>130</sup> For an overview of the litigation, see Faranaaz Veriava, 'The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism' (2016) 32 SAJHR 321.

<sup>131</sup> *Section 27 v Minister of Education* [2012] ZAGPPHC 114 [25]. Kollapen J listed government policy documents to hold that educational materials form an integral part of the right in [36].

<sup>132</sup> *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198 order ('BEFA SCA').

<sup>133</sup> *ibid* [47]–[49]. See also, *Basic Education For All v Minister of Basic Education* [2014] ZAGPPHC 251 [52] ('BEFA').

<sup>134</sup> *ibid* (BEFA SCA).

<sup>135</sup> *Equal Education v Minister of Basic Education* [2018] ZAECHC 6 [176] ('*Equal Education 2018*'); Funding norms [88], [96(i)]. See also, Faranaaz Veriava and Kate Paterson, 'The Right to Education' in J Dugard, B Porter, and D Ikawa (eds), *Research handbook on economic, social and cultural rights as human rights* (EE 2020) 119; Ann Skelton, 'How Far Will the Courts Go in Ensuring the Right to a Basic Education?' (2012) 27 SAPL 392, 402–403.

international human rights law must be considered in interpreting the right to education in the Bill of Rights.<sup>136</sup> The 4-A framework set out in Chapter 2 is particularly helpful to crystallise the facets of the right of access to educational materials. Not only must the right of access to educational materials be made *available* (as developed by South African courts), it must also be made acceptable, accessible, and adaptable for all. I return to this point in the section on equality and non-discrimination below.

#### **5.4.1.2. *Obligation to respect, protect, promote and fulfil the right of access to educational materials in basic education***

All organs of state are obliged to realise the rights in the Bill of Rights.<sup>137</sup> I first discuss the duty bearers and then turn to the nature and extent of the obligation.

##### **5.4.1.2.1. *Duty bearers***

The Schools Act provides for the Minister for Basic Education to promulgate regulations regarding school infrastructure, capacity and educational materials.<sup>138</sup> In respect of school infrastructure, the same provision was interpreted as *obliging* the Minister to promulgate regulations.<sup>139</sup> Arguably, the Minister is equally obliged to promulgate regulations in respect of educational materials.<sup>140</sup> This has not yet transpired.

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<sup>136</sup> Except for 'free' as discussed above.

<sup>137</sup> Constitution, ss 7(2) and 8(1).

<sup>138</sup> Schools Act, s 5A(1)(a), (b) and (c) respectively. The regulations on educational materials must include: '(i) stationery and supplies; (ii) learning material; (iii) teaching material and equipment; (iv) science, technology, mathematics and life sciences apparatus; (v) electronic equipment; and (vi) school furniture and other school equipment.'

<sup>139</sup> *Equal Education 2018* (n 135) [42]. Significantly, these regulations which are in force, include the provision of a library.

<sup>140</sup> Nikki Stein, 'Textbooks' in Faranaaz Veriava, Anso Thom, and Tim Fish Hodgson, *Basic education rights handbook: education rights in South Africa* (SECTION27 2017) 266. Further, provincial education departments are obliged to ensure the implementation of these regulations, including the provision of textbooks.

The Department has, however, created a draft learning and teaching support material (LTSM) policy, designating materials essential to the curriculum at all levels of education as ‘core’, and those assisting with learning as ‘supplementary’.<sup>141</sup> This policy has been drafted bearing in mind ‘flexibility of access’,<sup>142</sup> but at the time of writing has not yet been adopted.<sup>143</sup> In addition, the Funding Norms discussed in section 5.4.1 specify LTSM as an example of state allocation spending by schools. In addition to the state and statutory duty bearers, private parties also bear obligations, discussed below.

#### **5.4.1.2.2.            *Nature and extent of the obligation***

The right to basic education is immediately realisable,<sup>144</sup> despite it not being universally ‘free’. This includes the right of access to textbooks and other educational materials. In addition to the positive duty to provide textbooks outlined above,<sup>145</sup> the state is also under a negative duty to ensure that it does not interfere with the right to basic education.<sup>146</sup> Where access to educational materials already exists, the state must not take that away. This negative duty extends to private parties as well. The Constitutional Court recently reaffirmed that where learners are already receiving education, private parties cannot act

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<sup>141</sup> Department of Basic Education ‘Draft National Policy for the Provision and Management of LTSM’, 2014 [3].

<sup>142</sup> *ibid* [8].

<sup>143</sup> Nikki Stein (n 140) 267.

<sup>144</sup> *Juma Musjid* (n 5) [37]. But see, in terms of practical effect, Ann Skelton (n 135) 397; Kate Paterson, ‘Constitutional Adjudication on the Right to Basic Education: Are We Asking the State to Do the Impossible?’ (2018) 34 SAJHR 112.

<sup>145</sup> The holding of *BEFA SCA* (n 132) in relation to textbooks resonates with the ‘core’ materials in the Draft LTSM Policy (n 141): both guarantee textbooks essential to the curriculum of that particular grade.

<sup>146</sup> *Hoërskool Ermelo* (n 115) [52].

to take away or diminish such education.<sup>147</sup> The majority judgment left open the possibility of positive obligations also being imposed upon private parties.<sup>148</sup>

Drawing on the obligations set out in Chapter 2, the state is also under an obligation to regulate businesses that interfere with the realisation of children's rights. The state would be the primary duty bearer but it is not inconceivable that publishers and other private parties would also bear duties not to interfere with access. I argue that exorbitant textbook costs<sup>149</sup> would constitute an interference and in some cases a denial of the right of access to educational materials, particularly where the most disadvantaged are concerned.<sup>150</sup> Moreover, the lack of accessibility of educational materials in Braille and other formats for persons living with disabilities would also be a violation of the right. I discuss this further in section 5.6.3. South African courts have not used the language of 'minimum core' even when holding that educational materials (among other inputs) are essential components of the right to education and immediately realisable.<sup>151</sup> Importantly, if legislation infringes the right to basic education, it is only valid if it passes muster under s 36. I discuss this further in relation to the Copyright Act in section 5.6.3. I now turn to the right to further education.

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<sup>147</sup> *Pridwin* (n 112) [77], [83], [86] (Nicholls AJ).

<sup>148</sup> *ibid* [125] [126], [157] (Theron J). See, Meghan Finn, 'Befriending the Bogeyman: Direct Horizontal Application in *AB v Pridwin*' (2020) 137 SALJ 591. See also, on the possibility of private parties bearing positive obligations, *Daniels v Scribante* [2017] ZACC 13 [39]-[41], [46]-[48].

<sup>149</sup> See Jia Wang, *Conceptualizing Copyright Exceptions in China and South Africa*, vol 6 (Springer 2018) 203–205.

<sup>150</sup> In relation to no-fee schools, depending on the particular circumstances, the budgetary allocation may be insufficient to support the purchase of such textbooks by the school or provincial department. In relation to fee-paying schools, parents may not be able to afford high textbook costs.

<sup>151</sup> In relation to other socio-economic rights, South African courts have explicitly moved away from the concept of 'minimum core'. See *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19 [32]-[33] ('*Grootboom*'); *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15 [34] ('*TAC*'); *Mazibuko v City of Johannesburg* [2009] ZACC 28 [52]-[56].

#### 5.4.2. Further education

In respect of further education, the Bill of Rights requires the state to take ‘reasonable measures’ to make education ‘progressively available and accessible’.<sup>152</sup> By inference, further education covers all forms of education that do not fall within basic education.<sup>153</sup>

##### 5.4.2.1. *Content: access to textbooks and other educational materials*

The right to further education includes access to educational materials.<sup>154</sup> This has been confirmed by the SCA as a part of the right to further education of incarcerated persons.<sup>155</sup> Further, the #FeesMustFall protests in demanding fee-free quality education also invoked their right to further education.<sup>156</sup> The resulting Commission of Inquiry into Higher Education and Training (‘Fee Commission’) concluded that ‘tuition is for the great majority of the student body (and also for the aspirant student population) of little practical value without food, accommodation, transport, *books, computers/ tools/ equipment, internet connectivity, healthcare and in many instances, family support*’.<sup>157</sup> The Commission’s approach is similar to the Constitutional Court’s approach in giving content to the right to housing.<sup>158</sup> Just as housing entails inputs and services in addition to ‘bricks and mortar’, further education

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<sup>152</sup> Constitution, s 29(1)(b); *Moko v Acting Principal of Malusi Secondary School* [2020] ZACC 30 [27] (*Moko*).

<sup>153</sup> *Juma Musjid* (n 5) [37]; *BEFA SCA* (n 132) [35]–[37]. See, Stu Woolman and Michael Bishop, ‘Education’ in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa (5th Revision)* (2nd edn, JUTA 2013) 38.

<sup>154</sup> *BEFA* (n 133)

<sup>155</sup> *Hennie v Minister of Correctional Services* [2015] ZAGPPHC 311 [30]. See also, Constitution, s 35(2)(e).

<sup>156</sup> #FeesMustFall is a South African student movement that began in mid-October 2015. Its demands were to stop further increases in university fees – more radically, that further education be free and that the curriculum be decolonised. It resulted in no university fee increases in 2016 and increased government funding for universities. See, Report of Commission of Inquiry into the Feasibility of making High Education and Training Fee-free in South Africa, 13 November 2017 (‘Fee Commission Report’) [9]–[20]. See also, *Hotz v University of Cape Town* [2017] ZACC 10 [31].

<sup>157</sup> *ibid* (Fee Commission Report) [145] (emphasis added).

<sup>158</sup> *Grootboom* (n 151) [35].

entails more than the existence of educational institutions.<sup>159</sup> This comports with South Africa's international human rights obligations that include textbooks and other educational materials within 'indirect costs of education' as analysed in Chapter 2.

Further, the language of 'available and accessible' in s 29(1)(b) reflects the language of the 4-A framework analysed in Chapter 2. 'Availability' includes providing educational materials as a part of the other inputs necessary for education; 'accessibility' includes 'reasonable accommodation' for persons living with disabilities as well as ensuring access for all without discrimination.

#### ***5.4.2.2. Obligation to respect, protect, promote and fulfil the right of access to educational materials in further education***

While the right of access to educational materials is the same across levels of education,<sup>160</sup> the state's obligations vary.

##### ***5.4.2.2.1. Duty bearers***

The state, through the Department of Higher Education and Training, is the primary duty bearer.<sup>161</sup> The Further Education and Training Colleges Act 16 of 2006 provides the legislative framework through which the state can fulfil its obligations under s 29(1)(b). Importantly, it reiterates the obligation of the state, and universities and colleges under the Act, to promote the highest quality of education for all – specifically those who have been marginalised on the basis of socio-economic status.<sup>162</sup>

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<sup>159</sup> This resonates with the capabilities approach discussed in the Introduction to the Thesis.

<sup>160</sup> *BEFA* (n 133) [51].

<sup>161</sup> 'About Us' (*Department of Higher Education and Training*) <<https://www.dhet.gov.za/SitePages/AboutUsNew.aspx>> accessed 21 March 2021.

<sup>162</sup> Further Education and Training Colleges Act, preamble, ss 42, 43.

Private actors do not bear an independent obligation to *provide* further education. However, when the right to further education is provided by private actors, they bear obligations similar to the state – they cannot diminish or interfere with the right and must ensure that it is fulfilled to the same extent to which the state would have done.<sup>163</sup> In respect of educational materials, this means that it is arguably unconstitutional for publishers to increase their charges for journal databases to such an extent that South African universities are no longer able to afford them. As discussed in Chapter 2, the CESCRR takes a similar view to private parties involved in textbook delivery systems.

#### **5.4.2.2.2. *Nature and extent of the obligation***

The obligation to provide further education is progressively realisable. However, the state bears immediately realisable obligations *to take 'reasonable' measures* to realise the right.<sup>164</sup> The measures themselves are at the discretion of the relevant state organ.<sup>165</sup> They must be assessed on the basis of reasonableness review<sup>166</sup> and to establish that the measures were taken in order to make further education available and accessible. The structure of s 29(1)(b) thus guards against state inertia. Further, a rights-bearer cannot be inhibited from exercising their right to further education that is already available and accessible (within the bounds of the measures taken by the state).<sup>167</sup>

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<sup>163</sup> An extension of the logic in *Pridwin* discussed above.

<sup>164</sup> *Gelyke Kanse v Chairman of the Senate of the Stellenbosch University* [2017] ZAWCHC 119 [22].

<sup>165</sup> *ibid* [23].

<sup>166</sup> Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (JUTA 2010) 247, 151–157.

<sup>167</sup> *Moko* (n 152) [36]–[38]; *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38 [19].

The Constitutional Court has explained the scope of progressive realisation in relation to housing, and clarified the extent and character of the resulting obligations.<sup>168</sup>

The Court held that

[I]t is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention.<sup>169</sup>

The state must therefore consider the vastly differing economic levels in society and tailor its duties accordingly.<sup>170</sup> Analogously, in the case of access to educational materials, the state bears a range of obligations – including to create the conditions for access. These obligations may be discharged by regulating the market for educational materials through legislative and policy measures. This is significant for present purposes as it speaks to the state's obligation to regulate copyright where it acts as a barrier to accessing educational materials. The exception for educational purposes in the Copyright Act could be understood as performing this function, to the extent that its text enables it to do so.

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<sup>168</sup> However, the language in the right to housing in s 26(2) subjects the right to 'available resources' whilst the right to further education in s 29(1)(b) does not refer to resources at all. See also, in the context of fee-free higher education, arguments advanced by the Students for Law and Social Justice before the Fee Commission, Fee Commission Report (n 156) [156].

<sup>169</sup> *Grootboom* (n 151) [35]-[37].

<sup>170</sup> The quintile system can be understood as one application of this principle.

Further, state obligations arguably extend to regulating the prices of educational materials in the first instance to enable access for everyone.<sup>171</sup> This obligation is analogous to rent control legislation in respect of access to housing,<sup>172</sup> as well as medicine pricing policy in respect of the right to healthcare.<sup>173</sup> The state may also fulfil its obligation to ensure accessible and available educational materials by regulating price-fixing and other unfair or exploitative practices.<sup>174</sup>

#### 5.4.3. Equal access to educational materials for all

Rights bearers of the right to education also bear the right to equality and non-discrimination.<sup>175</sup> The right to education is therefore a right that must be *equally* realised for all, taking into account their specific circumstances of historical deprivation, socio-economic status and disability.<sup>176</sup> In its socio-economic rights jurisprudence, the Constitutional Court has affirmed that the word ‘everyone’ invites the application of

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<sup>171</sup> Only 5% of the population can afford to buy books at current prices. See, Eve Gray and Monica Seeber, ‘PICC-PASA Report on Intellectual Property Rights in the Print Industries Sector’ 44–45.

<sup>172</sup> *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2 [29], [34].

<sup>173</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14 [706] (Moseneke J) (‘New Clicks’).

<sup>174</sup> In late 2018, the Competition Commission launched an investigation into price-fixing of ‘[p]re-school to grade 12 books, associated teacher’s guides and support materials; student textbooks, learning material, associated teacher’s guide and support material for Technical and Vocational Education and Training Colleges at secondary education; textbooks and other publications for learning at tertiary education institutions; trade books (books for sale to the general public); and eBooks (Electronic versions of all of the abovementioned books)’<sup>174</sup> by the Publishers’ Association of South Africa (PASA). The outcome of this investigation will have implications for the right to education. See, ‘Media Statement: The Commission uncovers cartel of book publishers’ (CCSA, 29 August 2018).

<sup>175</sup> Constitution, s 9.

<sup>176</sup> *TAC* (n 151) [24]; *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17 [11].

substantive equality<sup>177</sup> to the realisation of rights.<sup>178</sup> The same language is used in the education guarantee.

Not only must the state provide educational materials at all levels of education (subject to progressive realisation for further education), but it is also obliged to ensure that these materials are meaningfully accessible by all.<sup>179</sup> For instance, textbooks must be made accessible in a variety of formats to enable accessibility by learners and students with visual and print disabilities. As described in Chapter 2, under the UNCRPD South Africa bears international obligations to realise the right to an inclusive education. While this is progressively realisable, what is immediately realisable is the provision of ‘reasonable accommodation’ to give effect to the principle of non-discrimination. Where domestic copyright laws prevent format shifting, the state is obliged to amend its regulation to enable it.

Further, the state is obliged to bear the direct and indirect costs of accessing educational materials. These costs may include expensive textbooks, building and provisioning libraries, and facilitating access through educational institutions by providing photocopying machines. These obligations stem from addressing socio-economic inequality as a vestige of the apartheid state.<sup>180</sup> If students are unable to access educational materials because they cannot afford them, this is likely to amount to unfair

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<sup>177</sup> Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 8–33; Catherine Albertyn, ‘Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice’ (2018) 34 SAJHR 441, 459–468.

<sup>178</sup> *Khosa v Minister of Social Development, Mablaule v Minister of Social Development* [2004] ZACC 11 [49], citing *Grootboom* (n 151) [35]–[37].

<sup>179</sup> Constitution, s 9; Sandra Liebenberg (n 166) 207.

<sup>180</sup> *Hoërskool Ermelo* (n 115) [47].

discrimination.<sup>181</sup> Another iteration of this problem may be seen in the form of entrenched unequal distribution of resources in historically white universities vis-à-vis historically Black universities.<sup>182</sup> The state must take steps to ensure that students at historically Black universities do not receive inferior quality education as compared to their counterparts at historically white universities, including in terms of access to educational materials.

## 5.5. Other relevant rights

The approach to interpreting rights in the Bill of Rights is purposive and emphasises the inter-relatedness of rights.<sup>183</sup> In addition to the right to equality and non-discrimination, access to educational materials also implicates the right of everyone to participate in cultural life,<sup>184</sup> freedom of expression and the right to receive and impart information,<sup>185</sup> and, to the extent that the rights-bearers are children, children's rights.<sup>186</sup> A detailed analysis of these rights and their relationship with the right to education is outside the scope of the Thesis. However, it is worth noting that these rights further strengthen the right of access to educational materials. They become relevant when conducting a limitations analysis in respect of statutes seeking to limit access to educational materials.

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<sup>181</sup> See, *Social Justice Coalition v Minister of Police* [2018] ZAWCHC 181 [65] stating that 'discrimination on the basis of poverty clearly impacts on the social and economic rights protected in the Constitution as this adversely affects the equal enjoyment of a person's right and freedom in a serious manner that is comparable to discrimination on a listed ground. Discrimination on the ground of poverty [...] amounts to unfair discrimination.' See also Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, s 34.

<sup>182</sup> *Hoërskool Ermelo* (n 115) [2], [46].

<sup>183</sup> *S v Zuma* [1995] ZACC 1 [15]; *Makwanyane* (n 78) [9]; *Mahlangu v Minister of Labour* [2020] ZACC 24 [55].

<sup>184</sup> Constitution, s 30.

<sup>185</sup> Constitution, s 16.

<sup>186</sup> Constitution, s 28.

## 5.6. Copyright Act 1978 and its regulations

I now turn to the domestic copyright regime in the Copyright Act. I draw on international law and historical context where necessary to objectively assess whether (and if so, to what extent) the Act limits the right of access to educational materials and whether this limitation is constitutionally valid.

Given its colonial context, the Copyright Act draws significantly from the British Copyright Act at the time, and the Berne Convention.<sup>187</sup> Having been enacted in the apartheid-era, the Copyright Act is an instance of ‘old-order legislation’ that remains in force subject to constitutional consistency.<sup>188</sup> The apartheid-state enacted this law around the same time as laws in service of its racially discriminatory education policy.<sup>189</sup> Access to educational materials for *all* was therefore not a priority within the discriminatory legal order.<sup>190</sup> The Court emphasised the constitutional imperative to radically depart from the context in which old-order legislation was enacted and instead interpret it ‘through the prism of the Bill of Rights’.<sup>191</sup> However, it also recognised the textual limits of the statute.<sup>192</sup> Where statutes cannot be interpreted as described, Parliament plays an important role in bringing old-order legislation in line with the Bill of Rights.<sup>193</sup>

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<sup>187</sup> Marcus Riby-Smith, ‘South African Copyright Law—the Good, the Bad and the Copyright Amendment Bill’ (2017) 12 JIPLP 216, 216; Jia Wang (n 149) 202.

<sup>188</sup> Constitution, Schedule 6, s 1(2).

<sup>189</sup> See for instance, the Afrikaans Medium Decree of 1974; Education and Training Act 1979; Extension of University Education Act 1959.

<sup>190</sup> *Daniels v Campbell* [2004] ZACC 14 [48] (Sachs J).

<sup>191</sup> *ibid* [45]. See also *ibid* [44] citing *Hyundai* (n 99) [21]-[22].

<sup>192</sup> *Hyundai* (n 99) [23].

<sup>193</sup> See generally *Holomisa v Holomisa* [2018] ZACC 40; *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19 [36] (Ngcobo J).

I adopt the above approach to interpreting the Copyright Act and its regulations. I first interpret its provisions as far as possible to promote the spirit, purport, and objects of the Bill of Rights and then turn to a limitations analysis of those provisions that *prima facie* limit the right of access to educational materials.

#### 5.6.1. Provisions of the Act relevant to accessing educational materials

The objects of the Copyright Act state that it was enacted ‘to regulate copyright and to provide for matters incidental thereto.’<sup>194</sup> The Act has been described as seeking to ‘create a system whereby the creator of an original work is afforded a qualified monopoly in the use or exploitation of his work’.<sup>195</sup> The Act provides for the creator to exclusively control the use of literary, artistic, musical, and cinematographic works. This extends to the reproduction, publication, performance, broadcast, transmission, or adaptation of the work.<sup>196</sup> The Act provides for the copyright holder’s authorisation to use the work in the above manner. As discussed in Part I of the Thesis, this directly affects published educational materials under copyright.

In respect of access to materials under copyright for educational purposes without authorisation by the copyright holder, the Act provides that, first:

Copyright shall not be infringed by any fair dealing with a literary or musical work—(a) for the purposes of research or private study by, or the personal or private use of, the person using the work.<sup>197</sup>

And secondly, using language identical to art 10(2) of the Berne Convention:

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<sup>194</sup> Copyright Act, objects.

<sup>195</sup> Owen Dean and Sadulla Karjieker, *Handbook of South African Copyright Law (15th Revision)* (3rd edn, JUTA 2015) para 1.2.

<sup>196</sup> Copyright Act, ss 6,7,8,9, 11 *inter alia*.

<sup>197</sup> Copyright Act, s 12(1)(a).

The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching:

Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.<sup>198</sup>

The above provisions are targeted at persons engaging in research, private study, teaching, and educational purposes in general. First, there is a constitutional imperative to interpret these provisions in a manner that furthers the objects in the Bill of Rights. If the text of the provisions makes it impossible, a limitations analysis is necessary. I turn first to s 12(1)(a) and then to s 12(4).

Section 12(1) permits fair dealing in relation to a limited category of works under copyright – literary and musical works.<sup>199</sup> Section 15 extends its application to artistic works.<sup>200</sup> While ss 16 and 17 extend the application of the *other* subsections of s 12 to sound recordings, cinematograph works, and computer programmes, it does *not* extend the application of s 12(1)(a) to them.<sup>201</sup> As a result, I argue that s 12(1)(a) unfairly discriminates against persons with sensory disabilities in respect of the excluded works and limits the right to education. It is likely unconstitutional to that extent. But for the limited scope of works, I argue that s 12(1)(a) may be plausibly interpreted in service of the Bill of Rights. read s 12(1)(a)

The limited scope of works creates a situation where a film studies researcher may not copy a film for research purposes but a literature researcher may copy an article for the same purposes, thus irrationally excluding entire disciplines for research purposes. In

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<sup>198</sup> Copyright Act, s 12(4).

<sup>199</sup> See also, Copyright Act, s 1(a), (b).

<sup>200</sup> Copyright Act, s 15.

<sup>201</sup> Copyright Act, ss 16(1), 17, 19B.

those circumstances, it textually limits the right to education in s 29.<sup>202</sup> I return to this point in the limitations analysis in section 5.6.3.

Moreover, s 12(1)(a) makes format shifting illegal<sup>203</sup> in respect of the excluded works, entirely excluding persons living with sensory disabilities from accessing films, recordings, and computer programmes for the listed purposes. For instance, it does not legalise closed captioning, sign language, text-to-speech, and audio-to-text for research and private or personal use.<sup>204</sup> This renders these works inaccessible to persons living with sensory disabilities including aural, visual, cognitive and intellectual, physical, and multiple disabilities.<sup>205</sup> Moreover, the market does not directly cater to persons living with disabilities.<sup>206</sup> Should any person attempt to format shift<sup>207</sup> without authorisation of the right holder in order to fulfil their constitutional rights, they do so under threat of criminal sanction.<sup>208</sup> Since these works are already available to persons without living with disabilities without the need for format shifting, this amounts to unfair discrimination on

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<sup>202</sup> It is not possible to apply a constitutional interpretation to expand the scope of s 12(1)(a) to include the excluded works. See, stating that ‘this [does] not mean that the court can read into the Copyright Act provisions that are not there’, Owen Dean and Sadulla Karjieker (n 195) para 9.1.3.

<sup>203</sup> *ibid* 9.2.4. Read with s 86, Electronic Communications and Transactions Act 25 of 2002, this applies even to materials purchased through the market that are licenced only in one format, significantly reducing adaptability. See generally, Coenraad Visser, ‘Technological Protection Measures: South Africa Goes Overboard. Overboard.’ [2006] SAJIC 54. A full analysis of the ECTA is outside the scope of this Thesis.

<sup>204</sup> Denise Nicholson, ‘Accommodating Persons with Sensory Disabilities in South African Copyright Law’ [2012] LLM dissertation University of the Witwatersrand 105–106.

<sup>205</sup> BE Reid and CB Ncube, Revised Scoping Study on Access to Copyright Protected Works by Persons with Disabilities, WIPO/SCCR/38/3 13 March 2019 [12]–[16].

<sup>206</sup> See Chapter 3.

<sup>207</sup> See, describing accessible format shifting as the use of assistive technology to transform the content of a work from one medium to another in order to render it accessible to persons living with disabilities, SCCR/38/3 (n 205) [10].

<sup>208</sup> Copyright Act, ss 23, 27.

the basis of a listed ground,<sup>209</sup> and impairs the ‘fundamental human dignity’<sup>210</sup> of persons living with sensory disabilities by excluding them from access, and is likely unconstitutional on this basis.<sup>211</sup> It is difficult to see any justification that could be advanced to justify the exclusion of persons living with disabilities from appropriate access.

Turning to listed works, the test in s 12(1) is ‘fair dealing’.<sup>212</sup> There has only been one case in South Africa interpreting ‘fair dealing’.<sup>213</sup> The High Court interpreted the Act to give effect to the Bill of Rights,<sup>214</sup> in particular the right to freedom of expression.<sup>215</sup> It took a contextual approach to fairness, stating that it is an ‘elastic’ concept that ‘involves a value judgment and will depend on the particular facts or circumstances at the time of dealing’.<sup>216</sup> On this approach, s 12(1)(a) may be interpreted in service of the objects of ss 29(1) and 9(3), including accessible format shifting for persons living with disabilities.<sup>217</sup> However, this is *only* in respect of its listed works. This does not cure the unfair discrimination discussed above.

