

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

Case no: **CCT 320/21**

In the matter between:

BLIND SA

Applicant

and

MINISTER OF TRADE, INDUSTRY AND COMPETITION

First Respondent

MINISTER OF INTERNATIONAL RELATIONS AND

COOPERATION

Second Respondent

SPEAKER OF NATIONAL ASSEMBLY

Third Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL OF

PROVINCES

Fourth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fifth Respondent

and

OWEN DEAN

First *Amicus Curiae*

MEDIA MONITORING AFRICA GROUP

Second *Amicus Curiae*

INTERNATIONAL COMMISSION OF JURISTS

Third *Amicus Curiae*

THIRD AMICUS CURIAE'S WRITTEN SUBMISSIONS

A. INTRODUCTION

1. The enactment of a provision such as the one contemplated in section 19D of the Copyright Amendment Bill is not only permissible, but legally required, in terms of South Africa's international human rights law obligations. This leads to the inevitable conclusion that the Copyright Act, as it stands, and in the absence of an amendment of this nature, which the High Court has accepted has been subject to "endless delay",¹ is both unconstitutional and in contravention of South Africa's international law obligations, both of which South Africa is required to perform "*diligently and without delay*".²
2. Recently in *Law Society of South Africa and Others v President of the Republic of South Africa and Others*, this Court reiterated the "centrality" of international law in "shaping our democracy" and its "*well-deserved prominence in the architecture of our constitutional order*" given the fact that "*we relied heavily on a wide range of international legal instruments to expose the barbarity and inhumanity of the apartheid system of governance in our push for its eradication*". It is this history that this Court held, "*informs the critical role that we need international law to play in the development and enrichment of our constitutional jurisprudence*".³

¹ High Court judgment, para 12.

² Constitution s 237, reads: "Diligent performance of obligations. All constitutional obligations must be performed diligently and without delay."

³ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) ("*Law Society*"), para 4. Emphasis added.

3. This approach is supported both by the provisions of the Constitution dealing with international law, detailed below, and the Preamble of the South African Constitution which sets out a vision to “build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations”.⁴ The Constitution, according to this Court in *Glenister v President of the Republic of South Africa*, also “reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, ***in particular international human rights law***”.⁵
4. The ICJ’s submissions are centered on both this “particular” importance placed in South Africa’s constitutional dispensation in complying with international human rights law, and the more general need to ensure compliance with international law in terms of the Constitution.
5. In its judgment striking down the impugned provisions, the High Court reaffirmed the importance of a “coherent international approach”, because, it reasoned, “a developing country such as ours can ill-afford to not keep abreast with international standards more so on matters commonly affecting human rights and humanity worldwide”. It therefore observed, after explicitly having regard to the ICJ’s submissions, that “*the protection of intellectual property at the expense of human rights of access to information requires a coherent international approach to dislodge the beneficiaries of the protection of their controlling powers*”.⁶ Such a complementary approach to the protection of intellectual property rights and of

⁴ Constitution, Preamble.

⁵ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para 97. Emphasis Added.

⁶ High Court, para 20.

human rights, which ensures that the two areas of law are construed harmoniously, therefore needed.

6. In the matter before this Court, the impugned provisions are challenged for their inconsistency with the South African Constitution, understood and interpreted in light of South Africa's international law obligations. The applicants and various amici, before this Court, raise arguments grounded in international human rights law, supporting the striking down of the impugned provisions.
7. One of the amici, Professor Owen Dean, while entirely omitting reference to applicable international human rights law, relies on provisions of international copyright law and international trade law to oppose the remedy sought by the applicants.
8. The ICJ submits that, as the High Court correctly identified, the application of international law is of significant importance in resolving the constitutional challenge before the Court.
9. We submit, however, that this Court may not pick and choose in applying the relevant international law regimes, as it appears Professor Dean does. Neither international human rights law nor intellectual property law nor any other area of international law stand as insulated as self-sufficient regimes. This Court must consider international copyright law and international trade law, alongside international human rights law, regarding the applicable international law standards as part of a single, coherent system. This, we argue, it must do in line with the principle of "systemic integration" in terms of Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("**VCLT**"). We submit that it is also

ultimately the only correct way to evenly interpret the sources of international trade law and international copyright law upon which Professor Dean relies upon.

10. In this way, although other human rights which are protected in a variety of international human rights instruments may be impacted by the impugned provisions, the ICJ's submissions focus directly on South Africa's obligations in terms of the Convention on the Rights of Persons With Disabilities ("**CRPD**"), the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**") and the Marrakesh Treaty to Facilitate Access to Published Work for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled ("**Marrakesh Treaty**"). It is important to note from the outset that South Africa itself in the context of its international representations has highlighted the significance of