Section 12(4) directly imports the language of art 10(2) of the Berne Convention into the Act. I have comprehensively interpreted this provision in Chapter 3 of this Thesis

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<sup>209</sup> Constitution, s 9(3).

<sup>210</sup> *Harksen v Lane NO* [1997] ZACC 12 [50(b)].

<sup>211</sup> *ibid* [50].

<sup>212</sup> See, for an analysis of ‘fair dealing’ in South Africa, Desmond Oriakhogba and Faith O Osadolor, ‘Musings on the Fair Use and Fair Dealing Exceptions to Copyright: Nigeria and South Africa in Focus’ (2017) 8 ESULJ 141, 150–151.

<sup>213</sup> *Moneyweb (Pty) Limited v Media 24 Limited* [2016] ZAGPJHC 81 interpreting s 12(1)(c) (*‘Moneyweb’*).

<sup>214</sup> See, for an acknowledgement of ‘fairness’ as including the interests of constitutional rights-bearers, Owen Dean and Sadulla Karjeker (n 195) para 9.2.7.

<sup>215</sup> *Moneyweb* (n 213) [110].

<sup>216</sup> *ibid* [114].

<sup>217</sup> See also, Copyright Act, ss 12(9) and (11).

and advanced a harmonious interpretation that reconciles states' human rights and copyright obligations. The constitutional imperative to interpret the Act in furtherance of the objects of the Bill of Rights entails an analogous exercise. *Moneyweb*, in applying this imperative, held that the Act must be interpreted 'consistent[ly]' with the Bill of Rights.<sup>218</sup> I argue that s 12(4) may plausibly be interpreted to enable the state to discharge its obligations under s 29 for all constitutional rights-bearers. A narrower interpretation would likely constitute a limitation of s 29 that would have to be justified by the state.<sup>219</sup>

However, as I argue below, despite the possibility of a constitutionally consistent reading of s 12(4), the Regulations pursuant to the Act conflict with s 12(4), and are therefore *ultra vires* the Act itself. Additionally, they unjustifiably limit the right to education.

#### 5.6.2. Regulations relevant to accessing educational materials

The regulations to the Copyright Act prohibit certain uses that the Act expressly permits in ss 12(1) and (4).<sup>220</sup> In particular, I am concerned with the regulations promulgated pursuant to s 13 of the Act.<sup>221</sup> I argue that these regulations are unlawful.

Section 13 of the Act provides for regulations to specify additional reproductive uses *outside* of the enumerated exceptions.<sup>222</sup> In other words, s 13 authorises regulations

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<sup>218</sup> *Moneyweb* (n 213) [110]; fn 33 stating that 'intellectual property rights may be limited by the right to freedom of expression' and quoting *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* [2005] ZACC 7.

<sup>219</sup> See, applying the three-step test to interpret fair dealing and fair practice and prioritising economic interests of the copyright holder, Owen Dean and Sadulla Karjeker (n 195) para 9.2.3..

<sup>220</sup> GN R2530 in GG 6252 of 22 December 1978 as amended by GN 1375 in GG 9807 of June 28, 1985) ('Regulations').

<sup>221</sup> Regulations, chapter 1.

<sup>222</sup> Copyright Act, s 13 provides:

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction

that recognise new exceptions *in addition to* existing exceptions. The chapter of the Regulations titled ‘Reproduction regulations (s 13)’,<sup>223</sup> prescribes that the three-step test as set out in s 13, along with a numerical ceiling, be applied to all uses contemplated under this chapter of the Regulations.<sup>224</sup> Importantly, however, the Regulations in this chapter are *not* limited to residual uses contemplated under s 13. A number of Regulations in this chapter relate to educational purposes – which, according to the scheme of the Act, are *already* provided for in s 12(1)(a) and (4). The particular regulations prohibit uses that are explicitly permitted under the Copyright Act and are therefore *ultra vires*. These include the definition of ‘cumulative effect’ and the inclusion of ‘teacher’ in reg 1, as well as regs 2, 3(b),(f),(h), 5, and 7-9 (‘the impugned regulations’).

First, the definition of ‘cumulative effect’ in reg 1 provides for numerical limits on the number of copies made during the ‘course of instruction’ and ‘for the purpose of instructing a particular class’.<sup>225</sup> This, as well as the inclusion of the definition of ‘teacher’ demonstrate that the Regulations in this chapter seek to limit the scope of educational uses under s 12(4) which does not include a numerical limit.

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is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

<sup>223</sup> Although the Minister also has a general power to promulgate regulations under Copyright Act s 39, the regulations were explicitly made in exercise of a narrower regulation-making power under Copyright Act, s 13, which only authorises the Minister to make regulations regarding *additional* reproductive uses not already authorised by the Act.

<sup>224</sup> Regulations, reg 2. See also, reg 1.

<sup>225</sup> Regulations, reg 1:

“cumulative effect” means- (a) not more than one short poem, article, story or essay or two excerpts copied from the same author or more than three short poems, articles, stories or essays from the same collective work or periodical volume for the purpose of instructing a particular class during any one term; and (b) not more than nine instances of such multiple copying for one course of instruction to a particular class during any one term.

Regs 3(b),(f),(h), 7, and 8 are all subject to reg 2, which provides for the reproduction of only one copy of a portion of a work and in any event, subjects the making of copies to the numerical ceiling set out in the definition of ‘cumulative effect’ and the fulfilment of the three-step test set out in s 13.<sup>226</sup> Reg 3(b), (f) and (h) govern the capacity of libraries to enable the reproduction or distribution of copies of a work. Reg 3(f) in particular restricts copies made by libraries to a single article from a journal or edited collection, or reasonable portion of other work, and limits its use to private study or personal or private use. In any event, all uses under reg 3 are subject to the ceiling imposed by reg 2, including researchers seeking access to materials through a library,<sup>227</sup> and inter-library loans.<sup>228</sup> This limits the application of ss12(1)(a) and (4) that contain open-textured terms enabling context-sensitive uses of works for research and educational purposes respectively.

Similarly, reg 7 limits the number of copies made by teachers for classroom use to one per pupil per course and any reproductive use under it is also subject to reg 2. Reg 8 enables one copy of a work or a portion of a work to be made for a teacher for ‘research, teaching or preparation for teaching in a class’, and subjects this to reg 2’s ceiling.<sup>229</sup> Both these regs clearly occupy the field contemplated by ss 12(1)(a) and (4).

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<sup>226</sup> Regulations, reg 2:

The reproduction of a work in terms of section 13 of the Act shall be permitted- (a) except where otherwise provided, if not more than one copy of a reasonable portion of the work is made, having regard to the totality and meaning of the work; and (b) if the cumulative effect of the reproductions does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author.

<sup>227</sup> Regulations, reg 3(b).

<sup>228</sup> Regulations, reg 3(h).

<sup>229</sup> Regulations, reg 8.

Regulation 5 prohibits the making of multiple copies of the same work or portion of work.<sup>230</sup> In a similar vein, reg 9 prohibits ‘copies [...] used to create or replace or substitute anthologies, compilations or collective works’.<sup>231</sup> Regulation 9 also prohibits the copying of the same materials every term.<sup>232</sup> These regulations effectively prohibit the creation of course packs, which I have argued in Chapter 3, is permitted by provisions of the Berne Convention containing language identical to s12(4).<sup>233</sup>

The impugned regulations are thus *ultra vires* the Act, as they prohibit uses that the Act expressly *permits* in ss 12(1)(a) and 12(4) –by outlawing course packs, significantly limiting the number of copies (in most cases to a single copy), imposing numerical ceilings, and by applying the three-step test to constrain the scope of ‘fair practice’ and ‘fair dealing’. To that extent, they violate the constitutional principle of legality.<sup>234</sup> that all exercises of public power must be lawful.<sup>235</sup> In the case of delegated legislation, the exercise of power is only lawful within the bounds and for the purpose prescribed by the enabling legislation.<sup>236</sup> Where subordinate legislation is promulgated in a manner that exceeds the

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<sup>230</sup> Regulations, reg 5: ‘The rights of reproduction and distribution shall extend to the isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions’.

<sup>231</sup> Regulations, reg 9(a).

<sup>232</sup> Regulations, regs 9(a), (b), (c).

<sup>233</sup> See also, Chapter 6.

<sup>234</sup> While delegated legislation is reviewable, it is not settled whether it is reviewable under Promotion of Administrative Justice Act 3 of 2000 or directly under the constitutional principle of legality. See, *Esau v Minister of Co-Operative Governance and Traditional Affairs* [2021] ZASCA 9 [6]–[7]. See also, Cora Hoexter, *Administrative Law* (2nd edn, JUTA 2011) 181, 200–201.

<sup>235</sup> Constitution, ss 1(c) and 33(1). See also *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3 [49].

<sup>236</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1 [76]; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17 [58]–[59].

bounds of the Act, as I have demonstrated it has above, that exercise of power is unlawful, contrary to the principle of legality and therefore unconstitutional.<sup>237</sup>

In addition to their unlawfulness for being *ultra vires* the Copyright Act, the impugned regulations also limit the constitutional right of access to educational materials under s 29 because they restrict access for learners at all levels of education.

### 5.6.3. Limitation of rights in the Bill of Rights

In this section, I argue that s 12(1)(a) and the impugned regulations under the Copyright Act are unlikely to survive a limitations analysis on the basis that the unjustifiably limit access to educational materials under s 29 and the right to equality under s 9(3) in the Constitution. To that extent, they are objectively unconstitutional. In practice, the precise contours of the limitations analysis, and its outcome, will be determined by the impugned provisions and the justifications advanced by the parties to defend them. My analysis is necessarily abstract to that extent but seeks to articulate the central issues likely to arise and how they are likely to be resolved.

The equal right to education for all analysed in section 5.4 includes access to educational materials at all levels. These materials, I explain, must not only be made available (held by South African courts) but must also be made accessible, adaptable, and acceptable. The legislation analysed above limits the availability, adaptability, and accessibility of materials for all (in different ways) – and has a particularly adverse impact on persons living with sensory disabilities. They limit the right to education and equality.<sup>238</sup>

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<sup>237</sup> This is a constitutional restatement of the common law principle of *ultra vires*. See *ibid* (*Pharmaceutical Manufacturers*) [50]–[51].

<sup>238</sup> Although it is outside the scope of this Thesis, children's rights, the right to dignity, the right to participate in cultural life, and the freedom of expression and free flow of information are also limited by these measures. A court would take this into consideration in its limitations analysis.

Having demonstrated a *prima facie* limitation, a justification analysis under s 36 of the Constitution then requires a competent court to take into account ‘all relevant factors’ including ‘the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.’<sup>239</sup> These factors provide direction for a court to engage in an all-things-considered proportionality assessment rather than a checklist exercise,<sup>240</sup> to determine whether a limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.<sup>241</sup> A court would engage in the following inquiry to analyse the evidence adduced to demonstrate the limitations of rights and the evidence adduced to defend the challenged provisions. The onus is on the state to adduce evidence to justify a limitation of rights.<sup>242</sup> My analysis seeks to identify the key issues that would arise in this inquiry.

The nature of the right to equality and the right to education is particularly important for transformation.<sup>243</sup> This is common to the impugned provisions, and is relevant to assessing the urgency of the situation and the evidence adduced by the state to justify the limitation.

I first consider s 12(1)(a) against the above factors. This analysis is replicable for the impugned regulations, but tailored to their individual purposes. I provide examples subsequently. Considering the purpose and importance of the limitation imposed by s

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<sup>239</sup> Constitution, s 36(1).

<sup>240</sup> *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5 [32] (Madala, Sachs and Yacoob JJ), [65]-[66] (O’Regan J and Cameron AJ).

<sup>241</sup> Constitution, s 36(1).

<sup>242</sup> *NICRO* (n 89) [34].

<sup>243</sup> Eg., *Hoërskool Ermelo* (n 115) [45].

12(1)(a), it must be understood in its context as an exception to copyright. In terms of the purpose of the limitation (the exclusion of particular works under s 12(1)(a)), it has been suggested that films and recordings have been excluded in order to prevent 'home copying'.<sup>244</sup> However, it is unclear as to why other works are not at the same risk of 'home copying' given the existence of scanning and photocopy machines. It is up to the state to furnish a reason for this classification. The importance of this purpose, as adduced by the state, must be weighed against the other factors such as the extent of the limitation and the availability of less restrictive means. As demonstrated in section 5.6.1, the extent of the limitation is severe as it renders materials excluded from s 12(1)(a) completely inaccessible to persons living with disabilities.<sup>245</sup> It is difficult to see what justification, if any, the state could put up in defence of the discriminatory impact of these provisions. Further, it also inhibits research in the disciplines of film and music where these materials would constitute key educational materials for those who cannot afford to purchase these materials through the market. The socio-economic position of the persons affected by the limitation must be considered.<sup>246</sup>

Further, the copyright laws of other 'open and democratic societ[ies]',<sup>247</sup> provide an array of less restrictive means available to the state to achieve the aim set out above. A legislated exception for accessible format shifting for persons living with disabilities is one, in order to address the discriminatory impact of the provision. In relation to research

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<sup>244</sup> Owen Dean and Sadulla Karjicker (n 195) para 9.2.4.

<sup>245</sup> See, *Mlungwana v S* [2018] ZACC 45 [82] holding 'the more severe a limitation is, the more powerful the justification for that limitation needs to be'.

<sup>246</sup> *Sarrabwitz v Maritz NO* [2015] ZACC 14 [46], [63].

<sup>247</sup> See SCCR/38/3 (n 205) [18]-[21] concluding that out of all the WIPO member states, to enable access to materials under copyright, 28 countries have legislated general copyright exceptions for persons living with disabilities; 25 countries for persons living with aural disabilities; 22 countries for persons living with cognitive disabilities; 19 countries for persons living with physical disabilities; 96 countries for persons living with visual disabilities.

materials, clearly articulated educational exceptions bearing in mind the particular inequalities faced in South Africa is another. I discuss this further in section 5.7 on the CAB.

A similar limitations analysis would follow in respect of the impugned regulations should they not already be unlawful for being *ultra vires* the Copyright Act. The purpose of these regulations is different from s 12(1)(a). It appears to be to limit free uses of works under copyright to ensure that the copyright holder's economic interests are not adversely affected.<sup>248</sup> As adduced and defended by the state, this must be weighed against the extent of its impact. Its nature, as an 'exception' to a statutory monopoly must also be assessed by courts.<sup>249</sup> The extent of the limitation on the right to education is significant<sup>250</sup> – for instance, course packs are expressly prohibited,<sup>251</sup> shifting the burden to under-resourced educational institutions to purchase multiple copies of expensive academic works, or indeed on to students who often cannot afford to do so.<sup>252</sup> This is particularly egregious during the COVID-19 pandemic. Further, the regulations place numerical ceilings on educational access and prevent format shifting which severely impacts persons living with varied disabilities,<sup>253</sup> as described in respect of s 12(1)(a). The overall impact of the

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<sup>248</sup> Owen Dean and Sadulla Karjieker (n 195) para 9.1.2.

<sup>249</sup> The Constitutional Court has held that the fact that a particular system operates as a monopoly is relevant to contextualise its impact and the nature of the obligations that arise. See *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20 [82]-[83]. See also, the SCA stating that 'statutory monopolies are the exception, not the rule and they need to be justified' in *Cadbury (Pty) Ltd v Beacon Sweets & Chocolates (Pty) Ltd* [2000] ZASCA 2 [13].

<sup>250</sup> 'Report on the Open Copyright Review' (*Shuttleworth Foundation*, 2008) 15-16.

<sup>251</sup> Regulations, reg 9.

<sup>252</sup> See, for instance, section 5.4.2.

<sup>253</sup> T Schonwetter, C Ncube, and P Chetty, 'South Africa' in C Armstrong and others (eds), *Access to knowledge in Africa: the role of copyright* (UCT Press 2010) 268–269.

regulations severely limits the right to education of persons living in poverty.<sup>254</sup> The Act itself provides an example of the less restrictive means that can be undertaken – for instance, the open-textured nature of s 12(4) enables a context-sensitive assessment potentially enabling access where a particular work is unaffordable but necessary for educational purposes. In other words, it addresses the situation where majority of the population is, in any event, excluded from the market due to the high prices of books, and is therefore unlikely to affect the economic interests of the copyright holders.<sup>255</sup> I discuss the other less restrictive means in my analysis of the CAB in section 5.7.

Given the particular importance of the rights at play and widespread socio-economic inequality, the impugned provisions are unlikely to survive a limitations analysis in practice. The outcome will depend ultimately on the evidence adduced and whether or not the state has discharged its burden. Finally, during the contestation over the CAB, there have been recent claims that copyright constitutes a form of constitutionally protected property. I argue that the question is as yet unsettled in section 5.7.3.2 and in any event demonstrate that the educational exceptions in the CAB are not arbitrary. There is thus no need for it to be included in a limitations analysis.<sup>256</sup>

## **5.7. Legislative reform: Copyright Amendment Bill**

After having discussed the likely unconstitutionality of the Copyright Act, I now turn to recent legislative reform aimed at significantly amending the Act. In this section, I discuss the provisions of the Copyright Amendment Bill ('CAB') that seek to remedy the defects

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<sup>254</sup> It is possible to conduct an unfair discrimination analysis in this regard as well with poverty as a ground for adverse impact discrimination. See *Social Justice Coalition* (n 181) [65].

<sup>255</sup> See Jia Wang (n 149) 203–205; Eve Gray and Monica Seeber (n 171) 45.

<sup>256</sup> Theunis Roux, 'Property' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa (5th Revision)* (2nd edn, JUTA 2013) 21–26.

in the Copyright Act and bring the institution of copyright in line with the Bill of Rights and new technological advancements. I conclude this section by outlining the current status of the CAB. I then address attempts by the publishers' lobby to cast copyright as a form of constitutional property.

#### 5.7.1. Copyright Amendment Bill

After numerous public consultations and parliamentary deliberations since 2009,<sup>257</sup> the CAB was passed by both houses of Parliament on 28 March 2019.<sup>258</sup> As discussed previously, as a result Parliament approved the WCT and WPPT for accession. Parliament is yet to formally consider the MVT but has highlighted the importance of the CAB to South Africa's accession to the MVT as well. According to the Constitution, the CAB awaited the President's assent before entering into force.<sup>259</sup> Fourteen months after it was passed, the President returned the CAB to Parliament citing constitutional concerns.<sup>260</sup> At the time of writing, about ten months after the President's referral letter, the CAB remains in Parliament.

The analysis in this section is divided into two parts: first, I analyse the provisions of the CAB that related to accessing educational materials for all, including those provisions relating to persons living with disabilities. Then, I discuss the international

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<sup>257</sup> 'Copyright Amendment Bill B13-2017' (PMG, 2021). See also, Denise Nicholson, 'The Copyright Amendment Bill: Genesis and Passage through Parliament' (2019) 20 LIASA-in-touch 16.

<sup>258</sup> 'Parliament Passes 11 Bills' (*Parliament of South Africa*, 28 March 2019).

<sup>259</sup> Constitution, s 79.

<sup>260</sup> Constitution, s 79(1); See also 'Referral of the Copyright Amendment Bill B13-2017 and the Performers Protection Amendment Bill B24-2016 to the National Assembly' (*President of South Africa*, 16 June 2020); I analyse these reservations, particularly those relating to international law, in detail in Sanya Samtani (n 11) 31–39.

institutional pressure that is apparent from the language in the President's letter. This, I argue, is an instance of the conclusions in Chapter 4 playing out.

### 5.7.2. Provisions relevant to accessing educational materials

The objects and purposes of the CAB have been described as follows:

The existing Copyright Act, 1978 is outdated and has not been effective in a number of areas. The creative industry is impacted upon; educators are hampered in carrying out their duties; researchers are restricted to further developing research; and people with disabilities are severely disadvantaged by having limited access to copyright works. For this reason, a need exists for Intellectual Property legislation to be consonant with the ever evolving digital space; to allow reasonable access to education; to ensure that access to information and resources are available for persons with disabilities; and to ensure that artists do not die as paupers due to ineffective protection. The latter is supported by the experience of the power imbalance, vulnerabilities and abuse taking place in the music industry, which Government was called on to address.<sup>261</sup>

Although the quoted text does not use the language of unconstitutionality, it indicates legislators' awareness that persons seeking education and persons living with disabilities are significantly impacted by the current legal framework.

In respect of the unconstitutionality demonstrated in section 5.6.3, the CAB can be understood as Parliament discharging its obligation to remedy old-order legislation that cannot be interpreted to further the objects of the Bill of Rights. Although I argue that s 12(4) of the current Act can plausibly be interpreted to further the objects of the Bill of Rights, its open-textured nature is a double-edged sword. While important for context-sensitive application, s 12(4) also leaves broad discretionary leeway to individual decision-makers to interpret the provision, leading to difficulty in foreseeing the acts for which infringement suits may be brought. The Constitutional Court has emphasised the

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<sup>261</sup> CAB, memorandum of objects 1.1.

importance of stating rules in a clear and accessible manner where they may affect rights.<sup>262</sup>

The provisions in the CAB that pertain to educational purposes is an instance of the same.

Further, as I go on to demonstrate, the CAB is an instance of the South African Parliament interpreting its concurrent copyright and human rights obligations in a harmonious manner as advanced in Chapters 2 and 3.

The CAB includes a provision for the accessible format shifting of works for persons with disabilities.<sup>263</sup> This rectifies the current Act's unfair discrimination set out in section 5.6.1 and gives effect to the right to equality.

Further, the CAB includes a series of detailed provisions to enable access to educational materials. I analyse them in turn. First, s 12A introduces 'general exceptions' that provide for a 'fair use' test in respect of 'research, private study or personal use, including a lawful copy of that work at a different time or with a different device' and 'scholarship, teaching and education'.<sup>264</sup> It also sets out an inclusive list of factors for a determination of 'fair use'.<sup>265</sup> This provision is residual in that if a particular use does not fall within any of the specified exceptions in the CAB, it can still be justified if it is for the purposes listed in s 12A. The CAB retains, in large part, s 12(4) of the current Act as s

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<sup>262</sup> *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8 [47].

<sup>263</sup> CAB, s 19D.

<sup>264</sup> This takes care of accessible format shifting for persons living with disabilities seeking to realise their right to education.

<sup>265</sup> CAB, s 12A(b) stating:

[A]ll relevant factors shall be taken into account, including but not limited to— (i) the nature of the work in question; (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work; (iii) the purpose and character of the use, including whether— (aa) such use serves a purpose different from that of the work affected; and (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and (iv) the substitution effect of the act upon the potential market for the work in question.

12B(1)(b) under the title ‘specific exceptions from copyright protection applicable to all works’.<sup>266</sup> It thus largely retains the language present in the Berne Convention.<sup>267</sup>

Further, the CAB recognises the particular relevance of ‘reproduction for educational and academic activities’. It explicitly permits reproductive uses of works under the Act for educational and academic activities as long as they meet the proportionality test of ‘extent justified by the purpose’ discussed in Chapter 3. Where conducted on behalf of educational institutions seeking to incorporate ‘the whole or substantially the whole of a book or journal issue, or a recording of a work’ into a course pack, this provision is subject to a precondition – that the educational institution must first approach the copyright holder for a licence on ‘reasonable terms and conditions’. Only if such a licence is unavailable can the whole work be incorporated.<sup>268</sup> This accounts for the possibility of *unreasonable* terms and conditions of a licence – and opens up the inquiry to analysing the availability of the materials under the 4-A framework in international human rights law discussed in Chapter 2. Moreover, reasonableness is a context-sensitive standard and it is submitted that governmental budgetary allocations to a particular institution, the quintile system where relevant, and societal inequality are likely to play a role in reviewing the reasonableness of the terms of the licence.

Further, for the avoidance of all doubt, the CAB explicitly permits:

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<sup>266</sup> CAB, s 12B(1) stating:

Copyright in a work shall not be infringed by any of the following acts: (b) any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question.

<sup>267</sup> I have analysed language of the Berne Convention in Chapter 3. Further, the factors in s 12A are similar to Singapore Copyright Act, 2 of 1987 (amended by Act 40 of 2019) s 35(2).

<sup>268</sup> CAB, s 12D(1) and (3). See also, s 12D(2).

printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network.<sup>269</sup>

As discussed in Chapter 3, this is an instance of fair practice under the Berne Convention. It also enables access to expensive academic texts that students cannot afford to buy individually and often libraries cannot afford to buy multiple copies. This is a discharge of state obligations in respect of the right to education – in particular, legislative steps in order to enable access without massive resource implications. I discuss this in further detail in Chapter 6, in the Indian case study. In any event, this provision does not cover ‘the whole or substantially the whole book or journal issue’. I have analysed the preconditions required to be fulfilled in such cases above.

As discussed in Chapter 3, the Berne Convention does not prohibit the use of whole works for educational purposes. The CAB limits the use of whole works to ‘textbooks’ and crystallises four circumstances in which whole textbooks may be reproduced: first, where the textbook is out of print; second, where the copyright holder cannot be found; and third, where ‘authorised copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works’.<sup>270</sup>

First, in relation to the market, it is clear that where a textbook is out of print there is no possibility of a photocopy substituting it and causing loss of revenue. Second, the inability to find the copyright holder is a safeguard to ensure that for textbooks that are likely to form a ‘core’ part of the curriculum, the consent of the copyright holder does not

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<sup>269</sup> CAB, s 12D(2). See also, Chapter 6.

<sup>270</sup> CAB, s 12D(4). Several countries have similar provisions, eg., Canada Copyright Act, art 29.4; Indian Copyright Act, s 52(1)(o).

deny the realisation of the right to education. Third, the South African textbook market is explicitly catered for in that the CAB only allows full reproductions where the same edition is *not* available through the market in South Africa. This is unlikely to cause damage to the domestic publishing industry. Finally, the fourth circumstance where photocopying a full textbook is possible is where the same edition is unavailable at the South African market price. This, I argue, is a legislative step taken by the state in order to ensure that financial constraints in respect of the indirect costs of education do not deny the realisation of the right to education to all. Importantly, in order to make the purposes of this provision (educational and academic activities) abundantly clear, the CAB outlaws reproductions of full textbooks for commercial purposes.<sup>271</sup> The claim that these provisions enable the widespread copying of full textbooks and consequent substitution of the market is thus exaggerated.<sup>272</sup>

The CAB also reflects common academic practice by explicitly permitting the incorporation of parts of works in ‘assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository’.<sup>273</sup> Further, in recognition of the disjunct interests of authors and publishers as set out in Chapter 4, the CAB vests in authors the legal right to make their research openly accessible despite assigning publishers exclusive licences where such research has been at least 50% funded by the state.<sup>274</sup> Moreover, it also provides for the unenforceability of agreements

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<sup>271</sup> CAB, s 12D(5).

<sup>272</sup> For these claims, see Michelle Woods, ‘Comments on Copyright Amendment Bill’, (*Infojustice*, 1 October 2018) <[https://legalbrief.co.za/media/filestore/2019/03/Letter\\_AF\\_Myburgh\\_to\\_Minister\\_R\\_Davies\\_Mr\\_E\\_Makue\\_14Mar2019.pdf](https://legalbrief.co.za/media/filestore/2019/03/Letter_AF_Myburgh_to_Minister_R_Davies_Mr_E_Makue_14Mar2019.pdf)> accessed 21 March 2021.

<sup>273</sup> CAB, s 12D(8).

<sup>274</sup> CAB, s 12D(7)(a).

that deny authors' the legal right described above.<sup>275</sup> Importantly, in order to preserve the moral rights of authors, the CAB provides for mandatory attribution to the extent feasible in all the above uses.<sup>276</sup>

But for the provision enabling accessible format shifting, there has been industry pushback in respect of the analysed provisions of the CAB, amongst others. The pushback has often arisen in terms of assertions of the non-fulfilment of the three-step test in respect of the enumerated exceptions; and attempts to characterise copyright as constitutionally protected property leading to claims of these provisions causing an 'arbitrary deprivation'. I address the first claim here, and the second in section 5.7.3.

As argued in Chapter 3, exceptions to copyright for educational purposes fall squarely within the bounds of art 10(2) of the Berne Convention. I have discussed the non-identical nature of art 9(2) (the Berne three-step test) and art 10(2) drawing on the history and structure of the Convention. Insofar as the operation of TRIPS is concerned, I have explained that where states are parties to both the ICESCR and the copyright treaties, art 10(2) can be interpreted to take on an obligatory character in respect of states' domestic fulfilment of their international human rights obligations. South Africa is one of those states.

In any event, I have argued that the WTO DSS has recognised the importance of the principle of effectiveness across the 'covered agreements' and that TRIPS' three step test must not be interpreted to apply to specified exceptions under the Berne Convention. Moreover, the objects and purposes of TRIPS explicitly enable states to take measures in the public interest in 'sectors of vital importance', 'to the mutual advantage of producers

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<sup>275</sup> CAB, s 12D(7)(e).

<sup>276</sup> CAB, s 12D(8).

*and users'* and in order to advance socio-economic welfare. The CAB is a reasonable interpretation of South Africa's international obligations undertaken by Parliament, and fits squarely within these objects. It seeks to fulfil the objects of the equal right to education, which is a 'sector of vital importance' in the South African context. And finally, according to the interpretive injunctions set out in section 5.3.3, it is a defensible policy choice within the paradigm of the Bill of Rights as a magnet.

### 5.7.3. Attempts to constitutionalise copyright as property

In this section, I address the industry's characterisation of copyright as property under s 25 of the Constitution.<sup>277</sup> I argue that, far from being settled, the question remains open. The determination of proprietary interests under s 25 is an avowedly case-by-case exercise, and at the time of writing, copyright has only ever been considered a statutory monopoly. In any event, I demonstrate that even if copyright is characterised as property under s 25, the enumerated exceptions for educational purposes survive a constitutional analysis and do not amount to arbitrary deprivation of property.

#### 5.7.3.1. *The question is unsettled in law*

In the process of 'certifying' the 1996 constitutional text,<sup>278</sup> one objection to the draft Constitution was that it failed to recognise a right to intellectual property. The Court held that although some countries and international instruments protected intellectual property

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<sup>277</sup> Eg., 'Submissions on the Constitutionality of the Copyright Amendment Bill and Performer Protection Amendment Bill' (Adams & Adams, 04 April 2019) <<https://copyrightcoalition.files.wordpress.com/2019/04/adams-and-adams-covering-letter-to-the-office-of-the-president.pdf>> accessed 21 March 2021. In these submissions, Adams & Adams represents 'trade associations [...] broadly representative of South Africa's copyright and creative industries'.

<sup>278</sup> During the transition to constitutional democracy the Constitutional Assembly was tasked with drafting the Final Constitution for South Africa. The earlier Interim Constitution detailed a set of 34 Constitutional Principles that were meant to form the basis of the Final Constitution. The Final Constitution had to be assessed against these Constitutional Principles. The Court held that there can be no further objections raised regarding Constitutional Principles after 'certification'. See *Certification* (n 101) [1]-[15].

as a constitutional right, other countries and regional instruments focused on human rights did not, and so it could not be considered to be universally accepted.<sup>279</sup> The Court therefore dismissed the objection. It did not pronounce on whether or not intellectual property fell within s 25.

Of course, this does not settle the question. But it throws light on the values at the heart of the rights in the Bill of Rights. Section 25 is not an affirmative right *to* property.<sup>280</sup> It is drafted in the negative.<sup>281</sup> The Constitutional Court recognised:

The question of property is fiercely contested in South African society. There is, as yet, little common ground on how we conceive of property under section 25 of the Constitution, why we should do so, and what purpose the protection of property should serve.<sup>282</sup>

Although land reform is its primary purpose, the provision is not limited to land and immovable property.<sup>283</sup> The Court has held that corporeal movables,<sup>284</sup> restitution of unjustified enrichment claims,<sup>285</sup> and money in hand<sup>286</sup> constitute property for the purposes of s 25(1). In split decisions, the majority of the Court held that liquor licences<sup>287</sup> constitute

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<sup>279</sup> *ibid* [75].

<sup>280</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5 ('FNB') [48].

<sup>281</sup> Constitution, s 25 provides:

No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property

<sup>282</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape* [2015] ZACC 23 [4] (Froneman J).

<sup>283</sup> Constitution, s 25(4)(b).

<sup>284</sup> FNB (n 280) [51].

<sup>285</sup> *National Credit Regulator v Opperman* [2012] ZACC 29 [63].

<sup>286</sup> *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport* [2015] ZACC 15 [16].

<sup>287</sup> *Shoprite Checkers* (n 282) [5] (Froneman J), [132(a)] (Madlanga J), but see [125], [127], [130] (Moseneke DCJ). Six out of eleven judges (a majority) held that a wine licence was property.

property but unlawful proceeds of crime do not.<sup>288</sup> In cases regarding mining rights,<sup>289</sup> a claim for loss of earning capacity<sup>290</sup> and goodwill,<sup>291</sup> the Court held that it was unnecessary to decide the question whether or not particular interests constituted property and directly applied the arbitrary deprivation analysis. This problematically *assumes* that s 25 is applicable rather than establishing its applicability in relation to the particular interest before the Court.<sup>292</sup> The definition of property under s 25(1) is far from settled.

The Constitutional Court has never decided a copyright case. The question thus remains open. However, it has treated patents and trademarks as statutory regimes. The Court characterised patents as an ‘artificial monopoly system’.<sup>293</sup> Regarding trademarks, the Court did not undertake a s 25 analysis of whether a parody constituted an arbitrary deprivation of the trademark owner’s right to property, despite the fact that the user derived economic benefit from the use. Instead, the Court dealt with the trademark under the Trademarks Act, interpreting the Act to promote the objects of the Bill of Rights in a manner

least destructive of other entrenched rights and in this case free expression rights. The reach of the statutory prohibition must be curtailed to the least intrusive means necessary to achieve the purpose of the section.<sup>294</sup>

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<sup>288</sup> *National Director of Public Prosecutions v Botha* NO [2020] ZACC 6 (Jafta J) [120]-[121]. But see, (Victor AJ) [57]. Five out of eight judges (a majority) held that unlawful proceeds of crime did not engage the s 25 property right.

<sup>289</sup> *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9 (‘AgriSA’).

<sup>290</sup> *Law Society of South Africa v Minister for Transport* [2010] ZACC 25 [84].

<sup>291</sup> *Phumelela Gaming and Leisure Limited v Gründlingh* [2006] ZACC 6 [42]. The Court erroneously categorised goodwill as ‘intellectual property’ when in reality they meant ‘intangible property’.

<sup>292</sup> The test laid down by *FNB* requires the determination of the applicability of s 25(1) before determining whether there has been a deprivation and subsequently whether that deprivation was arbitrary.

<sup>293</sup> *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* [2019] ZACC 41 [100].

<sup>294</sup> *Laugh It Off* (n 218) [48].

This logic has been applied to interpret the Copyright Act as discussed in section 5.6.1. The SCA judgment in the same case held that ‘intellectual property rights have no special status. The Constitution does not accord them special protection and they are not immune to constitutional challenge. Even if constitutional, their enforcement must be constitutionally justifiable.’<sup>295</sup>

When faced with an opportunity to interpret intellectual property rights, the Constitutional Court has not engaged in a constitutional property analysis and has not resolved the question whether intellectual property is contemplated under s 25. More recently, *Moneyweb*, discussed in section 5.6.1, did not conduct a s 25 ‘arbitrary deprivation’ analysis to determine whether plagiarism is a deprivation of ‘property’. Rather, it adopted the *Laugh It Off* approach, treating the Copyright Act as a statute to be interpreted to better promote the Bill of Rights.<sup>296</sup> Contrary to claims made by the industry, the question remains open as to whether ‘copyright’ is property for the purposes of s 25(1).

#### **5.7.3.2. Educational exceptions are not arbitrary deprivations of property**

After establishing that a particular interest constitutes property, it must be established that there has been a deprivation. It is enough for an interference in the exercise of the right to be demonstrated.<sup>297</sup> Then, it must be demonstrated that the deprivation is ‘arbitrary’. If the deprivation is not arbitrary then the right under s 25 is not limited and there is no need to advance to a s 36 limitations analysis.<sup>298</sup> Even if a court were to hold that copyright is property under s 25, provisions that seek to advance rights in the Bill of Rights are highly

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<sup>295</sup> *ibid* [17]; *Laugh It Off Promotions CC v South African Breweries International* [2004] ZASCA 76 [11],

<sup>296</sup> *Moneyweb* (n 213) [109]-[110].

<sup>297</sup> *FNB* (n 280) [57].

<sup>298</sup> *ibid* [70].

unlikely to be considered arbitrary, even if they are considered interferences that amount to deprivation.

The test for arbitrariness, also laid down in *FNB*, is whether there is ‘sufficient reason’ for the deprivation and whether it is procedurally fair.<sup>299</sup> There is unlikely to be any question of procedural unfairness given that these exceptions are contained in general legislation. The more significant question is the substantive ‘sufficient reason’ for the deprivation. For sufficient reason, the purpose of the deprivation in question must be assessed. In this case it is clear that the purpose of the educational exceptions in the CAB laid out in the previous sections is to fulfil the obligations incumbent upon the state to regulate the private market in order to ensure that the right to education at all levels is fulfilled. It is thus a constitutionally protected purpose. Moreover, it can be reasonably interpreted as consistent with binding international copyright and human rights law.

Second, the interests at stake here are those outlined in Chapter 4. Keeping in mind this complex relationship, it is important to note that the market currently excludes those living in poverty and those with disabilities. They will not affect the economic interests of authors and publishers because they were not able to participate in the market in the first place.<sup>300</sup> The moral interests of authors continue to be protected in any event as the exceptions prescribe attribution.

Third, the deprivation here does not encompass all incidents of ownership as outlined above, and therefore requires a less compelling justification than where it completely encompasses all incidents of ownership. It only encompasses particular circumstances where works are used for educational and academic activities. In addition,

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<sup>299</sup> *ibid* [100].

<sup>300</sup> Eve Gray and Laura Czerniewicz, ‘Access to Learning Resources in Post-Apartheid South Africa’ in Joe Karaganis (ed), *Shadow Libraries: Access to Knowledge in Global Higher Education* (The MIT Press 2018).

where the use of whole works is permitted, the circumstances are narrowly tailored as described above. In any event, the Constitutional Court has held that s 25 imposes a duty not to ‘over-emphasise private property rights at the expense of the state’s social responsibilities.’<sup>301</sup>

All things considered, it is very likely that the rights of persons living with disabilities as well as the equal right of everyone to access educational materials and the benefits of scholarship, scientific and otherwise, as protected by the Bill of Rights provide sufficient reason to deprive publishers of a percentage of revenue.<sup>302</sup> Even if copyright is held to be property, it is likely that the provisions that have been flagged as constituting a deprivation will not be considered to be arbitrary.

#### 5.7.4. Copyright Amendment Bill: international industry and current status

The CAB, as I have argued above, is a defensible policy choice by the legislature in domestically reconciling concurrent international copyright and human rights obligations, with the Bill of Rights as a magnet. However, as discussed in Chapter 4, the trade system prioritises industry interests over that of human rights’ bearers’ interests with real consequences for states seeking to adopt a harmonious interpretation. The President’s referral of the CAB closely tracks the objections raised by lawyers representing the

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<sup>301</sup> *AgriSA* (n 289) [62].

<sup>302</sup> PASA’s Annual Report for 2018-2019, indicates that revenue received from academic and educational publishing increased by 29% and 12% respectively. See ‘Annual Book Publishing Industry Survey’, (*PASA*, 2019).

publishers' lobby.<sup>303</sup> In this section, I argue that the referral is an instance of the 'chilling effect' of the WTO system outlined in Chapter 4.

In October 2019, the International Intellectual Property Alliance (IIPA), a coalition of private sector multinational industry groups for software, film, music, and publishing, filed a petition with the Office of the United States Trade Representative (USTR) to review whether South Africa's domestic policies offered 'adequate and effective protection of intellectual property rights'.<sup>304</sup> The claim made by IIPA was that CAB was likely to breach this criteria which would render it ineligible for the US trade benefits scheme for economic development in developing countries – the Generalised System of Preferences (GSP).<sup>305</sup> The GSP programme, established by the Enabling Clause, forms a part of the GATT under the umbrella of the WTO.<sup>306</sup>

If found to have inadequate domestic intellectual property protections according to the USTR, South Africa risks losing its GSP status. Moreover, it also risks being placed on the Special 301 Watchlist.<sup>307</sup> Being placed on the Watchlist entails the US government's ability to impose sanctions against South Africa; withdraw GSP benefits; and initiate

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<sup>303</sup> 'A Narrow Basis for a Decision with Wide Implications' (*International Federation of Library Associations and Institutions*, August 2020) <<https://blogs.ifla.org/lpa/2020/08/25/a-narrow-basis-for-a-decision-with-wide-implications/>> accessed 21 March 2021.

<sup>304</sup> 'USTR Announces GSP Enforcement Actions and Successes for Seven Countries' (USTR, 2019) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement>> accessed 21 March 2021. See, for the petition, 'Request for Review of the Intellectual Property Rights Practices of South Africa, 84 Fed Reg 11150' (IIPA, 25 March 2019) <<http://infojustice.org/wp-content/uploads/2019/11/IIPA-South-Africa-GSP-Review-Petition-2019.pdf>> accessed 21 March 2021.

<sup>305</sup> 19 USC 2462(c)(5). For an analysis, see Jonathan Band, Comments By WIPO Copyright Director Undermine IIPA's South Africa Petition, <<http://infojustice.org/archives/42414>> accessed 21 March 2021.

<sup>306</sup> Decision of November 18, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, BISD, 26th Supp. 203 (1979).

<sup>307</sup> USTR, 'Special 301', <<https://ustr.gov/issue-areas/intellectual-property/Special-301>> accessed 21 March 2021.

dispute settlement proceedings if the US believes that there has been a violation of TRIPS. In effect, the IIPA petition has the possibility of triggering sanctions – whether through unilateral retaliatory action by the US or through the WTO DSS.

The hearing took place in early 2020.<sup>308</sup> When the USTR published the report in May 2020, South Africa was not on the Special 301 Watchlist.<sup>309</sup> However, the President still returned the CAB to Parliament referring, in part, to concerns regarding the CAB's 'compliance' with international intellectual property treaties – the three-step test in particular.<sup>310</sup> The letter neither acknowledged South Africa's international human rights obligations nor its constitutional obligations in respect of access to educational materials. Rather, the letter refers to them as 'noble objectives'.<sup>311</sup> There are also assertions that educational exceptions may constitute arbitrary deprivations of property which I have countered in section 5.7.3.2. As Chapter 4 of the Thesis demonstrates, the disappearance of human rights is a feature of the pervasive trade system. The referral letter is an instance of a 'cautious interpretation' where the President adopts an interpretation of South Africa's international obligations that are skewed towards reducing 'friction' with the trade system and effectively under-realise not only South Africa's international obligations, but also domestic constitutional obligations.

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<sup>308</sup> 'GSP Hearing Transcript January 31, 2020' [8]-[176] <<https://www.regulations.gov/document?D=USTR-2013-0013-0054>> accessed 21 March 2021.

<sup>309</sup> USTR, '2020 Special 301 Report', <[https://ustr.gov/sites/default/files/2020\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf)> accessed 21 March 2021.

<sup>310</sup> Referral letter (n 260) [22.3].

<sup>311</sup> *ibid* [6].

## 5.8. Conclusion

The South African Constitution recognises the unique role that South Africa plays not only as a recipient of international law but also as an actor in international law. This is evinced through the interpretive provisions that encourage all organs of state to consider international law in interpreting the Bill of Rights, and in interpreting statutes consistently with the Bill of Rights. In doing so, the Constitution contributes to the domestic praxis of resolving the phenomenon of fragmentation of international law. In other words, the Bill of Rights acts as a magnet for South Africa's international obligations and domestic laws – attracting all interpretive possibilities towards it and requiring that the one closest to it be selected. International law plays an important role in interpreting the Bill of Rights, against which the constitutionality of the Copyright Act and its regulations would ultimately be tested. .

I have argued that several provisions of the Copyright Act potentially limit the right of access to educational materials. In particular, I considered ss 12(1)(a) and 12(4), concluding that s 12(4) with its open-textured test of 'fair practice', may be capable of an interpretation consistent with the Constitution, but that s 12(1)(a), which limits accessible format shifting, clearly limits the right. In respect of the regulations under the Copyright Act, I argued that not only are the impugned regulations likely unlawful because they are *ultra vires* the Copyright Act, but they also limit the right of access to educational materials and the rights of persons living with disabilities. The regulations and s 12(1)(a) of the Copyright Act are unlikely to survive a limitations analysis.

In order to enable access to educational materials for all, Parliament has taken steps towards domestically constructing South Africa's international obligations in a harmonious manner while legislating within the bounds (and to give effect to) South Africa's Constitution. The CAB thus seeks to rectify the constitutional infirmities in the

current Act. Its provisions take seriously South Africa's international human rights obligations and constitutional obligations to realise the rights in the Bill of Rights while at the same time also advancing a reasonable construction of its international intellectual property obligations.

Facing the 'chilling effect' described in Chapter 4, the President referred the CAB back to Parliament espousing a narrow interpretation of South Africa's international obligations *and* domestic constitutional obligations in respect of the Bill of Rights. It is currently in Parliament awaiting next steps. Having considered the legislative process, I turn now to Chapter 6, where I analyse an adjudicatory reconciliation of India's competing obligations.

## 6. ADJUDICATING ACCESS TO EDUCATIONAL MATERIALS: INDIA

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### 6.1. Introduction

Having discussed the legislative route in Chapter 5, in this Chapter, I analyse a judicial approach to reconciling these competing obligations in India. I critically analyse the Delhi High Court's interpretation of the educational exceptions in the Indian Copyright Act 1957. The judgments, I argue, offer insights into an interpretation of 'fair practice' grounded in the realities of a socio-economically stratified society. Although they do not explicitly draw on the Constitution's Bill of Rights ('Fundamental Rights'), these judgments provide an important starting point for understanding the role of the right to education in interpreting copyright exceptions.

I first set out India's treaty obligations in respect of the right to education and copyright in section 6.2. Second, I discuss how the Constitution of India, 1950 ('Constitution') governs the relationship between international and domestic law in section 6.3. The key provision setting out this relationship is a Directive Principle of State Policy ('DPSP'). To understand its nature and application, I discuss the particular role played by DPSPs in the constitutional scheme. This is crucial to understanding how India gives domestic effect to its international obligations. In the same vein as Chapter 5, I identify the 'magnetic effect' of the Fundamental Rights in structuring the domestic construction of India's international obligations in section 6.3.3.3. I then set out the extent to which access to educational materials is constitutionally guaranteed by analysing the right to education and its obligations in section 6.4. I discuss the implicit right to education, judicially evolved from the right to life, and a recent constitutional amendment introducing the right to primary education. In section 6.6.1, I analyse the relevant provisions of the Copyright Act regarding access to educational materials. I locate *DU Photocopy* as a site for

the intersecting interests of students, teachers, authors, educational institutions and publishers. I analyse the judgments of both benches of the Delhi High Court to set out the current position in Indian law. The Chapter concludes by discussing the implications of *DU Photocopy* for ongoing litigation, attempts at legislative reform and in constructing international law.

Before diving into the argument, an important caveat is necessary. The Indian Supreme Court has been widely characterised as a ‘polyvocal’ court.<sup>1</sup> As one commentator puts it ‘speaking of *the* Indian Supreme Court is in many ways a misnomer’ because, unlike the South African Constitutional Court, the Indian Supreme Court does not sit *en banc*.<sup>2</sup> Rather, it sits in benches of two or three judges unless a matter is specifically referred to a larger bench of five, nine, eleven or thirteen judges (‘Constitution benches’).<sup>3</sup> Every bench arrives at their own interpretation of the law. Theoretically, in order to maintain coherence, the interpretations of law from bigger benches are binding upon smaller benches, and the doctrine of *stare decisis* is in operation.<sup>4</sup> However, practice does not bear this out,<sup>5</sup> leading to the current situation where the highest Court speaks with multiple,<sup>6</sup> often contradictory

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<sup>1</sup> Eg., Nicholas Robinson, ‘Structure Matters: The Impact of Court Structures on Indian and US Supreme Courts’ (2013) 61 AJCL 101, 113–115. See, polyvocality in the context of the domestic application of international law, Lavanya Rajamani, ‘International Law and the Constitutional Schema’ in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*, vol 1 (OUP 2016) 144.

<sup>2</sup> Nick Robinson, ‘The Structure and Functioning of the Supreme Court of India’ in Gerald N. Rosenberg, Sudhir Krishnaswamy, and Shishir Bail (eds), *A Qualified Hope* (1st edn, CUP 2019) 33.

<sup>3</sup> Constitution, art 145. However, the allocation of matters to Constitution benches has declined in the past two decades. See, Chintan Chandrachud, ‘Measuring Constitutional Case Salience in The Indian Supreme Court’ (2016) 6 JInLS 42, 43.

<sup>4</sup> Nick Robinson (n 2) 34–36. See also, Upendra Baxi, ‘The Travails of Stare Decisis in India’, *Legal Change: Essays in Honour of Julius Stone* (Butterworths 1983) 38.

<sup>5</sup> Eg., Gautam Bhatia, ‘What is the Role of a Judge in a Polyvocal Court?’, (*IndConLawPhil*, 1 April 2017) <<https://indconlawphil.wordpress.com/2017/04/01/what-is-the-role-of-a-judge-in-a-polyvocal-court/>> accessed 21 March 2021.

<sup>6</sup> The multiplicity of voices is not directly an issue, *if* the above theoretical checks are effective in practice. In such circumstances, it can even be understood as an important source of creative constitutional interpretation

voices,<sup>7</sup> leading to institutional incoherence,<sup>8</sup> and rule of law concerns.<sup>9</sup> What follows in this Chapter is a good faith reconstruction of the jurisprudence, following a line of cases that properly applies the rules of constitutional interpretation.<sup>10</sup> The significant original contribution of this Chapter is to serve as a guide for the proper application of the relevant constitutional and statutory provisions relating to access to educational materials, notwithstanding possibilities of alternative interpretations. The Chapter highlights the important role that domestic courts play in constructing international law and reconciling competing obligations even when they may not see themselves as international actors.

## 6.2. India's international treaty obligations

India has consented to be bound by several international and regional instruments relating to the right to education and copyright respectively. In doing so, India undertakes to fulfil its obligations under these treaties in good faith.<sup>11</sup> I provide an overview of these

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and enabling the evolution of constitutional identity. See, Gary Jacobsohn, 'Constitutional Identity' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*, vol 1 (OUP 2016) 116.

<sup>7</sup> Eg., Gautam Bhatia, 'Potential for Chaos in India's Polyvocal Supreme Court', (*IACL-AIDC Blog*, 21 May 2018) <<https://blog-iacl-aidc.org/crisis-at-the-supreme-court-of-india/2018/5/20/potential-for-chaos-in-indias-polyvocal-supreme-court>> accessed 21 March 2021.

<sup>8</sup> See, Tarun Khaitan, 'Indian Democracy at a Crossroads', (*Verfassungsblog*, 22 October 2018) <<https://verfassungsblog.de/indian-democracy-at-a-crossroads/>> accessed 21 March 2021, stating '[t]he Indian Supreme Court remains a complicated, polyvocal, court, and cannot be attributed any coherent ideological or jurisprudential worldview'. See also, Aparna Chandra, 'Limitation Analysis by the Indian Supreme Court' in Mordechai Kremnitzer, Talya Steiner, and Andrej Lang (eds), *Proportionality in Action* (1st edn, CUP 2020) 466–468.

<sup>9</sup> See, eg., the discordant jurisprudence on the death penalty as set out in Law Commission of India, 'The Death Penalty' August 2015 Doc No 272 [106-173].

<sup>10</sup> See, for a similar caveat, Tarunabh Khaitan, 'Equality: Legislative Review under Article 14' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*, vol 1 (OUP 2016) 701.

<sup>11</sup> The extent of the obligations varies depending on whether India has signed, ratified or acceded to the relevant treaties.

obligations in this section. Part I of the Thesis deals with the key obligations comprehensively.

### 6.2.1. International human rights treaties

India is party to the core UN human rights treaties guaranteeing the right to education set out in Chapter 2. India acceded to the ICESCR in 1979,<sup>12</sup> but has neither signed nor ratified the OPICESCR. Individual communications cannot be brought to the CESC. India bears reporting obligations in respect of the monitoring function of the CESC, discussed in Chapter 4. The ICESCR has been domestically incorporated by the Protection of Human Rights Act, 1993.<sup>13</sup> Further, India ratified the UNCPRD in 2007, the UNCEDAW in 1993, the ICERD in 1968, and the UNCRC in 1992.<sup>14</sup> India has not consented to a single communications procedure under these treaties. Individuals and groups thus cannot file individual complaints at any of the above treaty bodies. However, India bears reporting obligations regarding the domestic application of these treaties.

India ratified the UNESCO Convention in 1946.<sup>15</sup> As a member of UNESCO, India participated in the World Conference on Education for All in 1990, that resulted in the non-binding World Declaration on Education for All and a Framework for Action: Meeting Basic Learning Needs.<sup>16</sup> India has expressed political commitments to ensure equal access to education for all by participating in the subsequent World Education

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<sup>12</sup> 'India' (*OHCHR*) <<https://www.ohchr.org/en/countries/asiaregion/pages/inindex.aspx>> accessed 21 March 2021.

<sup>13</sup> Protection of Human Rights Act, 1993 (as amended by the Protection of Human Rights Amendment Act 2006).

<sup>14</sup> *OHCHR* (n 12).

<sup>15</sup> 'Constitution' (*UNESCO*) <[http://portal.unesco.org/en/ev.php-URL\\_ID=15244&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html)> accessed 21 March 2021.

<sup>16</sup> UNESCO, World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs, (1990) ED-90/CONF205.

Forum at Dakar, and adopting the non-binding Dakar Framework for Action in 2000.<sup>17</sup> Most recently, in 2015, India participated in the World Education Forum at Incheon, adopting the non-binding Education 2030 Framework for Action based on SDG 4.<sup>18</sup> Although these instruments are not in the nature of treaties and do not create binding obligations, they affirm India's commitment to realising the right to education for all.

India's regional obligations reinforce its international obligations. India is a founding member of the South Asian Association for Regional Cooperation ('SAARC'), an intergovernmental organisation established for regional cooperation in matters of mutual economic, social, cultural, technical and scientific benefit of all countries in the region.<sup>19</sup> The objectives of SAARC include 'to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realise their full [potential]'.<sup>20</sup> Human rights play a key role in achieving these objectives.

India is party to the SAARC Social Charter that imposes obligations upon all states parties in respect of social welfare,<sup>21</sup> requiring states parties to adopt a participatory national plan of action.<sup>22</sup> The relevant objectives of the Charter are to 'promote universal respect for and observance and protection of human rights and fundamental freedoms for all'; to

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<sup>17</sup> UNESCO, World Education Forum, Dakar: Final Report, (2000) ED2000/WS/29.

<sup>18</sup> UNESCO, Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all, (2016) ED-2016/WS/28. See also, UNGA, Transforming our world: the 2030 Agenda for Sustainable Development, 21 Oct 2015, A/RES/70/1.

<sup>19</sup> Charter of the SAARC (adopted on 8 December 1985) <<https://www.saarc-sec.org/index.php/about-saarc/saarc-charter>> accessed 21 March 2021 art 1.

<sup>20</sup> Charter of the SAARC art 1.

<sup>21</sup> Social Charter (adopted 4 January 2004) <<https://www.saarc-sec.org/index.php/resources/agreements-conventions/54-saarc-social-charter/file>> accessed 21 March 2021.

<sup>22</sup> Social Charter art X.

ensure that ‘every member of society is enabled to satisfy basic human needs and to realise his or her personal dignity, safety and creativity’; and to recognise that ‘information communication technology can help in fulfilling social development goals and emphasise the need to facilitate easy access to this technology’.<sup>23</sup> These are relevant to accessing educational materials. The Charter obliges states parties to respect, protect and fulfil the rights under it,<sup>24</sup> and obliges states parties to use legislative, executive, and administrative measures to achieve these objectives.<sup>25</sup> The Charter reaffirms India’s obligation to provide free primary education under the ICESCR,<sup>26</sup> and to guarantee inclusive education for children living with disabilities under the UNCRPD.<sup>27</sup>

Further, India is party to the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia (‘Child Welfare Convention’), reaffirming its obligations under the UNCRC.<sup>28</sup> This Convention also requires India to develop a programme of action for the development of the child, including the provision of basic services like education.<sup>29</sup> India is required to take necessary measures including legislation,<sup>30</sup> political support,<sup>31</sup> and allocate adequate resources<sup>32</sup> to fulfil the provisions of the

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<sup>23</sup> Social Charter art II.

<sup>24</sup> Social Charter art I.2.

<sup>25</sup> Social Charter art III.4.

<sup>26</sup> Social Charter art V.1.

<sup>27</sup> Social Charter art VII.9.

<sup>28</sup> Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia (5 January 2002) < <https://www.saarc-sec.org/index.php/resources/agreements-conventions/51-saarc-convention-on-regional-arrangements-for-the-promotion-of-child-welfare-in-south-asia/file> > accessed 21 March 2021.

<sup>29</sup> Child Welfare Convention, art IV.2.

<sup>30</sup> Child Welfare Convention, art VII.1.

<sup>31</sup> Child Welfare Convention, art X.

<sup>32</sup> Child Welfare Convention, art X.

Convention. Further, the Convention commits states parties to encourage the dissemination of information and other materials that are of social and cultural benefit to children.<sup>33</sup> This includes educational materials amongst others.

Although I have focused on India's international obligations in respect of the right of access to educational materials as a part of the right to education, there are other allied rights in which the subsequent analysis may be grounded. A full exposition is outside the scope of this Thesis.

### 6.2.2. International copyright treaties

India is party to the international copyright treaties discussed in Chapter 3. As with South Africa, India is also a former British colony. The Berne Convention therefore previously applied to the territory of present-day India through the United Kingdom's accession in 1887. India (governed by the colonial British administration at the time) deposited an instrument of continued application of the Berne Convention in 1928.<sup>34</sup> Newly independent India's resistance (as a postcolonial copyright importing country) to the high standard of copyright protection in the Berne Convention has been documented in recent literature.<sup>35</sup> At the time, key among the problems with the Berne Convention was the lack of knowledge generation in the form of textbook production in developing countries – and consequent hefty royalty payments to foreign countries from whom India imported

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<sup>33</sup> Child Welfare Convention, art IV.5.

<sup>34</sup> 'India, Berne Convention: Treaties and Contracting Parties' (WIPO) <<https://wipolex.wipo.int/en/treaties/parties/remarks/IN/15>> 21 March 2021.

<sup>35</sup> Prashant Reddy Thikkavarapu and Sumathi Chandrashekar, 'New Delhi Challenges the Berne Convention', *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (OUP 2017) 117–120. See also, JH Shah, 'India and the International Copyright Conventions' (1973) 8 EPW 645.

textbooks.<sup>36</sup> The Indian delegation to the Stockholm Revision Conference of the Berne Convention played a key role in lobbying for what eventually became the Berne Appendix.<sup>37</sup> However, as discussed in Chapter 3, the Berne Appendix is widely considered a failure. Even so, India recently renewed its acceptance of the Berne Appendix.<sup>38</sup> After enacting its domestic copyright statute in 1957, India acceded to the Brussels Act of the Berne Convention in 1958, signed the Stockholm Act in 1967, and subsequently acceded to the Paris Act in 1984.<sup>39</sup> The Berne Convention thus binds India.

India signed the UNESCO Universal Copyright Convention (UCC) at its inception in 1952 and subsequently at its revision in 1971.<sup>40</sup> The UCC explicitly provides for priority

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<sup>36</sup> MC Chagla, *Roses in December: An Autobiography* (3rd edn, BVB 1974) 365. See also, Ministry of Education, 'Address By Shri MC Chagla, Minister of Education, Government of India', Eleventh Session of the Permanent Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) and the Seventh Session of the Inter-Governmental Copyright Committee, Held in New Delhi on December 2, 1963', *International Copyright: Needs of Developing Countries Symposium* (New Delhi 1967) 2–3.

Many books published abroad are not published [in India] at all. The authors or the publishers from countries abroad send their books here. The result is a large expenditure of foreign exchange on the part of this country. As you know, we can ill - afford to spend our foreign exchange; we have to conserve all the foreign exchange that we have. Now I do not want to prevent books coming into this country. I believe books are the very life-blood of democracy. People must read; people must think; people must be familiar with different ideas, even ideas which are opposed to ours. We must keep our windows open to all opinions and ideas and therefore I am entirely in favour of complete freedom of books coming to this country. But I have got to balance this with the economic needs of my country and if we can devise some method whereby we can prevent foreign exchange being spent on the import of books, we must think about it because it would, as I said, not merely affect India, but would also affect the African countries.

<sup>37</sup> Eva Hemmungs Wirtén, 'Colonial Copyright, Postcolonial Publics: The Berne Convention and the 1967 Stockholm Diplomatic Conference Revisited' (2010) 7 *SCRIPTed: A Journal of Law, Technology & Society* 532, 541–543.

<sup>38</sup> Declaration by the Republic of India Relating to arts II and III of the Appendix to the Paris Act (1971), Berne Notification No. 280 <[https://www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_280.html](https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_280.html)> accessed 21 March 2021.

<sup>39</sup> Subject to India's declaration on the ICJ and cinematographic works. See, 'India, Berne Convention: Treaties and Contracting Parties' (*WIPO*) <<https://wipolex.wipo.int/en/treaties/parties/remarks/IN/15>> accessed 21 March 2021.

<sup>40</sup> Universal Copyright Convention (UNESCO) <[http://portal.unesco.org/en/ev.php-URL\\_ID=15241&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html#STATE\\_PARTIES](http://portal.unesco.org/en/ev.php-URL_ID=15241&URL_DO=DO_TOPIC&URL_SECTION=201.html#STATE_PARTIES)> accessed 21 March 2021.

to be given to the Berne Convention.<sup>41</sup> Since the Berne Convention and, subsequently, TRIPS has near universal application, the UCC has fallen into disuse.<sup>42</sup> Further, India ratified the WIPO Convention in 1975, becoming a member of WIPO.<sup>43</sup> Recently, in 2018, India acceded to the WCT and WPPT.<sup>44</sup>

India is a founding member of the WTO.<sup>45</sup> It is thus bound by the ‘covered agreements’ which include TRIPS and the WTO DSU, analysed in Chapter 4. TRIPS, the Berne Convention and the UCC have been domestically incorporated into Indian law through the International Copyright Order, 1999, read with the Copyright Act.<sup>46</sup> India was the first country to ratify the MVT, strengthening its commitment to ensuring access to materials under copyright for persons living with visual and print disabilities, discussed in Chapter 3.<sup>47</sup>

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<sup>41</sup> UCC art XVII(1).

<sup>42</sup> S Ricketson and JC Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn, OUP 2006) para 18.27-18.29. A full analysis of the UCC is outside the scope of this Thesis.

<sup>43</sup> ‘WIPO Convention Contracting Parties’ (WIPO) <[https://wipolex.wipo.int/en/treaties/ShowResults?treaty\\_id=1&country\\_id=80C](https://wipolex.wipo.int/en/treaties/ShowResults?treaty_id=1&country_id=80C)> accessed 21 March 2021.

<sup>44</sup> ‘WCT Contracting Parties’ (WIPO), <[https://wipolex.wipo.int/en/treaties/ShowResults?search\\_what=C&treaty\\_id=16](https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=16)> accessed 21 March 2021; ‘WPPT Contracting Parties’ (WIPO), <[https://wipolex.wipo.int/en/treaties/ShowResults?search\\_what=C&treaty\\_id=20](https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=20)> accessed 21 March 2021.

<sup>45</sup> ‘Member Information: India’ (WTO) <[https://www.wto.org/english/thewto\\_e/countries\\_e/india\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/india_e.htm)> accessed 21 March 2021.

<sup>46</sup> International Copyright Order 1999.

<sup>47</sup> ‘Ratification by the Republic of India, Marrakesh Notification No. 1’ (WIPO) <[https://www.wipo.int/treaties/en/notifications/marrakesh/treaty\\_marrakesh\\_1.html](https://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_1.html)> accessed 21 March 2021. See also, Anita Joshua, ‘India ratifies Marrakesh Treaty for visually impaired’, (*The Hindu*, 03 July, 2014).

India has entered into preferential trade arrangements with several countries, including the UK and Russia.<sup>48</sup> It has also entered into several regional trade agreements, including the South Asian Free Trade Agreement (SAFTA).<sup>49</sup> These instruments are relevant to the extent to which they impose additional intellectual property protections.

The obligations emerging from these treaties cumulatively bind India to realise the right of access to educational materials and to create and regulate copyright. However, at every level, when organs of state in India make decisions about domestically applying these international obligations, their necessary first step must be to *interpret* the international law at issue. For instance, when a matter invoking international treaties is brought before court, judges must determine the *meaning* of the treaty provisions at issue. Only then can it determine their domestic legal effect. This ‘auto interpretation’ of international obligations at every stage recognises that states are *actors* both on the international and domestic plane in constructing international law by determining its domestic legal effect.<sup>50</sup> In this Chapter, I am directly concerned with the domestic legal effect of India’s treaty obligations in respect of access to educational materials.

### 6.3. The domestic effect of India’s treaty obligations

Much of the otherwise rich literature on the right to education and its application in the Indian context *assumes* the domestic applicability of international human rights law, rather than understanding how the Constitution governs the relationship between international

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<sup>48</sup> ‘Preferential Trade Arrangements, India’ (WTO) <<http://ptadb.wto.org/Country.aspx?code=356>> accessed 21 March 2021.

<sup>49</sup> ‘Regional Trade Agreements, India’ (WTO) <<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=356&lang=1&redirect=1>> accessed 21 March 2021.

<sup>50</sup> André Nollkaemper, ‘Grounds for the Application of International Rules of Interpretation in National Courts’ in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts* (OUP 2016) 35.

and domestic law.<sup>51</sup> I demonstrate how skipping this step affects the domestic application of the obligation as courts have made similar methodological omissions, impacting the jurisprudence. I argue that to fully understand the domestic effect of India's treaty obligations in respect of access to educational materials, and how international obligations interact with existing domestic constitutional and statutory provisions, it is necessary to turn to the Constitution.

As in the South African context, in the next section I address the provisions that empower Parliament to enter into and domestically give effect to international treaties, and those that provide for international law to play an interpretive role.

### 6.3.1. The domestic application of India's treaty obligations

I argue that, under the Constitution, the substantive provisions of the relevant treaties set out in Chapters 2 and 3 are unlikely to form a direct source of domestic rights and obligations in India without additional legislative steps. I discuss a line of reasoning that the Supreme Court has adopted, purporting to give direct effect to international obligations, and explain that the better view is that these obligations have *interpretive* effect. I analyse the latter in section 6.3.2.1.2.

The Constitution vests exclusive legislative competence in Parliament<sup>52</sup> to make laws on matters related to India's participation in international law-making and the

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<sup>51</sup> See eg., Florian Matthey-Prakash, 'Article 21A Clues for Its Content in International Law and Socio-Economic Rights Adjudication in India', *The Right to Education in India: The Importance of Enforceability of a Fundamental Right* (1st edn, OUP 2019); C Raj Kumar, 'International Human Rights Perspectives on the Fundamental Right to Education-Integration of Human Rights and Human Development in the Indian Constitution' (2004) 12 TJICL 237; Sujata Bhan and Suzanne Rodricks, 'Indian Perspective on Child's Right to Education' (2012) 69 *Procedia - Social and Behavioral Sciences* 367.

<sup>52</sup> India is a quasi-federal country. The legislative competence of both the centre and the state is encapsulated by Constitution art 246, read with the Seventh Schedule. In the Seventh Schedule, there are three lists detailing the fields within which the central government (through Parliament) may make laws (the Union List), the state governments (through state legislative assemblies) may make laws (the State List) and a third list where both the centre and state may make laws concurrently (the Concurrent List).

domestic application of international obligations.<sup>53</sup> Unlike South Africa, the Constitution does not specify *which* organ of state has the competence to enter into treaties. It only specifies that Parliament is empowered to legislate to *implement* treaty obligations.<sup>54</sup> The same provision has been interpreted to include Parliament's competence to *enter into treaties* as well.<sup>55</sup>

Under the Constitution, the powers of Parliament are coextensive with those of the Union Executive.<sup>56</sup> The Executive is thus empowered to exercise its functions within the particular areas of legislative competence of Parliament. Further, the Constitution specifically enables the Union Executive to 'exercise such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement'.<sup>57</sup> Read with arts 253, 246 and the Seventh Schedule of the Constitution, this provision indicates that the Union Executive is equally empowered to enter into treaties on the international plane, *and* apply international obligations domestically.<sup>58</sup> The Constitution does not provide clarity on how this coexistent power is apportioned between Parliament and the Union Executive. For instance, unlike South Africa, there is no explicit constitutional

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<sup>53</sup> Constitution, Seventh Schedule, entries 10, 11, 12, 13, 14, 15. See also, entries 1, 2, 3, 16, 17, 18, 19, 21, 25, 29, 31, 37, 41 and 57.

<sup>54</sup> Constitution, art 253 provides:

Notwithstanding anything in the foregoing provisions of this Chapter [on legislative competence], Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

<sup>55</sup> Aparna Chandra, 'India and International Law: Formal Dualism, Functional Monism' (2017) 57 InJIL 25, 32.

<sup>56</sup> Constitution, art 73(1)(a).

<sup>57</sup> Constitution, art 73(2)(b).

<sup>58</sup> VS Mani, 'Effectuation of International Law in the Municipal Legal Order: The Law and Practice in India' (1995) 5 AsianYIL 145, 161.

requirement of approval by Parliament before the executive enters into treaties and assumes international obligations. The only constitutional constraint is that all executive and legislative exercises of power must be compliant with the Constitution in general and the Fundamental Rights in particular.<sup>59</sup>

In practice, Parliament has legislated on an *ad hoc* basis domestically incorporating India's treaty obligations, rather than passing a general law to clarify the roles of particular organs of state in undertaking and implementing international law.<sup>60</sup> The absence of such enabling legislation is not a bar to Executive action that is within constitutional bounds and pertains to matters within Parliament's competence.<sup>61</sup> This has resulted in an Executive-led approach to entering into *and* implementing India's international obligations.<sup>62</sup>

The Supreme Court has clarified that the deposit of consent to be bound by international treaties does not on its own have domestic direct effect.<sup>63</sup> Where binding international obligations 'operate to restrict the rights of citizens or others or modify the laws of the State', legislation is necessary.<sup>64</sup> This has been confirmed, along with the principle that '[w]hensoever, it is well known, a conflict arises between a treaty and the

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<sup>59</sup> Constitution, art 73(1), 13(1).

<sup>60</sup> Aparna Chandra, 'India and International Law' (n 55) 33.

<sup>61</sup> *Rai Sahib Ram Jawaya Kapur v The State of Punjab* 1955 2 SCR 225 [15]-[19].

<sup>62</sup> *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1 [18]. See also, Constitution, Seventh Schedule, entry 14.

<sup>63</sup> *Maganbhai Ishwarbhai Patel v Union of India* (1970) 3 SCC 400 (Shah J) [80] ('*Maganbhai*'). See also, BN Patel, *The State Practice of India and the Development of International Law* (Brill-Nijhoff 2016) 13.

<sup>64</sup> *ibid* (*Maganbhai*) [81]. See also, 'A Consultation Paper on Treaty-Making Power under Our Constitution' (*National Commission to Review the Working of the Constitution*, 8 January 2001) [874]-[879].

domestic law or a municipal law, the latter shall prevail'.<sup>65</sup> This is a restatement of the formal dualism in art 253.<sup>66</sup>

However, as noted in the limited literature on the question, the Supreme Court has recently moved towards *directly* incorporating India's international human rights obligations.<sup>67</sup> Its decisions assume that the *judiciary* is equally competent to give direct domestic effect to treaty obligations, without any further steps taken by the executive or legislature.<sup>68</sup> This takes a monist position that is contrary to the dualist scheme in art 253 discussed above. It is nothing but an application of the doctrine of self-execution by another name, where international law is assumed to be applicable domestically without further steps to transform it.<sup>69</sup> Unlike South Africa, where the South African Constitution explicitly provides for the constitutional application of self-executing treaties, India's Constitution does *not* provide for treaties to be self-executing. A typical statement of the Supreme Court applying this doctrine of 'judicial incorporation' is

[i]n cases involving violation of human rights, the courts must forever remain alive to the international instruments and conventions *and apply the same to a given case* when there is no inconsistency between the international norms and the domestic law occupying the field.<sup>70</sup>

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<sup>65</sup> *Bhavesb Jayanti Lakhani v State of Maharashtra* (2009) 9 SCC 551 [48].

<sup>66</sup> The only – judicially evolved – exception to this rule, is India's treatment of customary international law as directly applicable provided that it is consistent with existing domestic law. See, *PUCL v Union of India* AIR 1997 SC 568 [23].

<sup>67</sup> VG Hegde, 'Indian Courts and International Law' (2010) 23 LJIL 53, 60–61; Lavanya Rajamani (n 1) 148.

<sup>68</sup> *Gramophone Company of India Ltd v Birendra Babadur Pandey* (1984) 2 SCC 534 [5]–[7].

<sup>69</sup> See also, for an exposition on the doctrine of self-executing treaties in the South African context, Sanya Samtani, 'International Law, Access to Courts and Non-Retrogression: Law Society v President of the Republic of South Africa' [2020] CCR 197.

<sup>70</sup> *Apparel Export Promotion Council v AK Chopra* (1999) SCC 579 [27] (emphasis added).

In *Apparel Export Promotion* cited above, and *Vishaka*,<sup>71</sup> courts directly applied the UNCEDAW. Both cases also ‘applied’ the Beijing Declaration and Platform for Action, 1995,<sup>72</sup> which is a soft law instrument. Does this mean that all international law, *regardless* of its binding value, creates domestic rights and obligations in India provided it is consistent with domestic law? Surely not, as this would be contrary to India’s sovereignty. The better view is that only those obligations that are internationally binding on India would be directly applicable, *if at all*. In any event, a closer look at the jurisprudence indicates that the Court has used a doctrine of ‘judicial incorporation’ as but *one* explanation for its utilisation of India’s treaty obligations.<sup>73</sup> The other interpretive explanation provided by the Court,<sup>74</sup> I argue in section 6.3.2.1.2, fits better with the constitutional scheme and the place of international law within it. It is this approach that should be adopted when interpreting the effect of the treaty obligations set out in section 6.2.

### 6.3.2. The interpretive functions of international obligations

In India, the interpretive functions of international obligations have been judicially evolved by interpreting art 51(c). Art 51(c) states, ‘[t]he State shall endeavour to [...] foster respect for international law and treaty obligations in the dealings of organised people with one

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<sup>71</sup> *Vishaka v State of Rajasthan* (1997) 6 SCC 241 [7], [10], [14].

<sup>72</sup> UN, Beijing Declaration and Platform of Action (adopted at the Fourth World Conference on Women, 27 October 1995).

<sup>73</sup> See also, *KS Puttaswamy v Union of India* (2017) 10 SCC 1 (Nariman J) (*‘Privacy-9J’*) [532]-[535] for a recent iteration of direct application stating

In the absence of any specific prohibition in municipal law, international law *forms part* of Indian law and consequently must be read into or as part of our fundamental rights. (emphasis added).

<sup>74</sup> *ibid* (Chandrachud J) [91]:

In the view of this Court, international law has to be construed as a part of domestic law in the absence of legislation to the contrary and, *perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content of international conventions to which India is a party*. (emphasis added).

another.<sup>75</sup> This provision is a DPSP.<sup>76</sup> An analysis of its nature is important to understanding its application. I first discuss the particular role of DPSPs in the constitutional scheme, and then, turn to the quoted DPSP in respect of the obligations set out in section 6.2.

#### **6.3.2.1.1. Nature of DPSPs**

The Constitution explicitly provides that DPSPs are non-justiciable.<sup>77</sup> An independent claim grounded solely in DPSPs cannot be enforced by courts,<sup>78</sup> and neither can a claim that a particular state policy has failed to comply with a DPSP be enforced.<sup>79</sup> Concurrently, the Constitution creates an unenforceable duty upon the state to employ DPSPs in discharging its law-making function.<sup>80</sup> Here, the definition of ‘law’ is inclusive and extends to the exercise of delegated legislation as well,<sup>81</sup> thus binding the executive and legislature to apply DPSPs.

The DPSPs and Fundamental Rights have been described as together constituting the ‘core’ and ‘conscience’ of the Constitution.<sup>82</sup> Courts have interpreted DPSPs to have

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<sup>75</sup> Constitution, art 51(c).

<sup>76</sup> Constitution, part IV.

<sup>77</sup> Constitution, art 37.

<sup>78</sup> Gautam Bhatia, ‘Directive Principles of State Policy’ in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*, vol 1 (OUP 2016) 646.

<sup>79</sup> *Common Cause v Union of India* (2015) 7 SCC 1 [8]; *Kesavananda Bharati Sripadagalvaru v State of Kerala* (1973) 4 SCC 225 (Mathew J) [1701]-[1704].

<sup>80</sup> Constitution, art 37. This excludes the judiciary. See *Naresh Shridhar Mirajkar v State Of Maharashtra* 1966 SCR (3) 744 (Gajendragadkar J) [58], [61], [64].

<sup>81</sup> Constitution, art 13(3)(a). See also *Indian Young Lawyers Assn v State of Kerala* 2018 SCC OnLine SC 1690 (Chandrachud J) [96].

<sup>82</sup> *Minerva Mills v Union of India* (1980) 3 SCC 625 (Chandrachud J) [56]-[57].

primarily three functions:<sup>83</sup> first, as presumptive, constitutionally defined conceptions of legitimate aims used to justify restrictions upon rights, *as long as these restrictions are reasonable*.<sup>84</sup> The mere invocation of a DPSP does not mean that restrictions on the exercise of the rights in the Fundamental Rights are presumptively reasonable. What it does mean, however, is that the goal in furtherance of which the restriction is enacted is constitutionally sanctioned.<sup>85</sup> The state would still need to establish that the restriction is reasonable for it to pass constitutional muster.<sup>86</sup> Second, DPSPs act as a substantive guide for the interpretation of statutes.<sup>87</sup> In addition to other rules of statutory interpretation, courts have held that statutes must be interpreted to promote DPSPs.<sup>88</sup> This is particularly relevant in the international law context. Third, DPSPs provide a values-based interpretive framework<sup>89</sup> within which the Fundamental Rights must be interpreted.<sup>90</sup> Where there are competing interpretations of a particular right in the Fundamental Rights, the conception that most closely accords with the values set out in the DPSPs must be preferred.<sup>91</sup> I turn now to interpreting art 51(c) within this framework.

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<sup>83</sup> As set out in a good faith reconstruction of the interpretation of DPSPs by the higher judiciary in Gautam Bhatia (n 78) 650–660.

<sup>84</sup> *Dalmia Cement (Bharat) Ltd v Union of India* (1996) 10 SCC 104 [21]; *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat* (2005) 8 SCC 534 [36]–[39].

<sup>85</sup> LK Weis, ‘Constitutional Directive Principles’ (2017) 37 OJLS 916, 919–920.

<sup>86</sup> *Minerva Mills* (n 82) [57], [58]. Importantly, this depends on the right that is alleged to be restricted as different rights have different standards of review.

<sup>87</sup> *Uttar Pradesh State Electricity Board v Hari Shankar* (1978) 4 SCC 16 (Chinnappa Reddy J) [17].

<sup>88</sup> *Regional Provident Fund Commissioner v Hooghly Mills Co Ltd* (2012) 2 SCC 489 [26].

<sup>89</sup> For an understanding of the value-pluralism inherent in the DPSPs, see generally, Tarunabh Khaitan, ‘Directive Principles and the Expressive Accommodation of Ideological Dissenters’ (2018) 16 IJCL 389.

<sup>90</sup> *State of Kerala v NM Thomas* (1976) 2 SCC 310 (Krishna Iyer J) [159]. See also, O Chinnappa Reddy, *The Court and the Constitution of India: Summit and Shallows* (OUP 2010) 82.

<sup>91</sup> *Randhir Singh v State of Uttar Pradesh* (1982) 1 SCC 618 (Chinnappa Reddy J) [8]; *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161 (*‘Bandhua 1984’*) (Bhagwati J) [10].

#### **6.3.2.1.2.      *Interpreting art 51(c)***

Art 51 places a non-justiciable obligation upon the state to ‘endeavour’. According to the ordinary meaning of ‘endeavour’, the state is obliged ‘to try, make an effort for a specified object; attempt strenuously’ towards the fulfilment of an object.<sup>92</sup> This exhortative obligation is one of effort rather than outcome.<sup>93</sup> Under art 51(c) specifically, the object of the state’s efforts is to ‘foster respect’ for ‘international law’ in general, and ‘treaty obligations’ in particular.<sup>94</sup> Taking note of its character as a DPSP, I apply the interpretive framework set out above to distil the following interpretive functions played by international law in the Indian context.

##### **6.3.2.1.2.1.      *Statutes must be interpreted consistently with binding treaty obligations***

Courts have interpreted art 51(c)’s injunction to ‘foster respect’ to mean that statutes must be interpreted in conformity with India’s binding treaty obligations, where such an interpretation is reasonably possible.<sup>95</sup> The Supreme Court has held that ‘the supremacy of the constituted legislature may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves’, thus maintaining that where it is not reasonably possible to interpret a statute consistently with international law, the law would not be invalid for that reason.<sup>96</sup> In addition, the ‘interpretive guide’ function of art 51(c) *qua* DPSP, entails using relevant international law (both binding and non-

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<sup>92</sup> Oxford Dictionaries, ‘Endeavour’ <<https://www.oed.com/view/Entry/61902?result=2&rskey=kZMcgo&>> accessed 24 November 2020.

<sup>93</sup> Lavanya Rajamani (n 1) 145; VG Hegde (n 67) 57.

<sup>94</sup> BN Patel (n 63) 122.

<sup>95</sup> *Union of India v Meghmani Organics Ltd* (2016) 10 SCC 28 [26]; *Jolly George Verghese v Bank of Cochin* [1980] 2 SCR 913 [9].

<sup>96</sup> *Aban Loyd Chiles Offshore Ltd v Union of India* (2008) 11 SCC 439 [100]-[103].

binding) to inform the interpretation of a statute when it is unclear or contested.<sup>97</sup> Since access to educational materials is regulated by a domestic copyright statute, this interpretive injunction is relevant to its interpretation.<sup>98</sup>

**6.3.2.1.2.2. *International law as an interpretive framework for the interpretation of Fundamental Rights***

Art 51(c) also fulfils the ‘interpretive framework’ function set out above in constructing the scope and content of Fundamental Rights. Returning to the discussion on the doctrine of self-execution, in this section, I discuss the alternative line of reasoning discernible from the judgments analysed in section 6.3.1. In *Vishaka*, for instance, in the absence of domestic laws governing sexual harassment at the workplace, the Supreme Court reasoned that

[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [arts 14, 15 19(1)(g) and 21 of the Constitution] to *enlarge* the meaning and content thereof, to *promote* the object of the constitutional guarantee.<sup>99</sup>

The better reading of *Vishaka*, as an alternative to ‘judicial incorporation’, is that the Court first identifies the relevant rights at issue in the Fundamental Rights. It then assesses their scope and content in domestic jurisprudence alongside India’s binding treaty obligations consistent with the Fundamental Rights. The Court then uses these obligations to enlarge the scope and content of the Fundamental Rights if necessary to promote the objects of the Fundamental Right at issue. On this reading, the international obligations do not form a direct source of rights and obligations – rather the rights and obligations are rooted in

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<sup>97</sup> *PUCL v Union of India* (2005) 2 SCC 436 (Sabharwal J) [17], [41], (Dharmadhikari J) [51]-[58]; *Gittha Hariharan v. Union of India* (1999) 2 SCC 228 [14].

<sup>98</sup> The Supreme Court invoked international treaties that bind India to interpret the Copyright Act in *Gramophone Company of India* (n 68) [29].

<sup>99</sup> *Vishaka* (n 71) [7] (emphasis added).

the Fundamental Rights. This better fits with the structure of the constitutional scheme on international law, set out in section 6.3.1.

*Vishaka* is not an outlier in this regard.<sup>100</sup> Most recently, in the absence of an explicit right to privacy, the Court has employed international law to ‘enlarge’ the scope and content of the fundamental rights to life, equality and freedom in the Fundamental Rights to include this right,<sup>101</sup> drawing on binding and non-binding international instruments.<sup>102</sup> For the purposes of this Thesis, it suffices to note that international law has been used to interpret the Fundamental Rights purposively. With regard to the right to education, international law has been used to clarify the state’s duties.<sup>103</sup> As I discuss in section 6.4, the right of access to educational materials is not an explicit right in the Constitution. It is implicit, as a part of the right to education. The interpretive framework provided by international law is helpful in filling out its content. Before applying these injunctions to the right of access to educational materials, I discuss the role of an overarching constitutional constraint in domestic interpretation: the Fundamental Rights.

### 6.3.3. The Fundamental Rights as a ‘magnet’ for interpreting international law and statutes

Similar to South Africa, in this section, I identify the particular constitutional role of the Fundamental Rights in the Indian context. Since the interpretive function of international

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<sup>100</sup> See also, with the same reasoning *AK Chopra* (n 70) [27]. See also for examples of other rights, *Thalappalam Service Coop Bank Ltd v State of Kerala* (2013) 16 SCC 82 [54]-[56] (*‘Thalappalam’*); *NALSA v Union of India* (2014) 5 SCC 438 [81], [35]; *Narvej Singh Johar v Union of India* (2018) 10 SCC 1 (RF Nariman J) [338]-[342] (*‘Narvej’*); *Assn of Medical Superspeciality Aspirants & Residents v Union of India* (2019) 8 SCC 607 [32].

<sup>101</sup> *KS Puttaswamy v Union of India* (2019) 1 SCC 1 [112], [508.14] (*‘Aadhaar-5J’*).

<sup>102</sup> See, *PUCL* (n 66) [20]-[26]; *Thalappalam* (n 100) [57]-[59]; *Narvej* (n 100) (Misra CJ) [162]-[167]; *Privacy-9J* (n 73) (Chandrachud J) [148]-[154].

<sup>103</sup> *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1 [213], [222]-[225].

law is located within the DPSPs, I argue that the unique relationship between DPSPs and Fundamental Rights cannot be ignored in its application. As discussed in section 6.3.2.1.1, courts have held that in giving effect to DPSPs, Fundamental Rights cannot be restricted unless these restrictions pass reasonableness review. This means that although Parliament is competent to legislate to give effect to India's international treaty obligations, the mere fact that it is doing so in furtherance of a presumptively legitimate purpose is not enough for the law to be constitutionally compliant. If the law restricts Fundamental Rights, it must pass reasonableness review.<sup>104</sup>

### **6.3.3.1. *No law can 'abridge' or violate the rights in the Fundamental Rights***

The Constitution provides that

[t]he State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.<sup>105</sup>

As discussed, the fact that a law cannot be interpreted consistently with international law does not affect its constitutionality. However, the constitutionality of a law is suspect if it abridges or violates Fundamental Rights. Here, law is defined broadly, and includes delegated legislation.<sup>106</sup> If a law violates a right in the Fundamental Rights, courts must first exercise their discretion to attempt to read down the law so as not to violate the right.<sup>107</sup> If that is not possible, courts are empowered to strike down the law as unconstitutional to that extent.<sup>108</sup> Put differently, this means that *all* law must comply with the Fundamental

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<sup>104</sup> Or, as mentioned previously, the standard of review that the particular right requires.

<sup>105</sup> Constitution, art 13(2).

<sup>106</sup> Constitution, art 13(3)(a). See also, HM Seervai, *Constitutional Law of India*, vol 1 (4th edn, Universal Book Traders 2002) 400.

<sup>107</sup> Eg., *Indra Das v State of Assam* (2011) 3 SCC 380 [32]-[40].

<sup>108</sup> Constitution, arts 32, 226. See generally, for a statement of the law on severability, *RMD Chamarbaugwalla v Union of India* AIR 1957 SC 628.

Rights and give effect to the DPSPs; but if it cannot give effect to a DPSP this does not in and of itself render it invalid.

### ***6.3.3.2. Limitations of rights in the Fundamental Rights must be constitutionally justified***

Different Fundamental Rights have different standards of review.<sup>109</sup> However, the Court has recently noted that ‘the thread of reasonableness runs through the entire fundamental rights chapter’.<sup>110</sup> Where the state fails to fulfil the relevant standard in justifying a limitation, the law is unconstitutional to the extent that it infringes that particular right.<sup>111</sup> I discuss below the differential standards that apply to the constitutional right to primary education,<sup>112</sup> the right to equality and non-discrimination,<sup>113</sup> and the right to life,<sup>114</sup> which includes the right to education at all levels. This analysis is relevant in the event that Parliament seeks to amend the Copyright Act.

### ***6.3.3.3. The magnetic effect of the Fundamental Rights***

The overall interpretive effect of the interpretive injunctions set out above is this: undomesticated international obligations *qua* DPSPs form a presumptively legitimate aim towards which Parliament and the Executive may carry out their functions. Thus, statutes must be interpreted to give effect to international law, but cannot limit Fundamental Rights

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<sup>109</sup> Aparna Chandra, ‘Proportionality in India: A Bridge to Nowhere?’ (2020) 3 UOxHRHJ 55, 62. See also, an attempt by the same author to draw on common elements used in limitations analyses across rights, Aparna Chandra, ‘Limitation Analysis by the Indian Supreme Court’ (n 8) 461.

<sup>110</sup> *Shayara Bano v Union of India* (2017) 9 SCC 1 [91] (*‘Shayara Bano’*).

<sup>111</sup> Eg., *Shreya Singhal v Union of India* (2015) 5 SCC 1 [55]-[68], [79].

<sup>112</sup> Constitution, art 21A.

<sup>113</sup> Constitution, arts 14, 15.

<sup>114</sup> Constitution, art 21.

unless they pass reasonableness review. Fundamental Rights act as a constitutional constraint.

In respect of international law that is consistent with and governs the same subject matter as the Fundamental Rights, where a court identifies that the content of the right at issue must be supplemented in order to fulfil its purpose, it utilises these international obligations as interpretive tools. In almost all the cases cited above, this has overlapped with the international human rights treaties and standard setting instruments analysed in Chapter 2. Most recently, the Supreme Court has affirmed that

Constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation. In fact, the enactment of the Human Rights Act by Parliament would indicate a legislative desire to implement the human rights regime founded on constitutional values and international conventions acceded to by India.<sup>115</sup>

This does not mean that India elects to negate its non-human rights obligations in international law – it is still bound by the principle of *pacta sunt servanda* under the VCLT. Rather, it means that all obligations, whether international or domestic, must be discharged in conformity with the Fundamental Rights.<sup>116</sup> And, as discussed, the Fundamental Rights often overlap with international human rights law, thereby domestically prioritising their application. I explain the implications of this understanding below.

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<sup>115</sup> *Privacy-9J* (n 73)(Chandrachud J) [133]. But see, the Court's failure to recognise the principle of non-refoulement. It ordered the deportation of Rohingya refugees in *Mohd Salimullah v Union of India* WP (C) 793/2017. An appeal to this order has been pending since 2018 and is being heard at the time of writing.

<sup>116</sup> Except for where statutes that restrict Fundamental Rights pass reasonableness review.

## 6.4. The right to education and educational materials

Having set out the international interpretive framework above, I turn to the domestic guarantees regarding the right to education. I locate the right of access to educational materials as a part of the right to education under the Indian Constitution.

The Indian Constitution did not have an explicit right to education until 2002 when it was amended to add art 21A.<sup>117</sup> Before this, the courts developed an enforceable right to education as an aspect of the right to life under art 21 read with DPSPs. For this reason, I first analyse the implicit right to education at all levels found under art 21 read with DPSPs, and then turn to the aspects of the right that were later made explicit in the right to education in art 21A. Finally, I discuss the role of international law in including access to educational materials in the right.

### 6.4.1. Art 21 and relevant DPSPs

The Supreme Court has interpreted the right to life<sup>118</sup> expansively.<sup>119</sup> A typical statement of this interpretation is

the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings.<sup>120</sup>

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<sup>117</sup> Constitution (Eighty-Sixth Amendment) Act of 2002. For an overview of the political and civil society contestation around the amendment and its critique see Vijayashri Sripati and Arun K. Thiruvengadam, 'India: Constitutional Amendment Making the Right to Education a Fundamental Right' (2004) 2 IJCL 148.

<sup>118</sup> Constitution, art 21 provides, 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.

<sup>119</sup> Anup Surendranath, 'Life and Personal Liberty' in Sujit Choudhry, Pratap Bhanu Mehta, and Madhav Khosla (eds), *The Oxford Handbook of the Indian Constitution*, vol 1 (OUP 2016) 757. I analyse art 21 to the extent necessary to understand the right to education. A comprehensive analysis of the provision is outside the scope of this Thesis.

<sup>120</sup> *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* 1981 AIR 746 [7]-[8]. Cited with approval in several cases, eg., *Privacy-9J* (n 73); *Joseph Shine v Union of India* (2019) 3 SCC 39; *Common Cause v Union of*

In addition to ‘facilities for reading, writing and expressing one-self in diverse forms’, the Supreme Court has included the right to educational facilities and the right to compulsory primary education within the right to life.<sup>121</sup> In the next sections, I analyse the judicially evolved right and the state’s corresponding duties.

#### **6.4.1.1. *Judicial evolution of the implicit right to education under art 21***

In *Mobini Jain*, the Court established the existence of an enforceable right to education in the Fundamental Rights, concluding that ‘the right to education flows directly from the right to life’.<sup>122</sup> In *Unni Krishnan*, the Court sought to qualify the right by emphasising that

of course, the magnitude and content of the components of this right would depend on the extent of the economic development of the country, but it must, in any view of the matter, include the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.<sup>123</sup>

In both cases, the Court recognised the importance of the right to education for the realisation of all other rights in the Fundamental Rights.<sup>124</sup> This is similar to the understanding of the right to education as an ‘empowerment right’ in South Africa. In further justifying the importance of an enforceable right to education as an aspect of the right to life, the Court employed a structural reading of the Constitution and reasoned that the goals of social, economic and political justice outlined in the Preamble and reflected in

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*India* (2018) 5 SCC 1; *Navej* (n 100); *Confederation of Ex-Servicemen Assns. v Union of India* (2006) 8 SCC 399; *Chameli Singh v State of UP* (1996) 2 SCC 549. Also cited comparatively in *Muhamad Juzaili bin Mohd Khamis v State Government of Negeri Sembilan* [2015] 3 MLJ 513; 2015 SCC Online MYCA 121 (Malaysia); *Watan Party v Federation of Pakistan* (2012) PLD SC 292 (Pakistan); *Government of Bangladesh v Prof Nurul Islam* 2018 (2) LNJ (AD); 2016 SCC Online Bang SC (App) 26 : 9 SCOB [2017] AD 46 (Bangladesh).

<sup>121</sup> *Bandhua Mukti Morcha v Union of India* (1997) 10 SCC 549 [11]; *Bandhua 1984* (n 91) [183].

<sup>122</sup> *Mobini Jain v State of Karnataka* (1992) 3 SCC 666 [12] (*‘Mobini Jain’*).

<sup>123</sup> *Unni Krishnan, JP v State of AP* (1993) 1 SCC 645 [182] (*‘Unni Krishnan’*) citing *Francis Coralie Mullin* (n 120) [8].

<sup>124</sup> *Mobini Jain* (n 122) [13]; *Unni Krishnan* (n 123) [183]. An early argument for the inclusion of the right to education as a part of the right to life was also made in *State of AP v Lavu Narendranath* (1971) 1 SCC 607 [18]-[19].

the DPSPs<sup>125</sup> would be unreachable without the realisation of an equal right to education for all.<sup>126</sup>

#### **6.4.1.2. Scope and content of the right**

The Supreme Court has held that the right to life includes an *equal* right to education for all, at all levels, in line with the principle of equality and non-discrimination.<sup>127</sup> However, the content of the right varies for different levels of education. In *Unni Krishnan*, the Court used DPSPs as an interpretive framework to interpret the right to life. The Court drew on art 45 (before it was amended in 2002) that stated

The State shall endeavour to provide within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

The Court admonished the state for delaying the achievement of the objective in art 45 for a period well over the ten year time frame.<sup>128</sup> On the basis that this was the only DPSP that contained a time frame, it held that every child has an immediately enforceable right to free education up to the age of 14 years.<sup>129</sup>

Further, in respect of education *after* the age of 14 years, the Court held that the right to education in art 21 must be interpreted within the framework of art 41, another DPSP.<sup>130</sup> In other words, the equal right to education for all beyond the age of 14 years

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<sup>125</sup> Constitution, arts 38, 39, 41, 45, 46.

<sup>126</sup> *Mobini Jain* (n 122) [8]; *Unni Krishnan* (n 123) [183].

<sup>127</sup> *Mobini Jain* (n 122) [19].

<sup>128</sup> *Unni Krishnan* (n 123) [172].

<sup>129</sup> *ibid* (S Mohan J) [44], [175].

<sup>130</sup> Constitution, art 41 states:

The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, *to education* and to public assistance in cases of

only exists to the extent to which the state can guarantee it within the state's own economic capacity and extent of development.<sup>131</sup> Further, in doing so, the state is required to have 'due regard' for the economic welfare of the groups mentioned in art 46.<sup>132</sup> This is similar to the progressive realisation guarantee in the ICESCR, where the state is mandated to take steps towards the full achievement of the right but within its maximum available resources. I discuss the important role India's ratification of the ICESCR plays in determining the relationship between arts 21 and 21A in section 6.4.3.

In terms of the equality dimension of the right to education, in *Mobini Jain*, the Court recognised that financial barriers, in particular 'capitation fees' for accessing education at all levels, were infringed the right to equality.<sup>133</sup> In *Unni Krishnan*, the Court recognised the particular role of private educational institutions in providing higher education and held that in order to prevent 'profiteering' and commercialisation of education,<sup>134</sup> these institutions could charge admission fees subject to a legislative ceiling but not 'capitation fees'.<sup>135</sup> This was later overruled in respect of private unaided educational institutions where the Court held that governmental restrictions on fees were 'unacceptable'.<sup>136</sup> Rather, as long as private institutions provide education with a charitable

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unemployment, old age, sickness and disablement, and in other cases of undeserved want.  
(emphasis added)

<sup>131</sup> *Unni Krishnan* (n 123) [171], [181], [182].

<sup>132</sup> *ibid* [171]. Constitution, art 46 states:

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

<sup>133</sup> *Mobini Jain* (n 122) [21].

<sup>134</sup> *Unni Krishnan* (n 123) [196], [198], [203].

<sup>135</sup> *ibid* [226(2)].

<sup>136</sup> *TMA Pai Foundation v State of Karnataka* (2002) 8 SCC 481 [54]-[57], [60] ('*TMA Pai*').

object rather than the object of making a profit,<sup>137</sup> a ‘reasonable revenue surplus’ generated from fees was held to be constitutional.<sup>138</sup>

In respect of locating the right of access to educational materials within art 21, I argue that India’s international obligations should act as an interpretive framework on the basis of art 21 *qua* DPSP. The ICESCR’s 4A framework is particularly helpful as it enables the content of the right to education recognised above to be enumerated. Not only must education be available, as *Unni Krishnan* implies, it must also be accessible, adaptable, and acceptable. This resonates with *TMA Pai*’s holding that general regulation for the maintenance of infrastructure is constitutional. As argued in Chapter 2, educational materials form an integral part of educational infrastructure. I return to this point after discussing art 21A.

#### **6.4.1.3. Obligations flowing from the right**

The jurisprudence analysed above indicates that the state is the primary duty bearer in respect of realising the right to education for all. Importantly, it indicates that private parties play a significant role in discharging these functions. However, the Court specified that private parties are under no general obligation to run educational institutions but where they decide to do so,<sup>139</sup> they must act constitutionally.<sup>140</sup> At the same time, they are afforded a wide degree of autonomy in determining fees.<sup>141</sup> As a way of ensuring that everyone has access to quality education, the Court pointed to possible general regulatory measures that could be taken by the State to ensure that minimum norms and standards

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<sup>137</sup> See for the characterisation of education as a public duty, *Unni Krishnan* (n 123) [197].

<sup>138</sup> *TMA Pai* (n 136) [54], [57].

<sup>139</sup> A discussion of minority educational institutions is outside the scope of this Thesis.

<sup>140</sup> *Unni Krishnan* (n 123) [197]. A discussion of the affirmative action cases is outside the scope of this Thesis.

<sup>141</sup> *PA Inamdar v State of Maharashtra* (2005) 6 SCC 537 confirming *TMA Pai* (n 136) [55], [68].

are adhered to by private and public institutions alike, even in respect of admissions as long as they are reasonable.<sup>142</sup>

The Court clarified that in respect of primary education up to the age of 14, the state cannot use resource constraints to justify not providing such education.<sup>143</sup> In respect of education beyond the age of 14, the state's obligation is progressive, and the right is only enforceable subject to the state's economic capacity and development.<sup>144</sup> I return to the particular obligations upon the state and private parties that remain after discussing the content of art 21A.

#### **6.4.1.4. *Limitations to the right***

Since the right to education has been judicially evolved under the right to life, the appropriate standard of review for its limitation is the standard developed under art 21. This is an important consideration to bear in mind in respect of any future amendments to the Copyright Act that relate to its educational exceptions to the extent that exceptions enable the fulfilment of the right to education.

According to its text, the right to life and the rights nested within it may only be limited by 'procedure established by law'.<sup>145</sup> In its early days, the Court interpreted this to mean that *any* procedure, as long as it was established by law (defined in art 13), would be sufficient to limit art 21.<sup>146</sup> This was later overruled by the Court which held that the

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<sup>142</sup> *TMA Pai* (n 136) [54]; *Unni Krishnan* (n 123) [88], [90], [210]; *Modern Dental College & Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353 [55], [75] ('*Modern Dental College*').

<sup>143</sup> *Unni Krishnan* (n 123) [182].

<sup>144</sup> *ibid.*

<sup>145</sup> Constitution, art 21.

<sup>146</sup> See generally, *ADM Jabalpur v Shivkant Shukla* AIR 1976 SC 1207.

procedure itself must be ‘right and just and fair and not arbitrary, fanciful or oppressive’.<sup>147</sup> Thus, for a limitation of a right under art 21 to be valid, the state must demonstrate that it is non-arbitrary and reasonable.<sup>148</sup> This has been criticised as a vague standard due to the lack of factors detailing the arbitrariness and reasonableness enquiries.<sup>149</sup>

More recently, the Supreme Court held that the ‘procedure established by law’ under art 21 must not only be non-arbitrary and reasonable, but also *proportionate*.<sup>150</sup> However, the content of the proportionality test requires further development.<sup>151</sup> The test has been articulated in the context of the implicit right to privacy under art 21 in Chandrachud J’s judgment in *Privacy-9J* (forming a plurality):

An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.<sup>152</sup>

This statement of proportionality must be read along with the test articulated in Kaul J’s concurring judgment that also applied the proportionality test, albeit more clearly. The version of the test articulated in Kaul J’s judgment was that

(i) The action must be sanctioned by law; (ii) The proposed action must be necessary in a democratic society for a legitimate aim; (iii) The extent of such interference must be proportionate to the need for such interference;

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<sup>147</sup> *Maneka Gandhi v Union of India* 1978 SCR (2) 621 [7] (*‘Maneka Gandhi’*). See also Manoj Mate, ‘The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases’ (2010) 28 BJIL 216, 246.

<sup>148</sup> *ibid* (*Maneka Gandhi*) [4],[7].

<sup>149</sup> Tarunabh Khaitan, ‘Beyond Reasonableness – A Rigorous Standard of Review for Art 15 Infringement’ (2008) 50 JILI 177, 191.

<sup>150</sup> See *Privacy-9J* (n 73) Chandrachud J (with four judges concurring) and Kaul J that together make a majority of six out of nine.

<sup>151</sup> Aparna Chandra, ‘Proportionality in India: A Bridge to Nowhere?’ (n 109) 71. Vrinda Bhandari and Karan Lahiri, ‘The Surveillance State, Privacy and Criminal Investigation in India: Possible Futures in a Post-Puttaswamy World’ (2020) 3 UOxHRHJ 15. A full exposition of proportionality in the Indian context is outside the scope of this Thesis.

<sup>152</sup> *Privacy-9J* (n 73) Conclusion H.

(iv) There must be procedural guarantees against abuse of such interference.<sup>153</sup>

Kaul J's test has been interpreted to include, in step two, that the state must show that the measure causes 'minimal impact on rights'.<sup>154</sup> However, when the Supreme Court subsequently applied this proportionality test in *Aadhaar-5J*, it dropped the 'minimal impact' aspect under the 'necessity' inquiry.<sup>155</sup> Instead, it held that the alternatives to the measure must be identified by the state, following which their effectiveness (whether they realise the goal in question in a 'real and substantial manner') must be analysed individually. Further, the impact of these measures on the right in question must be determined, following which the Court must decide whether any of the other measures are preferable to the measure in question. If so, the measure in question is likely to be disproportionate subject to the balancing of interests.<sup>156</sup>

Strictly speaking, the test in *Privacy-9J* remains the authoritative test despite the distinction in its application in *Aadhaar-5J*, given its higher bench strength.<sup>157</sup> Moving forward, any limitation of the rights in art 21 must cumulatively fulfil the above test for it to be a valid 'procedure established by law'. This is similar to the limitations analysis

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<sup>153</sup> *Privacy-9J* (n 73) (Kaul J) [70]-[71].

<sup>154</sup> Vrinda Bhandari and Karan Lahiri (n 151) 24; Amba Kak and others, 'An Analysis of Puttaswamy: The Supreme Court's Privacy Verdict' 11 *IndraStra Global* 1, 4–5. See also, Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgment: Limitations' (*IndConLawPhil*, 01 September 2017) <<https://indconlawphil.wordpress.com/2017/09/01/the-supreme-courts-right-to-privacy-judgment-vi-limitations/>> accessed 21 March 2021.

<sup>155</sup> *Aadhaar-5J* (Sikri J) (n 101) [158]. See also, Mariyam Kamil, 'The Aadhaar Judgment and the Constitution – II: On proportionality' (*IndConLawPhil*, 30 September 2018) <<https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/>> accessed 21 March 2021.

<sup>156</sup> *ibid* (*Aadhaar-5J*) (Sikri J) [155].

<sup>157</sup> Constitution, art 145. See also, applying the *Privacy-9J* proportionality test to assess restrictions on the freedom of occupation, *Modern Dental College* (n 142); *Internet and Mobile Assn of India v RBI* (2020) SCCOnline SC 275.

undertaken in South Africa. It remains to be seen how this test is applied to the right to education under s 21.

#### 6.4.2. Art 21A and the Right to Education Act, 2009

How does the introduction of an explicit right to education change the above landscape?

I first discuss the content of the new right, and then turn to its relationship with art 21.

In 2002, the Constitution was amended to include an explicit right to education in the Fundamental Rights. In addition, it also amended art 45 of the DPSPs<sup>158</sup> and added a non-binding fundamental duty to the Constitution.<sup>159</sup> Art 21A provides:

The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

This places an obligation upon the state to *provide* such education and to enact legislation to discharge this obligation. The Right to Education Act, 2009 ('RTE Act'), was enacted pursuant to art 21A.<sup>160</sup> It is an instance of a 'constitutional statute', where the state is *required* to legislate to fulfil a positive constitutional obligation.<sup>161</sup> The RTE Act describes the manner in which the right to free and compulsory education must be implemented by the

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<sup>158</sup> Constitution, art 45 (as substituted by Constitution (Eighty-Sixth Amendment) Act of 2002, s 3):

Provision for early childhood care and education to children below the age of six years –  
The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

<sup>159</sup> Constitution, art 51A (k).

<sup>160</sup> See generally, Archana Mehendale, 'Compulsion to Educate' in Krishna Kumar (ed), *Routledge handbook of education in India: debates, practices, and policies* (Routledge 2018).

<sup>161</sup> For another example of a constitutional statute in the Indian context see, Malavika Prasad, 'Guest Post: Right To Information (RTI) and the Idea of a Constitutional Statute' (*IndConLawPhil*, 31 July 2019) <<https://indconlawphil.wordpress.com/2019/07/31/guest-post-rti-and-the-idea-of-a-constitutional-statute/>> accessed 21 March 2021; Gautam Bhatia, 'The Amendments to the Right to Information Act are Unconstitutional' (*IndConLawPhil*, 25 July 2019) <<https://indconlawphil.wordpress.com/2019/07/25/the-amendments-to-the-right-to-information-act-are-unconstitutional/>> accessed 21 March 2021. See also, Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37 OJLS 461.

state.<sup>162</sup> The right to education under this Act includes an equal right to the same quality of education,<sup>163</sup> without discrimination, for children living with disabilities;<sup>164</sup> children whose parents or guardian earn an annual income lower than the minimum amount specified by the state through notification and children who are disadvantaged by virtue of their caste, class, language, gender or any other social, cultural, economic, geographical or such other factor.<sup>165</sup>

Significantly, for the purposes of this Thesis, the RTE Act provides:

[N]o child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education.<sup>166</sup>

Indirect costs of education, including the cost of textbooks and other educational materials, as discussed in Chapter 2 are thus included within this provision. In a similar vein, the RTE Act stipulates that it is the duty of the state *qua* government to provide 'learning equipment' and *qua* local municipal authority to provide 'learning material' as a part of educational infrastructure.<sup>167</sup> This is further clarified in the minimum norms and standards enumerated in the Act.<sup>168</sup> Every recognised school under the RTE Act must fulfil these norms and standards within a period of three years, failing which the school would

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<sup>162</sup> *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1 [40] ('*Pramati Educational Trust*').

<sup>163</sup> Although, the Supreme Court has excluded the application of the RTE to minority schools whether aided or unaided by the state, *ibid* [47].

<sup>164</sup> RTE Act, s 3(3). See also, Persons with Disabilities (Equal Opportunities, Protection and Full Participation) Act 1996.

<sup>165</sup> RTE Act, ss 8(c), 9(c). See also, s 12(1)(c) requiring private unaided schools to reserve 25% of seats in class 1 for children from the same disadvantaged sections of society. This was held to be constitutional in *Pramati Educational Trust* (n 162) [42].

<sup>166</sup> RTE Act, s 3(2).

<sup>167</sup> RTE Act, ss 8(d), 9(f).

<sup>168</sup> RTE Act, Schedule.

be derecognised and no longer allowed to function.<sup>169</sup> These norms and standards include the provision of teaching and learning equipment for each class ‘as required’<sup>170</sup> as well as the creation and provision of a library in every school which provides ‘newspaper [sic] magazines and books on all subjects, including story-books’.<sup>171</sup> Educational materials are comprised of the above, and are therefore included.

The Model Rules<sup>172</sup> pursuant to the RTE Act also explicitly include the provision of free textbooks as well as free assistive learning materials and support for children living with disabilities.<sup>173</sup> The Model Rules particularly prevent any form of discrimination against children from disadvantaged groups as described above in respect of access to textbooks as well as library and information and communication technology facilities amongst others.<sup>174</sup>

It is therefore clear that educational materials are included within the ambit of the right to primary education, defined by the RTE Act as education between the ages of six to fourteen. The state bears the primary responsibility for providing free textbooks and ensuring access to a well-stocked library for all children. It would be helpful at this stage for international law *qua* DPSPs to be used as an interpretive framework in providing insight on the aspects of the right of access to educational materials. As discussed in the

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<sup>169</sup> RTE Act, ss 18, 19.

<sup>170</sup> RTE Act, Schedule (5).

<sup>171</sup> RTE Act, Schedule (6).

<sup>172</sup> These rules provide direction to state legislatures for the enactment of state-based RTE Acts as education is a matter within the competence of both the central and state legislatures.

<sup>173</sup> Model Rules, Rule 5, 14(3).

<sup>174</sup> Model Rules, Rule 7(2).

context of art 21, the 4A framework set out in Chapter 2 assists in giving further content to the right.

There is no explicit test for the limitation of the right to education in art 21A. Courts have not developed one.<sup>175</sup> From a systematic study of the limitations analysis undertaken by the Indian Supreme Court, moving forward, courts are likely to apply either a version of the proportionality test set out above, or one that focuses on reasonableness.<sup>176</sup>

#### 6.4.3. Relationship between the right to education in arts 21 and 21A

Does the explicit right to education in art 21A extinguish the implicit right to education in art 21? I argue that it does not for the following reasons. First, arts 21A and 21 cover overlapping but non-identical subject matter. Art 21A textually covers the right to education between the ages of 6-14.<sup>177</sup> Art 21 is broader in its field of application and has explicitly been held to cover the right to education above the age of 14. In fact, in most of the cases analysed above, the fact situation concerned higher educational institutions. Moreover, after the introduction of the DPSP on early childhood education,<sup>178</sup> it is arguable that art 21, interpreted within the framework offered by the DPSPs, includes the right to early childhood education as well. Thus, it is clear that the explicit inclusion of art 21A does not automatically extinguish the judicially evolved right developed by courts under art 21.

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<sup>175</sup> In *Pramati Educational Trust* (n 162), the Court considered whether art 19(1)(g) – the freedom of occupation of minority schools – was infringed by the RTE Act. It thus did not need to consider whether and to what extent art 21A was infringed.

<sup>176</sup> Aparna Chandra, 'Limitation Analysis by the Indian Supreme Court' (n 8) 461.

<sup>177</sup> Florian Matthey-Prakash, 'From a Directive Principle to a Fundamental Right' in Florian Matthey-Prakash, *The Right to Education in India: The Importance of Enforceability of a Fundamental Right* (OUP 2019) 106–114. See also, for a criticism of the age limit in art 21A, PP Rao, 'Fundamental Right to Education' (2008) 50 JILI 585; Anil Sadgopal, 'Right to Education vs. Right to Education Act' (2010) 38 Social Scientist 17.

<sup>178</sup> Constitution, art 45.

Second, a reading that art 21A extinguishes the guarantees developed under art 21 is contrary to the principle of non-retrogression in international human rights law. As set out in section 6.2 and analysed in Chapter 2, India is party to the ICESCR. Its obligations include making primary education free, compulsory and immediately realisable, and in respect of education at all other levels, taking steps with a view to achieving the full realisation of the right subject to ‘maximum available resources’. The corollary of progressively realisable rights is that once the state has taken steps to increase the overall level of enjoyment of a particular right, it may *not* take steps back to reduce the realisation of the right. If it does, it must justify its actions on several bases discussed in Chapter 2. I argue that reading art 21A to extinguish the judicially evolved right to education in art 21 would be a retrogressive measure. This would apply not only to the right to education before and after the ages of 6-14, but also in respect of the aspects of the right to primary education that art 21A does not capture. The onus would be on the state to justify this retrogressive step, should it contend that this is the case. Thus, both arts 21 and 21A together encapsulate the guarantee of the right to education.

I now return to an additional aspect of the content of the right to education under art 21 that courts have not yet had occasion to detail – access to educational materials. I also discuss the nature of the obligations that stem from these additional aspects of the right.

#### 6.4.4. Applying international law’s interpretive injunctions to locate a fundamental right of access to educational materials

In developing the right to education under art 21, unlike South Africa, Indian courts have not had the opportunity to set out the content of the right in detail. However, they have recognised educational facilities and facilities for reading, writing and self-expression as a part of the right. In respect of art 21A, as set out in section 6.4.2, the legislature has set out

minimum norms and standards for all educational institutions offering primary education. These include the provision of textbooks, as well as access to other educational materials through a library in every school. This, I argue, constitutes the early signs of domestically recognising a right of access to educational materials.

India is party to the ICESCR that guarantees the right to education. As demonstrated in Chapter 2, this right includes the right of access to educational materials. In short, educational materials must be accessible to all – both physically and economically; meaningfully made available; adaptable to circumstances such as the current global pandemic; and acceptable to all, given varied cultural and linguistic backgrounds. Moreover, access to educational materials must be guaranteed to all without discrimination. As set out in section 6.3.2, ‘foster[ing] respect for international law and treaty obligations’ *qua* DPSPs is a presumptively legitimate goal for legislatures, offers an interpretive guide for statutes, and provides an interpretive framework for the interpretation of Fundamental Rights. The third of these functions is key in these circumstances.

Arts 21A and 21 overlap to some extent with the ICESCR’s guarantees and other treaties that India is party to, set out in section 6.2. It is unlikely that the guarantees in the ICESCR in respect of education are inconsistent with the Constitution, particularly after the inclusion of art 21A. I argue that the analysis set out in Chapter 2 should be used to ‘enlarge’ the content of the right to education under the Fundamental Rights to include the right of access to educational materials at all levels of education. Courts and the legislature are beginning to recognise this right as set out above. Importantly, this does not mean that international law would form a source of direct rights and obligations – rather, arts 21 and 21A remain the source of the right and the obligation. The Fundamental Rights thus act as a ‘magnet’ for India’s international obligations.

In respect of the obligations that flow from this right, international law also provides clarity. India is bound to respect, protect and fulfil the right of access to educational materials as set out in Chapter 4. Where this relates to primary/basic education, the state is required to ensure, as part of its minimum core obligation, that this right is immediately realised. The cost of textbooks and other educational materials cannot be a barrier to accessing primary/basic education. The state is thus bound to provide or finance textbooks and other educational materials in public schools. This is incorporated within the RTE Act as discussed in section 6.4.2. The obligation is likely to be differentiated for private aided schools and private unaided schools, as well as for minority aided and unaided schools. This obligation does not extend to private parties.

With regard to other levels of education, India undertakes obligations to progressively realise the right to education. India is not bound to *provide* textbooks or other educational materials at these levels directly. It is however bound to take steps to enable access to the maximum of its available resources. Where there is unequal access to educational materials by individuals belonging to disadvantaged groups in society, the state is bound to ensure equal access to these materials on the basis of the principle of non-discrimination. This would include, as the Court recognised in the early right to education decisions set out above, situations where socio-economic conditions form barriers to accessing education at all – and by extension educational materials. Moreover, as recognised in all the decisions set out above, the state is empowered to regulate both public and private educational institutions to set minimum standards for quality education, as well as to prevent exploitative capitation fees and other financial barriers to education. Where it can be demonstrated that educational materials are prohibitively priced so as to form barriers to accessing education, it is arguable that the state's duty to enable access is triggered.

#### 6.4.5. Equal access to educational materials for all

In judicially evolving a right to education under the right to life, the Court has emphasised the equitable nature of the right. Not only does a right to education exist under the Indian Constitution, but it is a right to education for *all*, irrespective of their socio-economic status, caste, religion, disability, gender, and other markers of group disadvantage. The right to equality under the Constitution is thus engaged where access to educational materials is not *equally* realised for all.

I provide a brief overview of the equality jurisprudence to the limited extent that it has a bearing upon the equal right of access to educational materials for all. This is relevant in assessing the relative impact of a legislative measure on disadvantaged groups. A full analysis of the jurisprudence is outside the scope of this Thesis.<sup>179</sup>

Early on, the Court developed an understanding of formal equality under art 14.<sup>180</sup> A classification made by law had to fulfil the following test to ensure that it did not fall foul of the guarantee in art 14: first, the classification had to be based on an ‘intelligible differentia’ and second, that there had to be a rational nexus between the class created by law and the legislative purpose. Everyone had to be equally *treated* by the law.<sup>181</sup> Further, claimants bore the burden of proof to show that they had in fact been treated *differently* from others in a similar situation.<sup>182</sup> This has been criticised as a highly formalistic view of

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<sup>179</sup> But such a task has been undertaken by Gauri Pillai, ‘Reimagining Reproductive Rights in India: The Role of Non-Discrimination’, unpublished doctoral thesis on file with author. I draw on the work done in this manuscript to explain the application of art 14 to analogous grounds of discrimination.

<sup>180</sup> Constitution, art 14:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

<sup>181</sup> Eg., *Chiranjit Lal Choudhry v Union of India* 1950 SCR 869 [9]; *State of West Bengal v Anwar Ali Sarkar* 1952 SCR 284 (Mukherjea J) [44].

<sup>182</sup> See *State of Bombay v FN Balsara* 1951 SCR 682.

equality.<sup>183</sup> Although this line continues to be taken in case law today,<sup>184</sup> the Court has simultaneously developed ‘non-arbitrariness’ as a new test for a law to limit the right to equality under art 14.<sup>185</sup> This doctrine has been variously criticised as ‘boundlessly manipulable’<sup>186</sup> and ‘hang[ing] in the air’.<sup>187</sup> The Supreme Court has also held that the doctrine of arbitrariness is of ‘doubtful legitimacy’ and that it is not a ground in and of itself for a statute to be declared unconstitutional under art 14.<sup>188</sup> The conceptual confusion surrounding arbitrariness has, however, not deterred courts from grounding findings in it.<sup>189</sup>

On yet another parallel track, the Court has employed an understanding of substantive equality under art 14.<sup>190</sup> This has shifted the understanding of equality from one that was tied to equal treatment by law to one that relates to the *impact* of a law (whether facially neutral or not) upon a group or an individual.<sup>191</sup> A typical statement of the Court in this regard is

The primary enquiry to be undertaken by the Court towards the realisation of substantive equality is to determine whether the provision [in the statute

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<sup>183</sup> Tarunabh Khaitan, ‘Equality: Legislative Review under Article 14’ (n 10) 719.

<sup>184</sup> Eg., *Harsora v Harsora* (2016) 10 SCC 165.

<sup>185</sup> *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3 [85]-[87].

<sup>186</sup> Gautam Bhatia, ‘Equal Moral Membership: Naz Foundation and the Refashioning of Equality under a Transformative Constitution’ (2017) 1 InLR 115, 116–117.

<sup>187</sup> HM Seervai (n 106) 438.

<sup>188</sup> Eg., *Rajbala v State of Haryana* 1 SCC 463 (Chelameswar J) [68]-[69].

<sup>189</sup> *Shayara Bano* (n 110) (Nariman J) [55]; *Navej* (n 100) (Nariman J) [353].

<sup>190</sup> See for eg., *Joseph Shine* (n 120) (Chandrachud J) [38]; *Indian Young Lawyers Assn v State of Kerala* (Chandrachud J) 2018 SCC OnLine SC 1690 [117].

<sup>191</sup> *Navej* (n 100) (Chandrachud J) [409].

in question] contributes to the subordination of a disadvantaged group of individuals.<sup>192</sup>

This is the better understanding of art 14 as it accords not only with the constitutional history of art 14 but also constitutional values.<sup>193</sup> I apply this understanding of substantive equality in my analysis of the equal right of access to educational materials under the right to education. Where there is legislative interference with access to educational materials, it must be shown that the law does not contribute to the subordination of a disadvantaged group. This includes an individual or a group experiencing systemic disadvantage along the lines of particular ascribed characteristics that are not articulated in art 15(1), including socio-economic class and disability.<sup>194</sup> If the law in question is shown to contribute to such disadvantage, it *prima facie* falls foul of the equality guarantee in art 14.<sup>195</sup>

Is there any way the state can justify a facially neutral law that adversely impacts upon a particular disadvantaged group or an individual belonging that group under art 14? The Delhi High Court in *Naz Foundation* developed a test in this regard that read the reasonable classification test substantively,<sup>196</sup> beyond its ‘traditional and doctrinaire’

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<sup>192</sup> *Joseph Shine* (n 120) (Chandrachud J) [38].

<sup>193</sup> See traversing the relevant parts of the Constituent Assembly Debates, Gautam Bhatia (n 186) 138–141.

<sup>194</sup> *Naz Foundation v Government of NCT of Delhi* 160 (2009) DLT 277 [93], [113].

<sup>195</sup> *ibid* [99] stating that ‘art 15 is an instance and particular application of the right to equality which is generally stated in art 14’. There is some debate in the literature about whether the anti-discrimination provision in art 15(1) is an open or closed list in respect of the protected characteristics that it articulates. A full discussion of this is outside the scope of the thesis. However, I have adopted the view that since the text of art 15(1) clearly denotes a closed list of protected characteristics, analogous grounds of discrimination such as disability and class can only be included under art 14. See, for a full discussion Gautam Bhatia (n 186) 143–144; Tarunabh Khaitan, ‘Reading Swaraj into Article 15: A New Deal for All Minorities’ (2009) 2 NUJSLR 419, 425.

<sup>196</sup> *Naz Foundation* (n 194) [88].

understanding,<sup>197</sup> introduced a substantive element to the test of non-arbitrariness,<sup>198</sup> and a new element of *proportionality* to the analysis.<sup>199</sup> Although the outcome in *Naaz* was overruled in *Koushal*,<sup>200</sup> the Supreme Court later heard a curative petition in *Navtej Johar* which affirmed the reasoning (and outcome) in *Naaz*.<sup>201</sup> In *Naaz*, the Court held that in order for a law to be consonant with art 14, the aim of the legislation (the ‘state interest’) must be ‘legitimate and relevant’.<sup>202</sup> Further, its means must be ‘proportionate to achieving the state interest’.<sup>203</sup>

To ensure that every individual has access to educational materials, irrespective of their socio-economic circumstances, art 14 is an important guarantee. For any future amendments of the Copyright Act, potential impact upon disadvantaged groups must be considered. Further, state legislative action in furtherance of fulfilling the right to education must also pass muster under art 14 and must not adversely impact groups or individuals

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<sup>197</sup> Catherine MacKinnon, ‘Sex Equality under the Constitution of India: Problems, Prospects, and “personal Laws” (2006) 4 IJCL 181, 188.

<sup>198</sup> *Naaz Foundation* (n 194) [89].

<sup>199</sup> *Naaz Foundation* (n 194) [92]. This aspect of the test was subsequently also adopted in *Shayara Bano* (n 110) [101]:

Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under art 14.

<sup>200</sup> *SK Koushal v Naaz Foundation* (2014) 1 SCC 1.

<sup>201</sup> *Navtej* (n 100) (Chandrachud J) [409].

<sup>202</sup> *Naaz Foundation* (n 194) [79], [86], [92].

<sup>203</sup> *Naaz Foundation* (n 194) [92]. I have discussed proportionality in section 6.4.1.4. The law is yet to develop in respect of harmonising the proportionality tests under various rights.

that are disadvantaged, including persons living with disabilities and other socio-economic disadvantages.<sup>204</sup>

## **6.5. Other relevant rights**

The Supreme Court has recognised that the Fundamental Rights function as an ‘integrated scheme’.<sup>205</sup> In addition to the right to equality, the right of access to educational materials also implicates the right of everyone to participate in cultural life of their choosing<sup>206</sup> and the freedom of speech and expression and within it the freedom to receive and impart information.<sup>207</sup> A detailed analysis of these rights and their relationship with the right to education is outside the scope of the Thesis. However, it is worth noting that these rights further strengthen the right of access to educational materials. They become relevant (particularly freedom of expression) when conducting a limitations analysis in respect of statutes seeking to limit access to educational materials. I return to this below.

## **6.6. Copyright Act 1957**

In this section, I analyse the relevant provisions of the Copyright Act. In the course of setting out the statutory exceptions for educational purposes, I critically analyse the *DU Photocopy* case and discuss how it paves the way for equitable access to educational materials for all.

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<sup>204</sup> Where this maps onto caste, or any other explicit protected characteristic, Constitution art 15 is engaged and the test in that right must be fulfilled.

<sup>205</sup> *Maneka Gandhi* (n 147) [202].

<sup>206</sup> Constitution, arts 29, 30.

<sup>207</sup> Constitution, art 19(1)(a).

Independent India enacted its first copyright law in 1957.<sup>208</sup> Prior to this, the copyright laws that were enacted were either extensions of the British Copyright Act to its then-colonies or used identical language to the British Act.<sup>209</sup> The Copyright Act 1957 has been subsequently amended to include new technological developments and evolving international norms.

#### 6.6.1. Provisions of the Act relevant to accessing educational materials

In this section I analyse the scheme of the Act regarding access to educational materials. The Act provides that copyright is a statutory creation,<sup>210</sup> created and governed by the same Act.<sup>211</sup> The Act provides for exclusive control (authorisation of the copyright owner) over the use of artistic, literary, musical, dramatic and cinematographic works, computer programmes and sound recordings to vest in the creator.<sup>212</sup> This extends to reproduction,<sup>213</sup> circulation/broadcast,<sup>214</sup> performance,<sup>215</sup> translation,<sup>216</sup> adaptation,<sup>217</sup> rental,<sup>218</sup> and

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<sup>208</sup> For a full discussion of the politics behind the Copyright Act 1957, see generally Prashant Reddy Thikkavarapu and Sumathi Chandrashekarani (n 35).

<sup>209</sup> Lionel Bently, 'Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries' (2007) 32 C-KLR 1181, 1183–1185. See also, for details on the colonial history of copyright in India, Shubha Ghosh, 'A Roadmap for TRIPS: Copyright and Film in Colonial and Independent India' (2011) 1 QMJIP 146.

<sup>210</sup> See also, Alka Chawla, *Law of Copyright: Comparative Perspectives* (LexisNexis 2013) 1–3.

<sup>211</sup> Copyright Act, s 16. See also, Endlaw J (n 229) [25]–[28]. But see *Penguin Books Ltd v India Book Distributors* AIR 1985 Delhi 29 [24], for an understanding of copyright as a 'unique form of property and monopoly, [...] essentiality pecuniary rights'.

<sup>212</sup> Copyright Act, s 13.

<sup>213</sup> Copyright Act, s 14(a)(i).

<sup>214</sup> Copyright Act, ss 14(a)(ii), 14(c)(iii).

<sup>215</sup> Copyright Act, s 14(a)(iii).

<sup>216</sup> Copyright Act, s 14(a)(v).

<sup>217</sup> Copyright Act, s 14(a)(vi).

<sup>218</sup> Copyright Act, ss 14(b)(ii), 14(e)(ii), 14(d)(ii).

transformation into a film or sound recording, in the case of literary, musical or dramatic works.<sup>219</sup> These works include textbooks and other educational materials within its ambit. The exclusive control discussed above is explicitly subject to the other provisions in the Act.<sup>220</sup> These other provisions include exemptions from infringement. The Act defines infringement as any of the above uses of materials under copyright that take place without the authorisation of the copyright owner or a licence.<sup>221</sup> It also lists the uses that do not constitute infringement of copyright.<sup>222</sup> In this list, the Act makes specific provision for access to materials under copyright for educational instruction as well as research and private use. I first discuss access to educational materials ‘in the course of instruction’ and then turn to access to educational materials outside of the course of instruction.

#### ***6.6.1.1. Access to educational materials ‘in the course of instruction’***

To provide for access to educational materials in ‘the course of instruction’, the Act states:

The following acts shall not constitute an infringement of copyright, namely,— [...]

- (i) the reproduction of any work—
  - (i) by a teacher or a pupil in the course of instruction; or
  - (ii) as part of the question to be answered in an examination; or
  - (iii) in answers to such questions;<sup>223</sup>

The quoted section provides a list of purposes for which the reproduction of materials under copyright is exempt. The reproduction must be performed ‘in the course of instruction’; in setting questions for exams; or in answering exams. In doing so, the section

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<sup>219</sup> Copyright Act, s 14(a)(iv).

<sup>220</sup> Copyright Act, s 13.

<sup>221</sup> Copyright Act, s 51. See also, Copyright Act, s 63 for the criminal and civil sanctions of a finding of infringement.

<sup>222</sup> Copyright Act, s 52.

<sup>223</sup> Copyright Act, s 52(1)(i).

recognises widely used technologies of access across India,<sup>224</sup> as well as digitisation and e-learning facilitated by the government<sup>225</sup> through photocopying and scanning relevant journal articles, circulating relevant e-books etc., for educational purposes<sup>226</sup> to benefit rights-bearers seeking to fulfil their right to education. The framing and incorporation of this provision into the Act, I argue, can be better understood as Parliament crafting a law to harmonise India's international obligations set out in Chapters 2 and 3. More specifically, s 52(1)(i) makes use of the 'permission' in art 10(2) of the Berne Convention to realise everyone's right of access to educational materials under the ICESCR. This, I argue, is a legislated instance of 'fair practice' under the Berne Convention bearing in mind India's socio-economic context.<sup>227</sup> My analysis of the recent *DU Photocopy* case discusses this further.

Amid similar contestation around the extent of exceptions for educational purposes around the world,<sup>228</sup> the Delhi High Court was recently charged with interpreting

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<sup>224</sup> See, eg., Alka Chawla, 'Photostatting in Institutes of Higher Education - Curse for Copyright Owners or a Boon for the Researchers?' (2012) 54 JILI 520, 538; Lawrence Liang, 'India: The Knowledge Thief' in Joe Karaganis (ed), *Shadow Libraries: Access to Knowledge in Global Higher Education* (MIT 2018); Lawrence Liang, 'Exceptions and Limitations in Indian Copyright Law for Education: An Assessment' (2010) 3 LDR 198, 205.

<sup>225</sup> Government of India (Ministry of Human Resource Development), Mission Statement of National Mission on Education through Information and Communication Technology, 15-19; Government of India, (Ministry of Human Resource Development), National Policy on Education 1986 (as modified in 1992) [8.10].

<sup>226</sup> See, Amlan Mohanty, '5 reasons why course packs are legal in India' (*SpicyIP*, 31 October 2012) <<https://spicyip.com/2012/10/5-reasons-why-course-packs-are-legal-in.html>> accessed 21 March 2021.

<sup>227</sup> Concurring on the application of art 10(2) of the Berne Convention to the exclusion of the three-step test in TRIPS to educational exceptions in the Copyright Act, see Lawrence Liang (n 224) 221.

<sup>228</sup> Eg., *Princeton University v Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996) (US) ('*Princeton University*') (held against course packs, but see dissenting judgments); *Cambridge University v Patton*, 769 F.3d 1232 (11th Cir. 2014) (US) (held largely in favour of course packs but for four excerpts); *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 (Canada) (held in favour of photocopying materials for researchers); *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (Canada) (held in favour of course packs). This remains a contested issue, eg., *Copyright Agency Limited v University of Adelaide* (Advance Ruling) [2020] ACopyT 3 (Australia) (ongoing, case regarding academics emailing materials under copyright to students for educational purposes).

the scope and content of s 52(1)(i) in *DU Photocopy*.<sup>229</sup> The litigation arose as a result of an infringement suit filed by three of the world's largest academic publishers (Oxford University Press, Cambridge University Press, and Taylor & Francis (Routledge))<sup>230</sup> against the activities of a photocopy shop (Rameshwari Photocopy) licenced by Delhi University. The Association of Students for Equitable Access to Knowledge ('ASEAK') and Society for the Promotion of Equitable Access to Knowledge ('SPEAK') comprising of students and academics and researchers respectively intervened on the side of Delhi University and Rameshwari. The suit was filed on the basis that the shop was photocopying extracts of materials under copyright to create 'course packs' for students. These course packs collated study materials prescribed by the University's syllabus for each course, in the form of photocopied extracts of materials under copyright.<sup>231</sup> In short, they formed the key course materials crucial to fulfilment of the relevant course.<sup>232</sup> As I discuss, the Delhi High Court held that these activities fell squarely within the ambit of s 52(1)(i) and therefore did not infringe copyright. *DU Photocopy* is the *only* case so far to have considered this legal issue in India, and it did so in depth. Its holding has resonance for several countries around the world grappling with similar issues – particularly in the global South, where photocopying is centrally important to accessing educational materials.<sup>233</sup> I discuss the range of

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<sup>229</sup> *The Chancellor, Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 5128; (2016) 160 DRJ (SN) 678 ('Endlaw J' or 'Single Bench'); *The Chancellor, Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229; (2016) 235 DLT 409 (DB); (2017) 69 PTC 123 ('Division Bench'). Collectively 'DU Photocopy'.

<sup>230</sup> Complaint filed by plaintiff-publishers [1]-[3] <<https://spicyip.com/resources-links/du-photocopy-case>> accessed 21 March 2021.

<sup>231</sup> *ibid* [8]-[9].

<sup>232</sup> Written submissions (SPEAK) [2857] <<https://spicyip.com/resources-links/du-photocopy-case>> accessed 21 March 2021.

<sup>233</sup> Eg., Andrew Rens, Achal Prabhala, and Dick Kawooya, *Intellectual Property, Education and Access to Knowledge in Southern Africa* (TRALAC 2006) 25–36; RB Okiy, 'Photocopying and the Awareness of Copyright in Tertiary Institutions in Nigeria' (2005) 33 *Interlending & Document Supply* 49.

interpretive arguments reflecting the interests at stake, and analyse the authoritative interpretation of s 52(1)(i) established by the Court. In doing so I highlight an important omission in the judgments that, I argue, is crucial for future arguments on access to educational materials within and outside courts.

#### **6.6.1.1.1. *Plaintiff-publishers' interpretation***

The plaintiff-publishers argued that s 52(1)(i) should be interpreted in light of India's international obligations.<sup>234</sup> They argued that 'TRIPS' three-step test applied to all exceptions and limitations, including educational exceptions.<sup>235</sup> Accordingly, s 52(1)(i) must be interpreted narrowly as an instance of a 'certain special case' and the uses falling within s 52(1)(i) must fulfil the three-step test. They argued that the creation of course packs failed to fulfil the three-step test and so was not covered by s 52(1)(i).<sup>236</sup>

Further, the plaintiff-publishers argued that the text of s 52(1)(i) specified that only a teacher or a pupil could carry out the act of reproduction. In the case at hand, they were not doing so – rather they were paying for Rameshwari Photocopy to carry out these activities. Additionally, they contended that s 52(1)(i) only covered single instances of copying rather than multiple copies.<sup>237</sup>

Further, the plaintiff-publishers contended that the text of s 52(1)(i) only extended to 'reproduction' and did not cover 'publication'. They argued that the creation of course

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<sup>234</sup> Notes on Plaintiff's submissions [2710] <<https://spicyip.com/resources-links/du-photocopy-case>> accessed 21 March 2021.

<sup>235</sup> See Chapters 3 and 4 for a response to this argument.

<sup>236</sup> Notes on Plaintiff's submissions (n 234) [2711]-[2712].

<sup>237</sup> *ibid* [2714]-[2715].

packs and their circulation amounted to ‘publication’ and not just ‘reproduction’. Reproduction, they contended, was limited to making copies and not circulating them.<sup>238</sup>

The plaintiff-publishers also argued that the test of ‘fair dealing’<sup>239</sup> applied to assessing whether the act of photocopying materials and creating and circulating course packs were within the ambit of s 52(1)(i).<sup>240</sup> They applied the fairness factors set out in American and Canadian case law<sup>241</sup> to argue that course packs had a detrimental effect on the market for the original work;<sup>242</sup> that there were alternatives available to Delhi University in the form of compulsory licencing arrangements;<sup>243</sup> that the purpose and character of the use was commercial in nature because Rameshwari charged for photocopying;<sup>244</sup> that a substantial amount of the original works had been included within the course packs both quantitatively – ranging from 5% to 100% of works (including book chapters in edited volumes) – and qualitatively – works spanning an entire syllabus.<sup>245</sup>

Finally, drawing on the scheme of the Act, the plaintiff-publishers argued that in any event s 52(1)(i) was inapplicable – rather the applicable provision was the provision relating to the use of unpublished passages of literary works by an educational institution<sup>246</sup> and in the alternative, the provision regarding library copies of full books in limited

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<sup>238</sup> *ibid* [2715]-[2716].

<sup>239</sup> I discuss this in section 6.6.1.2 when analysing s 52(1)(a).

<sup>240</sup> Notes on Plaintiff’s submissions (n 234) [2719].

<sup>241</sup> *CCH (Canada)* (n 228); *Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994).

<sup>242</sup> Notes on Plaintiff’s submissions (n 234) [2719], citing *Princeton University* (n 228).

<sup>243</sup> *ibid* [2720].

<sup>244</sup> *ibid* [2721].

<sup>245</sup> *ibid* [2722].

<sup>246</sup> Copyright Act, s 52(1)(h).

circumstances where books are unavailable for sale in India.<sup>247</sup> They further demonstrated how the course packs did not fulfil the tests under either of the alternative provisions.<sup>248</sup>

They also argued the creation of course packs should not be allowed in the larger public interest. They contended that if it were, the publishing industry would lose out on essential revenue that would have been invested in the creation of new educational materials and their dissemination.<sup>249</sup>

#### **6.6.1.1.2. Defendants' interpretation**

The defendants – Rameshwari Photocopy, Delhi University, and associations of academics (SPEAK) and students (ASEAK) – countered that s 52(1)(i) was indeed the applicable provision.<sup>250</sup> They argued that Rameshwari Photocopy was acting as a licensee of Delhi University on the basis of a licence agreement between them.<sup>251</sup> The agreement specified that the services of Rameshwari would be limited to students, teachers, staff affiliated with the University and authorised users of the particular library in the faculty.<sup>252</sup> These arrangements, they contended, fit within the scheme of s 52(1)(i) as, although teachers and pupils were not mechanically carrying out the act of photocopying, Rameshwari was doing

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<sup>247</sup> Copyright Act, s 52(1)(o). I discuss both these provisions in section 6.6.1.3.

<sup>248</sup> Notes on Plaintiff's submissions (n 234) [2719]-[2720]. They also argued that fair dealing was limited to qualifying s 52(1)(a) and textually excluded from application to s 52(1)(i).

<sup>249</sup> *ibid* [2722].

<sup>250</sup> They countered the plaintiff-publishers' argument that s 52(1)(h) was applicable using a textual interpretation.

<sup>251</sup> Written Submissions (SPEAK) [2857] <<https://spicyip.com/resources-links/du-photocopy-case>> accessed 21 March 2021; Written Submissions (ASEAK) [2867] <<https://spicyip.com/resources-links/du-photocopy-case>> accessed 21 March 2021.

<sup>252</sup> *ibid* (Written Submissions (SPEAK)) [2857].

so on their behalf and not for any other purpose.<sup>253</sup> Further, the defendants cited comparative law to indicate that where legislative intent existed to circumscribe the types of reproduction, legislatures have explicitly done so.<sup>254</sup> Given that the Indian legislature did not, they contended that reproduction was to be given a broad meaning and would include mechanical photocopying.

Further, they argued that the activities of Rameshwari were indeed non-commercial as they were not carried out for profit. The licence agreement between Delhi University and Rameshwari Photocopy fixed a nominal fee for charging for photocopies in order to cover running costs of labour, maintenance and utilities.<sup>255</sup> This did not amount to a commercial use.

The defendants argued that s 52(1)(i) was to be interpreted like an ordinary statutory provision, rather than narrowly as suggested by the plaintiff-publishers on the basis that a clear social goal was evident from the provision – ‘access to affordable education’.<sup>256</sup> To support this, they advanced excerpts from the legislative debates surrounding the amendment of the Copyright Act to include s 52(1)(i) that indicated legislative intent to include reproduction by researchers, teachers, and students within the ambit of the provision.<sup>257</sup> To interpret the text of s 52(1)(i), particularly ‘in the course of instruction’, the defendants drew on the New Zealand Copyright Act, 1962<sup>258</sup> as it was

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<sup>253</sup> *ibid* [2858] citing the dissenting judgments of Merrit J and Martin J in *Princeton University* (n 228). See also Written Submissions (Delhi University) <<https://spicyip.com/resources-links/du-photocopy-case>> accessed 21 March 2021 [2230].

<sup>254</sup> Eg., Copyright, Designs and Patents Act, 1988, s 32 (UK); UrhG, art 53 (Germany).

<sup>255</sup> Written Submissions (SPEAK) (n 251) [2857].

<sup>256</sup> *ibid* [2867].

<sup>257</sup> Endlaw J (n 229) [15].

<sup>258</sup> As interpreted in *Longman Group Ltd v Carrington Technical Institute Board of Governors* [1991] 2 NZLR 574 (New Zealand).

used in the same context. They advanced that the phrase should be interpreted to cover all copying that ‘forms a part of and arises out of the course of instruction’ irrespective of the point in time when it is performed.<sup>259</sup> Further they advanced that the ordinary meaning of ‘instruction’ is broader than lecturing in a classroom and encompasses all manner of educational use.<sup>260</sup> The defendants turned to a practical explanation of how instruction takes place in higher education institutions to support this argument. Instruction, they contended, spans the start of the course until the very end – the interactive model includes prescribed reading before attending classroom lectures.<sup>261</sup>

Regarding the extent of copying permitted under s 52(1)(i), the defendants argued that the extent must be justified by the purpose. This is the same test as that set out in art 10(2) of the Berne Convention. They argued that in and of itself, this did not preclude the copying of full books but this extent of copying must be demonstrated to be necessary to achieve the educational purpose.<sup>262</sup> In any event, they demonstrated that the average amount of copying per work was less than 10%.<sup>263</sup> They cited empirical studies regarding the purchasing power of students in India vis-à-vis the exorbitant prices of academic works to justify the extent of copying to create course packs.<sup>264</sup> The defendants made the unaffordability of educational materials for a vast majority of the Indian population clear in oral argument.<sup>265</sup>

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<sup>259</sup> Written Submissions (SPEAK) (n 251) [2858]-[2859].

<sup>260</sup> Written Submissions (ASEAK) (n 251) [2843]-[2844].

<sup>261</sup> *ibid* [2845]-[2846].

<sup>262</sup> Written Submissions (SPEAK) (n 251) [2860]-[2861].

<sup>263</sup> *ibid* [2865].

<sup>264</sup> *ibid* [2861].

<sup>265</sup> Endlaw J (n 229) [15].

In the alternative, the defendants argued that the creation of course packs fell within the ambit of s 52(1)(a). They argued that the four factor test advanced by the plaintiff-publishers was indeed fulfilled – the purpose was to provide affordable access to materials under copyright for educational purposes; the character of the use was non-commercial as demonstrated by the terms of the licence; 28 works out of 130 works were unavailable on the plaintiff-publishers’ websites and hence entirely inaccessible without photocopying; the copying was insubstantial – both qualitatively and quantitatively. Further, the defendants argued that extracts of materials were unable to compete with full books published by the plaintiff-publishers in the market.

Finally, countering the plaintiff-publishers’ arguments on the applicability of international law, the defendants argued that international law was inapplicable and in any event the interpretation of the Berne Convention and TRIPS Agreement was contested.<sup>266</sup> Countering the plaintiff-publishers’ claims of loss of revenue, the defendants adduced evidence to indicate the robust growth of the publishing industry despite these claims.<sup>267</sup>

Importantly, the defendants also advanced constitutional arguments to interpret the Copyright Act. Delhi University contended that it was a state agency, under art 12 of the Constitution, with a *duty* to impart education as imposed by the DPSPs.<sup>268</sup> It argued that it was fulfilling this duty by enabling access to educational materials and that the Copyright Act’s provisions must be interpreted in light of this constitutional duty - that ‘both the constitutional framework and the statutory rights should work hand in hand’.<sup>269</sup>

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<sup>266</sup> Written Submissions (SPEAK) (n 251) [2869]. I have set out the correct position on international law’s applicability in section 6.3.

<sup>267</sup> *ibid* [2870].

<sup>268</sup> Constitution, arts 39(f) and 41.

<sup>269</sup> Written Statement (Delhi University) [2231]-[2233] <<https://spicyip.com/resources-links/du-photocopy-case>> accessed 21 March 2021.

Although DU invoked the principle that ‘constitutional commands in the form of State Directives as well as fundamental rights operate on a higher pedestal than that of any legislation’,<sup>270</sup> they stopped short of asserting a *right* of students to access educational materials under art 21. ASEAK, however, in their written submissions asserted that

[s]tudents’ right to educational material cannot be left to the vagaries of private treaty between commercial publishers and universities – either in the form of reprography licence or other commercial arrangements – especially in light of the explicit legislative mandate of clauses 52(1)(i)(i) and (a) of the Copyright Act.<sup>271</sup>

Further completing the link between ‘users’ rights’ and constitutional rights-bearers, SPEAK asserted that the exceptions in question (ss 52(1)(i) and 52(1)(a)) should be interpreted as giving effect to a *right* of access to educational materials in a deeply unequal society where several students cannot afford the books published by the plaintiff-publishers.<sup>272</sup> SPEAK argued that the right of access to education and educational materials could be read into art 21 of the Constitution as well as arts 41 and 46 of the DPSPs. In light of this, adopting the plaintiff-publishers’ interpretation of the Copyright Act would violate these provisions. SPEAK argued that the interpretation of the defendants should be preferred by the court, as it enabled the state (through Delhi University) to fulfil fundamental rights guarantees in the Constitution.<sup>273</sup>

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<sup>270</sup> *ibid* [2231].

<sup>271</sup> Written Statement (ASEAK) [2472] <<https://spicyip.com/resources-links/du-photocopy-case>> accessed 21 March 2021.

<sup>272</sup> Written Statement (SPEAK) [2685]-[2686] <<https://spicyip.com/resources-links/du-photocopy-case>> accessed 21 March 2021.

<sup>273</sup> *ibid* [2688].

#### **6.6.1.1.3. *Delhi High Court's holding on s 52(1)(i)***

These arguments were advanced before a single bench of the Delhi High Court and subsequently, on appeal, to a Division Bench of the Delhi High Court. The Single Judge, Endlaw J, dismissed the suit of the plaintiffs and held that there was no infringement of copyright.<sup>274</sup> The Division Bench dismissed the appeal, and refused to grant an interim injunction (as requested by the plaintiff-publishers) to restrain Rameshwari from its activities.<sup>275</sup>

The Single Judge Bench largely upheld the defendants' interpretation of s 52(1)(i).<sup>276</sup> Endlaw J upheld the approach to interpreting exceptions to copyright as ordinary statutory provisions as advanced by the defendants.<sup>277</sup> The Court concluded that course packs for educational purposes were squarely within s 52(1)(i).<sup>278</sup> The Court affirmed that s 52(1)(i) did not include quantitative restrictions as such restrictions cannot be read into the provision by the Court.<sup>279</sup> The definition of 'reproduction', according to Endlaw J, included the compilation and distribution of course packs as this took place for

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<sup>274</sup> The suit was dismissed on procedural grounds under The Civil Procedure Code, 1908, order VII rule 11. See also, Written Statement (Delhi University) (n 269) [2228]; Written Statement (SPEAK) (n 269) [2677].

<sup>275</sup> The Division Bench remanded one factual issue to the Single Bench Judge – whether the reproductions of full works that have been included within the course packs were necessary for the purpose of education. See, *DB* (n 229) [79]. This never took place because the plaintiff-publishers withdrew the suit. See, 'Joint statement by Oxford University Press, Cambridge University Press and Taylor & Francis' (*OUP*, 09 March 2017). This was in part due to a civil society campaign by students and academics at the University of Oxford, petitioning OUP to refrain from appealing. For the purposes of full disclosure, I was involved in this campaign. In addition to written petitions, see, 'Panel Discussion on Copyright and Course Packs' (*University of Oxford Law Faculty*, 24 November 2016) < <https://www.law.ox.ac.uk/content/copyright-and-course-packs-collision-course-competing-value> > accessed 21 March 2021.

<sup>276</sup> However, neither the Single Judge Bench nor the Division Bench referred to the constitutional arguments of the defendants. I discuss this in section 6.6.1.1.5.

<sup>277</sup> Endlaw J (n 229) [41].

<sup>278</sup> *ibid* [51].

<sup>279</sup> *ibid* [97].

‘limited use’.<sup>280</sup> Endlaw J explained that this was not the same as ‘publication’ under the Act, which required communication to the public.<sup>281</sup>

In terms of the scope of ‘course of instruction’, Endlaw J held that s 52(1)(i) ‘permitted [reproductions] for any instructional use, not necessarily in educational institutions’<sup>282</sup> but that the use was required to be ‘instructional’, meaning ‘to furnish knowledge or information, to train in knowledge or learning, to teach, to educate’.<sup>283</sup> Further, the Court drew on related case law that employed the phrase ‘in the course of’ to determine its meaning in the context of education as

a process commencing from the teacher readying herself/himself for imparting instruction, setting syllabus, prescribing text books, readings and ensuring, whether by interface in classroom/tutorials or otherwise by holding tests from time to time or clarifying doubts of students, that the pupil stands instructed in what he/she has approached the teacher to learn.<sup>284</sup>

Further, on the role of Rameshwari, rather than teachers or pupils directly, in performing the mechanical act of photocopying, Endlaw J held that Rameshwari was contracted by the University and was carrying out the reproduction on behalf of teachers *for* pupils.<sup>285</sup> The mere fact that Rameshwari Photocopy received a small payment for their services did not in and of itself disqualify their use from falling within s 52(1)(i) because the purpose was educational and ‘in the course of instruction’.<sup>286</sup>

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<sup>280</sup> *ibid* [57].

<sup>281</sup> *ibid* [47]-[49], [52].

<sup>282</sup> *ibid* [56].

<sup>283</sup> *ibid* [60].

<sup>284</sup> *ibid* [72].

<sup>285</sup> *ibid* [55].

<sup>286</sup> *ibid* [88].

The Division Bench judgment confirmed the applicability of s 52(1)(i) to course packs.<sup>287</sup> It also confirmed Endlaw J's interpretation of s 52(1)(i) as set out above.<sup>288</sup> Moreover, it went further and rejected the application of the American four-factor fair use test to s 52(1)(i). It instead articulated the test as 'so much of the copyrighted work can be fairly used which is necessary to effectuate the purpose of the use'.<sup>289</sup> This, I explain, is none other than the standard set out in art 10(2) of the Berne Convention. In this regard, the Division Bench clarified its position on the arguments advanced before it in respect of international law, holding that it was 'merely directory' and that states parties 'have enough leeway [...] to enact the copyright law in their municipal jurisdiction concerning use of copyrighted works for purposes of dissemination of knowledge'.<sup>290</sup>

#### **6.6.1.1.4. Analysis of DU Photocopy: other interests at stake**

Although I have analysed the arguments advanced by the publishers, students, academics, educational institution, and photocopy service and the judgments of the Court above, there are two other sets of interests that were implicated in the litigation – the interests of authors (from whom publishers acquired copyright or a licence therein) and copyright collecting societies. Alongside the litigation, a civil society campaign was launched.<sup>291</sup> This included over 300 authors, 33 of whom had authored the relevant materials included within the course packs at issue, pledged their support for the wide dissemination of their works

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<sup>287</sup> DB (n 229) [17].

<sup>288</sup> *ibid* [28], [34]-[35], [50]-[51], [60], [75]-[76]. It made a fine distinction between reproduction and publication of materials under copyright and justified course packs under the former because Rameshwari did not turn a profit. See, also *ibid* [52], [57].

<sup>289</sup> *ibid* [33].

<sup>290</sup> *ibid* [63].

<sup>291</sup> 'Appeal to publishers to withdraw suit filed against Delhi University' (*change.org*) <<https://www.change.org/en-IN/petitions/academics-appeal-to-publishers-to-withdraw-suit-filed-against-delhi-university>> accessed 21 March 2021; John Daniel, 'Pay Up!' (*Youtube*, 26 December 2012) <<https://www.youtube.com/watch?v=WM64BMobQ2c>> accessed 21 March 2021.

through course packs in an open letter.<sup>292</sup> The letter sought to ‘place on record [their] distress’ at the suit, and recognise that ‘in a country like India marked by sharp economic inequalities, it is often not possible for every student to obtain a personal copy of a book’.<sup>293</sup> This led to the absurd situation where authors explicitly stated their wish that their works be widely read while publishers persisted with the suit, effectively seeking to restrict access to their works while purporting to increase such access.

In respect of collecting societies, though the Indian Reprographic Rights Organisation, the Federation of Indian Publishers, and Association of Publishers in India applied to intervene in the suit on the side of the publishers, their applications were dismissed.<sup>294</sup> Their reason for impleadment was based on an argument by the plaintiff-publishers that a compulsory licence was an alternative means available to Delhi University<sup>295</sup> and that by not availing of one they were depriving plaintiff-publishers of revenue from the licence fee. By holding that the appropriate provision for course packs was s 52(1)(i), the Court effectively disposed of this argument. Still, some commentators have argued for their application to course packs.<sup>296</sup> However, where a use is statutorily excluded from the ambit of copyright, the scheme of the Copyright Act indicates that it

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<sup>292</sup> ‘Copy row: Authors back DU students’ (*Hindustan Times*, 13 March 2013).

<sup>293</sup> ‘Covering letter to publishing houses’ <<https://spicyip.com/docs/DU%20Photocopying%20case/Covering-Letter-to-Publishers.pdf>> accessed 21 March 2021.

<sup>294</sup> *The Chancellor, Master & Scholars of the University of Oxford v Rameshwari Photocopy* CS(OS) No.2439/2012, IA No.76/2017, IA No.78/2017 & IA No.77/2017 (20 January 2017).

<sup>295</sup> Copyright Act, ss 30, 32A.

<sup>296</sup> See generally, Prashant Reddy Thikkavarapu, ‘The DU Photocopy Judgement – a Chronicle of the Missed Arguments’ (2018) 2 InLR 224.

cannot be brought back into the exclusive control of copyright owners, whether through a licence or otherwise.<sup>297</sup>

#### **6.6.1.1.5.      *Analysis of DU Photocopy: paving the way forward***

The judgments of the Delhi High Court (the Division Bench judgment, and the Single Judge Bench to the extent that the Division Bench endorsed it) has been widely hailed as ‘a blow for the right to knowledge’,<sup>298</sup> evidence of a ‘paradigm change’ where ‘education is not an exception’,<sup>299</sup> and as embodying the recognition that ‘quality higher education is not compatible with an overzealous copyright law’.<sup>300</sup> In this section, I explain the important groundwork laid by *DU Photocopy* for future arguments surrounding access to educational materials and copyright.<sup>301</sup>

#### **6.6.1.1.5.1.      *‘Fair practice’ encompassing the purchasing power of the user***

In determining the extent of reproduction enabled by s 52(1)(i), the Division Bench appeared to apply the test in art 10(2) of the Berne Convention. This is an important observation as it arguably constitutes subsequent practice in interpreting art 10(2) of the

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<sup>297</sup> See, Shamnad Basheer, ‘Copyright Aggression vs Educational Access: The "Grammar" of Justice?’ (*SpicyIP*, 26 October 2012) <<https://spicyip.com/2012/10/copyright-aggression-vs-educational.html>> 21 March 2021; Shamnad Basheer, ‘A Tantalising Copyright Offer: Lessons from Canada and New Zealand’ (*SpicyIP*, 10 March 2013) <<https://spicyip.com/2013/03/a-tantalising-copyright-offer-lessons.html>> 21 March 2021.

<sup>298</sup> Lawrence Liang, ‘A Blow for the Right to Knowledge’, (*The Hindu*, 19 September 2016).

<sup>299</sup> Shamnad Basheer, ‘Cropping Copyright: Education is not an Exception’, (*SpicyIP*, 23 September 2016) <<https://spicyip.com/2016/09/cropping-copyright-education-is-not-an-exception.html>> 21 March 2021.

<sup>300</sup> Satish Deshpande, ‘Copy-wrongs and the invisible subsidy’, (*Indian Express*, 07 October 2016).

<sup>301</sup> These arguments (or a version thereof) are likely to arise in *Elsevier Ltd v Alexandra Elbakyan* CS(COMM) 572/2020 & I.A. 12668/2020, 12671/2020 & 12672/2020 <<https://indiankanoon.org/doc/90397612/>> accessed 1 April 2021.

Berne Convention as *unconstrained* by the TRIPS Agreement's three-step test – in the manner interpreted in Chapters 3 and 4 of this Thesis.

It must be noted that although the Division Bench judgment held that there was significant leeway in India giving domestic effect to its international obligations, it did not purport to interpret India's international obligations under these treaties. Rather, it stated that Parliament had already interpreted these obligations and legislated to create s 52(1)(i) pursuant to them. As I argue in this Thesis, although this is a partly accurate regarding Parliament's role, courts must take the appropriate methodological steps to interpret legislation within the framework of international law.<sup>302</sup> Decisions of domestic courts arguably constitute subsequent practice in international law.<sup>303</sup> The more courts take this international law-making role seriously, the more impact domestic courts will have on the interpretation and construction of international law.

Further, the Division Bench judgment made an important contribution to interpreting 'fair practice' under art 10(2) of the Berne Convention. In dealing with the plaintiff-publishers' contention that a broad interpretation of s 52(1)(i) would impact the market for materials under copyright and cause loss of revenue, the Division Bench observed that

the recipient of the literacy programme is not a potential customer. Similar would be the situation of a student/pupil, who would not be a potential customer to buy thirty or forty reference books relevant to the subject at hand.<sup>304</sup>

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<sup>302</sup> These steps include first determining the relevant treaty obligations that form the interpretive framework (see section 6.2), second, interpreting the relevant provisions using the VCLT, third, selecting a reasonable interpretation of a statute that aligns with this interpretation (see section 6.3.2.1.2.1).

<sup>303</sup> A Tzanakopoulos and CJ Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 LJIL 531; Antonios Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts* (OUP 2016).

<sup>304</sup> DB (n 229) [36].

By asking the question of whether or not the user in question (here, students) would even be able to *afford* to access materials through the market,<sup>305</sup> the Division Bench contributes to understanding ‘fairness’ not only in respect of copyright holders but also users. The logical next step is for future courts to ask whether the works under copyright are *meaningfully available* to them through the marketplace, or if the *only* way in which the works can be accessed is through availing the exception.

#### **6.6.1.1.5.2.            *Importance of education***

Both the Single Judge Bench and the Division Bench highlighted the particular importance of education in society.<sup>306</sup> The Division Bench went further and recognised the importance of equitable access to education by stating

So fundamental is education to a society - it warrants the promotion of equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position. Of course, the more indigent the learner, the greater the responsibility to ensure equitable access.<sup>307</sup>

Although both benches did not refer to the constitutional arguments advanced by the defendants, this *dictum* resonates with the rights to equality and education discussed in section 6.4. I argue that in its emphasis and outcome, the judgments stopped just short of recognising a right of access to educational materials but demonstrated a strong commitment to education. Although the Court had to decide the narrow question whether or not an infringement suit was made out, in both instances it was still required to engage in a statutory interpretation exercise to determine the applicable provision of the Act. In section 6.3 of this Chapter, I comprehensively set out the principles of statutory and

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<sup>305</sup> See, for an empirical study detailing the problem of access in relation to unaffordability of published materials, Shamnad Basheer and others, ‘Exhausting Copyrights and Promoting Access to Education: An Empirical Take’ (2012) 17 JIPR 335.

<sup>306</sup> Endlaw J (n 229) [55]; DB (n 229) [30].

<sup>307</sup> *ibid* (DB) [30].

constitutional interpretation relevant to interpreting the Copyright Act. In short, the approach the Court *should have taken*<sup>308</sup> and the approach that future courts must take, is to ensure that they prefer an interpretation of the Copyright Act that promotes the objects of the Fundamental Rights. If that is not possible, or there is a clear legislative intent to circumscribe the scope of a right, courts must engage in limitations analysis under the relevant right. Here, a proportionality analysis would be required as set out in section 6.4.1.4. Moreover, courts must also select a reasonable interpretation of the Copyright Act that is compatible with India's international obligations. In order to do so, the Court must first determine India's international obligations – and this extends, as discussed in section 6.2, not only to India's international copyright obligations but also human rights obligations.

The reasoning and outcome in *DU Photocopy* paves the way for a paradigm shift, enabling Indian (and indeed international) courts to move away from an isolationist reading of copyright legislation that understands 'education' as an exception to copyright without more. The analysis advanced in this Chapter paints the other half of the picture – the interests of users protected by educational exceptions are recognised as enforceable rights under the Constitution. Moreover, it entails that should Parliament seek to amend the Copyright Act,<sup>309</sup> it must ensure that its amendments do not infringe the right to education and equality among other rights, and if they do, that these amendments pass the limitations analysis set out in the previous section in respect of every right at issue.

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<sup>308</sup> In this case, the emphasis on education and equitable access (notwithstanding the lack of rights-based language) led to an outcome that effectively enabled the fulfilment of the right to education and equality.

<sup>309</sup> See, for a critique of the current consultation, Nikhil Purohit, 'Amendments to the Copyright Act: Hidden Consultations and the Missing Public Angle of Copyright Law – Part I', (*SpicyIP*, 09 Nov 2020) <<https://spicyip.com/2020/11/amendments-to-the-copyright-act-hidden-consultations-and-the-missing-public-angle-of-copyright-law-part-i.html>> 21 March 2021.

A related question that arises, as analysed in Chapter 5, is whether the characterisation of copyright as property has any bearing on the weighing of interests at stake. In the Indian context, a right against deprivation of property is no longer a part of the Fundamental Rights.<sup>310</sup> Even if copyright were characterised as property under the constitutional right, it would likely have to pass a proportionality analysis for it to limit a right in the Fundamental Rights. In any event, a right against deprivation of property under the Indian Constitution is explicitly subject to ‘authority of law’<sup>311</sup> and the statutory provisions analysed in this section would likely pass muster as they have been validly enacted. Further, given that the right to freedom of occupation<sup>312</sup> has been raised in several cases regarding private parties and the right to education,<sup>313</sup> it may be that in future cases a similar claim is brought in respect of the copyright industry. The Supreme Court’s recent decision in *Modern Dental College* is particularly instructive here as it assesses the reasonableness of restrictions that may be placed on the exercise of the freedom. The effect of its holding is that the person or institution providing education must first demonstrate that it is not profiteering. If they are found to be profiteering, art 19(1)(g) is inapplicable.<sup>314</sup> If they are not found to be profiteering, any restriction on the freedom of occupation must be adjudged to be reasonable.<sup>315</sup> A restriction (such as an educational exception) in respect of furthering access to education is therefore *prima facie* reasonable.

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<sup>310</sup> Constitution, art 300A.

<sup>311</sup> *KT Plantation v State of Karnataka* (2011) 9 SCC 1 [106]-[110].

<sup>312</sup> Constitution, art 19(1)(g).

<sup>313</sup> Eg., *TMA Pai Foundation* (n 136); *Modern Dental College* (n 142).

<sup>314</sup> *ibid* (*Modern Dental College*) [30].

<sup>315</sup> Constitution, art 19(6). See, *Modern Dental College* (n 142) [53].

### 6.6.1.2. *Educational materials outside of a ‘course of instruction’*

I now turn to a brief analysis of the other relevant provisions that relate to accessing educational materials in the Copyright Act. In addition to s 52(1)(i), regarding access to materials under copyright outside of a ‘course of instruction’, or for private use, the Act provides that

The following acts shall not constitute an infringement of copyright, namely,—

(a) a fair dealing with any work, not being a computer programme, for the purposes of—

- (i) private or personal use, including research;
- (ii) criticism or review, whether of that work or of any other work;
- (iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public.

Explanation.— The storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer programme which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright.<sup>316</sup>

The quoted section incorporates ‘fair dealing’ as a limitation on *any* use of a work under copyright for the purpose of research or private study. This includes reproduction in the nature of scanning and photocopying amongst other techniques. Although ‘fair dealing’ is not defined in the Act, it has been interpreted by Indian courts as non-exhaustively incorporating the four-factor test present in American law on ‘fair use’ to determine the content of ‘fairness’.<sup>317</sup> The key distinction between ‘fair dealing’ in the Indian context<sup>318</sup> and ‘fair use’ in the American context is that the former sets out a closed list of purposes

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<sup>316</sup> Copyright Act, s 52(1)(a).

<sup>317</sup> *India TV Independent News Service Pvt Ltd v Yasraj Films Pvt Ltd* 2013 (53) PTC 586 (Del). See also, *Syndicate of the Press of The University of Cambridge on behalf of the Chancellor, Masters and School v BD Bhandari* (2011) 185 DLT 346 (DB) [34].

<sup>318</sup> See, Arpan Banerjee, ‘Copyright and Academic Photocopying: The Delhi University Case’ in Shyamkrishna Balganes, Ng-Loy Wee Loon, and Haochen Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (CUP 2020) 307.

that cannot be expanded while the latter does not set out a list at all.<sup>319</sup> Indian courts have used the four-factor test under ‘fair use’<sup>320</sup> to determine the content of ‘fairness’ rather than expanding the purposes at issue.

In relation to the first factor, courts have held that uses that are for the primary purpose of commercial benefit are excluded from fair dealing.<sup>321</sup> However, courts have clarified that the mere derivation of some commercial benefit from the use does not, on its own terms, automatically render the use unfair.<sup>322</sup> Regarding the second factor, courts have held that fair dealing encompasses uses that are ‘transformative’ in nature – that is, those uses that add value to existing work to transform the purpose of the work and do not supplant the original purpose.<sup>323</sup> And, in relation to the third and fourth factors, the Supreme Court has clarified that ‘fair dealing’ does not in and of itself preclude the complete reproduction of materials under copyright where necessary, including whole books.<sup>324</sup>

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<sup>319</sup> See generally, Giuseppina D’Agostino, ‘Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use’ (2007) Research Paper No. 28/2007 CRLPE.

<sup>320</sup> 17 USC 107 states:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work

<sup>321</sup> *GE Power India Ltd v NHPC Limited* 2020 SCC OnLine Del 667 [8]; *Tips Industries Ltd v Wynk Music Ltd* MANU/MH/0862/2019 [36]. See also *Rupendra Kashyap v Jivan Publishing House* 1996 (38) DRJ.

<sup>322</sup> *Super Cassettes Industries Ltd v Hamar Television Network Pvt Ltd* 2011 (45) PTC 70 (Del) [8].

<sup>323</sup> *The Chancellor Masters and Scholars of the University of Oxford v Narendera Publishing House* 2008 SCC OnLine Del 1058; (2008) 38 PTC 385 [34].

<sup>324</sup> *Academy of General Education Manipal v B Malini Malhya* (2009) 4 SCC 256. See, NS Gopalakrishnan, ‘Intellectual Property Laws’ (2009) 44 Annual Survey of Indian Law 598, 499.

In line with the interpretive framework set out in this Chapter, I argue that those uses that are necessary to fulfil a right in the Fundamental Rights can arguably be considered ‘fair’. I have demonstrated a version of how this argument would work in section 6.6.1.1.5.2 in relation to s 52(1)(i).

### **6.6.1.3.     *Other relevant provisions***

In addition to the provisions analysed above, the Copyright Act permits three copies to be made, of literary materials under copyright by a non-commercial public library, ‘for the use of the library if such book is not available for sale in India’, to be exempt from infringement of copyright.<sup>325</sup> This provision is particularly important to ensure the ‘availability’ dimension of the right to education discussed in Chapter 2. This provision may be understood as another instance of ‘fair practice’ under the Berne Convention where the quantitative limit on the number of copies acts as a legislative determination of the extent required by the purpose. This determination specifically includes access to educational materials through non-commercial public libraries – since university libraries are a key source for accessing educational materials in India.<sup>326</sup> Additionally, unlike the South African legislation, the Copyright Act enables accessible format shifting in order to ensure that persons living with disabilities are not deprived of access to educational materials on the basis of market priorities.<sup>327</sup> This provision is India’s domestic legislation pursuant to the MVT.

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<sup>325</sup> Copyright Act, s 52(1)(o).

<sup>326</sup> Endlaw J (n 229) [75].

<sup>327</sup> Copyright Act, s 52(1)(zb).

## 6.7. Conclusion

The Indian Constitution recognises a right of access to educational materials. In particular, in a deeply unequal country, the realisation of this right is entwined with the right to equality. Although *DU Photocopy* did not apply the Fundamental Rights to its interpretation of the Copyright Act, it recognised the importance of both interests protected by these rights. In doing so, it held in favour of equitable access to educational materials for all.

This decision contributes to understanding how domestic courts participate in international law-making. In particular, domestic courts are well-placed to harmonise the competing obligations incumbent upon a state – if only they identify the relevant obligations and recognise that they have this power. Thus, *DU Photocopy* also enables an analysis of how courts can *better* participate in this exercise. The arguments advanced in this Chapter seek to set out the methodological steps that future courts, and indeed any organ of state interpreting India's international obligations in respect of accessing educational materials, must take in order to construct international law from below.

Finally, this Chapter performs an important identification task – it systematically analyses the relevant international treaties that India is party to regarding the right to education and copyright, clarifies the relationship between international and domestic law as governed by the Constitution, marshals the DPSPs and Fundamental Rights in service of statutory and constitutional interpretation as per the constitutional scheme, identifies a right of access to educational materials within the Constitution, and articulates a constitutional reading of the Copyright Act. In doing so, the Chapter demonstrates how the competing obligations set out in Part I have been harmoniously reconciled by the Delhi High Court. This offers direction to other global South countries seeking to reconcile their competing obligations domestically.



## 7. CONCLUSION

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In advancing the argument in this Thesis, I read and cited over 500 pieces of work under copyright, including journal articles and books, and browsed through several others to select the most relevant works. A single journal article costs anywhere between 20<sup>1</sup> to 35GBP,<sup>2</sup> while the relevant books cost anywhere between £25<sup>3</sup> and £455.<sup>4</sup> Purchasing access to the relevant materials required to complete this Thesis outside a higher education institution (or indeed at an institution apart from the University of Oxford or any other well-resourced university in the global North) would be near impossible for me, an upper-caste, upper-middle class Indian woman using Rupees. If this is the case for someone in a relatively well-off socio-economic position living without a disability, the picture is far worse for people living at the margins. Put differently, 87.4% of India's population (approximately 1.2 billion people) lives off less than £4.01 per day<sup>5</sup> (approximately 20% of the cost of a single journal article on the lower end).<sup>6</sup> The problem of access is acute.

The only way for most people to access the materials they require for educational purposes is through formal and informal networks of access – these include public libraries

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<sup>1</sup> Eg., 'Leiden Journal of International Law' (*Cambridge Core*, 31 July 2013) <<https://doi.org/10.1017/S0922156513000228>> accessed 21 March 2021.

<sup>2</sup> Eg., 'Indian Law Review' (*Taylor & Francis*, 15 December 2017) <<https://doi.org/10.1080/24730580.2017.1396529>> accessed 21 March 2021.

<sup>3</sup> Eg., 'Brill-Nijhoff' (Brill, 22 August 2012) < <https://doi.org/10.1163/9789004235403>> accessed 21 March 2021.

<sup>4</sup> Eg., 'Oxford University Press (OUP, 05 January 2006) <<https://global.oup.com/academic/product/international-copyright-and-neighbouring-rights-9780198259466?cc=gb&lang=en&>> accessed 21 March 2021.

<sup>5</sup> Of which 22.5% (312 million people) live off less than £1.39 a day, and 61.7% (858 million people) live off less than £2.33 a day. See, 'World Development Indicators: Poverty Rates at International Poverty Lines' (*World Bank*) <<http://wdi.worldbank.org/table/1.2>> accessed 21 March 2021.

<sup>6</sup> This is notwithstanding the digital divide impacting access to the internet and other capability deprivations.

and educational institutions (for those in formal courses of education). But the number of copies of a particular work in a library depends on the library budget, which in turn depends on how well-resourced a particular educational institution is, which, if it is a public or government-aided institution, depends on governmental budgetary allocations. And global South countries like India and South Africa have significant resource constraints. Technologies of access, like photocopying, thus play a crucial role in bridging the access gap.<sup>7</sup> But, these technologies are treated with suspicion by the law. The key worry is that they will have a substitution effect on the market for materials under copyright. However, as demonstrated above, 87.4% of the population of India are unlikely to be able to afford a single journal article, let alone constitute the market for such materials.

Although there are economic questions around publishing models and their sustainability, as well as their capacity to meet the high demand for educational materials in their current form, this Thesis does not delve into these questions. Rather, this Thesis is concerned with the role of the *state* in facilitating access. By recognising that educational purposes are not only exceptions to copyright but are also guaranteed by human rights, the Thesis shines a light on the state's duties in respect of both legal regimes and their interaction in international and domestic law.

In this Conclusion, I discuss the significant original contribution that this Thesis has made towards the above aim. I focus on its contribution to intersecting bodies of law. I then describe some implications of this research and briefly demonstrate its application to the contemporary moment.

Having introduced the importance of access and the role of copyright in the Introduction, at the heart of Chapter 2 is the *equal* right of access to educational materials

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<sup>7</sup> Eg., Andrew Rens, Achal Prabhala, and Dick Kawooya, *Intellectual Property, Education and Access to Knowledge in Southern Africa* (TRALAC 2006).

for all. I located this right as a part of the right to education in international human rights law. By synthesising the under-researched work of the UN human rights treaty body system, I set out the content of the right. Remaining sensitive to particular markers of vulnerability leading to various types of deprivations of access, the Chapter analysed the relevant provisions in respect of persons living with disabilities, persons living in poverty, children, women and girls, and racial minorities. I also set out states parties' obligations. In doing so, I identified contextual factors relevant to particularising these duties. I also discussed the extent to which the human rights system recognises and guarantees authors' rights. The Chapter is the first of its kind to marshal this work in the area of access to educational materials in service of interpreting the UN human rights treaties.

Chapter 3 examined the regulation of access to educational materials by the international copyright treaties. I argued that art 10(2) of the Berne Convention creates the necessary room for states parties to both the international copyright treaties and human rights treaties to fulfil both sets of obligations. I set out a novel interpretation of art 10(2), applying the VCLT rules of interpretation and focusing in particular on the neglected elements of systemic integration and subsequent practice. I concluded that the better interpretation of art 10(2) is grounded in the authoritative French version of the Berne Convention, which envisioned a broader set of educational purposes than merely classroom instruction. The Chapter advanced the argument that, viewed harmoniously, art 10(2)'s permissive nature takes on an obligatory character for those states parties to both sets of treaties. The Chapter drew on the logic of the MVT to construct this argument, thereby contributing to mainstreaming disability studies. Finally, the Chapter set out the better interpretation of the relationship between the Berne Convention and TRIPS, based on the principle of systemic integration. In particular, it focused on the objects and purposes of TRIPS to counter-balance its limiting language in the three-step test.

Chapter 4 conducted an investigation into how public international law deals with obligations that are in tension. In this Chapter, I set out the tensions across the obligations analysed in Chapters 2 and 3, identifying apparent and genuine conflicts. I argued that Chapter 3 set out a harmonious interpretation to resolve most of the identified conflicts, in line with the ILC's guidance. However, I identified some conflicts that required the application of the ILC's conflict avoidance and resolution tools. But for international law's reluctant recognition of the substantive consequences of obligations *erga omnes partes* norms, I demonstrated that these tools were most effective to avoid/resolve conflicts within specialised bodies of law rather than *across* these bodies as required by this Thesis. In any event, I argued that the literature's attempts at an *a priori* resolution of conflict misses an important piece of the puzzle: the normative environment in which the competing obligations are interpreted. The Chapter comparatively analysed the institutional design of the WTO DSS and CESCR to demonstrate that the same interests are prioritised differently in different systems. Importantly for the purposes of this Thesis, I demonstrated how certain features of the WTO DSS lead to the prioritisation of the interests of the industry as compared to the interests of students, learners, and those seeking education, despite the fact that states undertake human rights obligations to protect the latter. In this arrangement, authors' interests *qua* creators disappear into the background. Moreover, I also explained the real consequences faced by states parties to the treaties analysed in Chapters 2 and 3 for adopting the harmonious interpretation advanced in Part I of the Thesis and enacting domestic educational exceptions to copyright that fulfil their human rights obligations in respect of access to educational materials.

Part I of the Thesis thus argued that states parties to international human rights treaties and copyright treaties are bound to fulfil both sets of treaties. It demonstrated that a harmonious interpretation was possible – and set out this interpretation. However, the institutional analysis conducted by Part I offers an explanation for why states parties are

reluctant to adopt this interpretation in crafting their domestic laws. The implications of this are particularly acute for persons living with disabilities and persons living in poverty to whom the market does not afford access. Part II illustrated this reluctance in the South African case study, and provided a counter-point to it in the Indian case study.

An important part of the argument advanced in this Thesis is the role of domestic law in constructing the meanings of international treaty obligations. Countries in the global South are less likely to be in a position to purchase access to the market on behalf of persons living with disabilities and in poverty as compared to countries in the global North due to resource constraints.<sup>8</sup> This global inequality means that technologies of access like photocopying are more likely to be the key modes of access in the global South. It also entails that apparent conflicts between international human rights and copyright obligations are more likely to arise in respect of the global South. Thus, while countries like Norway and Switzerland may find that their state resources enable them to fulfil both sets of international obligations, this is unlikely for countries like South Africa and India.

Thus, through the inclusion of Part II, the Thesis demonstrates the necessity for a contextual appraisal of states' international obligations to better respond to their needs, rather than proposing a one-size-fits-all approach to resolve competing obligations. Part II contributes to a better understanding of the dialogic relationship between international and domestic law outside of the traditional categories of monist and dualist. The argument in the Thesis, and by extension in international law, is incomplete without understanding how domestic states construct their obligations with reference to their own internal domestic systems.

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<sup>8</sup> See, Upendra Baxi, 'What May the "Third World" Expect from International Law?' (2006) 27 TWQ 713. See also, Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Philosophy & Public Affairs 113.

In light of this, Chapter 5 focused on South Africa's recent legislative process to reform its Copyright Act. I argued that South Africa's Constitution posits the Bill of Rights as a magnet in domestically giving effect to South Africa's international treaty obligations, tending to attract international instruments that protect the same interests as the Bill of Rights and to give them greater weight in its interpretation. I located the right of access to educational materials as part of the right to education in the Bill of Rights and analysed the constitutional obligations it imposes upon the state across levels of education. I then analysed the extent to which the apartheid-era Copyright Act and its regulations can be read to promote the objects of the Bill of Rights. I argued that out of the two provisions that regulate access to educational materials in the Act, one is likely unconstitutional as it unfairly discriminates against persons living with sensory disabilities. The other, employing identical language to art 10(2) of the Berne Convention, could plausibly be read to promote the objects of the Bill of Rights and render it constitutional. However, I argued that several of the Regulations under the Act are *ultra vires* and therefore unlawful, in addition to limiting the right of access to educational materials. I then analysed the CAB, which seeks to introduce provisions that are tailored to South Africa's particular context. I argued that the CAB is an instance of the South African Parliament interpreting South Africa's twin sets of international obligations in order to give effect to a harmonious interpretation. However, I demonstrated that the President's referral letter, sending the CAB back to Parliament, is an instance of the 'chilling effect' articulated in Chapter 4. Given Parliament's delay addressing the reservations to the CAB, allowing a likely unconstitutional situation to continue, Chapter 5 contributes to the ongoing debate by advancing a clear legal analysis of the Copyright Act and the CAB.

Chapter 6 then turned to how Indian courts have resolved this tension in the *DU Photocopy* case. I argued that *DU Photocopy* impliedly applied art 10(2) of the Berne Convention in analysing the scope of the exception for educational purposes in the Indian

Copyright Act. Importantly, it identified purchasing power of users as an important factor in analysing whether the creation of course packs was ‘fair practice’. This contributes to interpreting ‘fair practice’ in international law, as an instance of subsequent practice, and is particularly relevant to other global South jurisdictions grappling with similar issues. Further, the judgments’ emphasis on the importance of education in a deeply unequal country, I argued, paves the way for future courts to consider how Fundamental Rights recognise this importance through guaranteeing both education and equality as *rights*. Thus, I analysed the implied right to education, judicially evolved under the right to life, and the explicit right to education included through a constitutional amendment. I argued that the introduction of an explicit right does not extinguish the implied right as this would be normatively retrogressive and run the risk of violating the ICESCR. I critiqued the *DU Photocopy* case on the basis that the judges engaged in an exercise of statutory interpretation without regard for India’s international human rights obligations *qua* DPSPs and Fundamental Rights despite clear constitutional injunctions to do so. I thus provided a way forward for future courts to interpret similar issue by setting out these constitutional injunctions. Given the polyvocality of courts in India, Chapter 6 performed the important task of identifying and systematising the jurisprudence on this issue. Finally, Chapter 6 contributes to the contemporary landscape where the Delhi High Court is once again seized with an infringement suit against shadow libraries that implicates the same concerns. It also contributes to strengthening the provisions facilitating access to educational materials in the Copyright Act by providing a constitutional basis to ensure that any future amendments to the Act that seek to limit access must pass a limitations analysis.

Overall, the Thesis advances a methodological approach to international law that takes domestic actors seriously. This approach is applicable across subject areas in international and domestic law. Reading the Thesis through this lens, courts, legislators, and indeed any actor seeking to interpret international law on the domestic plane can

determine the methodological steps to be taken in conducting such an interpretation and thereby contributing to international meaning-making. Actors seeking to interpret international law on the international plane can utilise the approach in this Thesis to understand the subsequent practice of states in constructing their international obligations domestically. A future direction for research is the role of different domestic constitutional actors in interpreting these obligations and the differential effect of international pressure upon these actors. In the South African context, this Thesis demonstrated the chilling effect faced by legislatures and the executive, while in the Indian context, courts did not face a similar hurdle.

Further, the Thesis advances an institutional approach to international interpretation that does not separate norms from their context. This is particularly helpful in understanding the ‘structural biases’ of institutions and how institutional features condition interpretive outcomes. This is applicable across institutions, whether located on the international or domestic planes. In addition to offering helpful tools for those seeking to navigate the WTO DSM and the CESCRC in particular, the approach taken by the Thesis enables the same questions to be asked of the features of other institutions in seeking to secure access to educational materials. Moreover, this approach might inform future institutional design of international and domestic organisations charged with monitoring and adjudicatory functions.

In terms of interpreting treaty provisions, the Thesis demonstrates the dangers of interpreting treaty provisions in self-contained regimes with sole reference to that regime in isolation from general international law. It offers a solution: using the principle of systemic integration as an interpretive tool to ensure that regimes governing the same subject matter (or indeed intersecting in other ways) actually speak to one another. This finds application across subject matters in international law: whether it is in the areas of

international human rights law and trade law; international humanitarian law and human rights law; or international environment law and trade law, amongst others.

Substantively, the Thesis is directly analogous to other issues at the nexus of intellectual property and human rights. In the contemporary moment, a year into the global pandemic, the argument in this Thesis is most urgent in the area of equitable access to vaccines and patent law. The access to medicines movement has long since been engaged in this struggle in relation to life-saving drugs and the right to health. Further, the recent spate of free trade agreements across the world make it necessary for states to negotiate for intellectual property provisions that do not unduly circumscribe the scope of their human rights obligations. Outside of intellectual property, the approach taken by this Thesis also has application to other private law regimes that seek to regulate an interest concurrently protected as a human right.

Finally, the domestic constitutional analysis conducted by the Thesis in the South African and Indian contexts offer insights into how global South jurisdictions can better realise the right of access to educational materials. These insights may be applied to other global South jurisdictions facing similar issues such as Brazil, Colombia, Indonesia etc., in conducting a similar analysis grounded in the particular jurisdiction. The Thesis thus demonstrates the importance of domestic actors in harmonising international obligations.

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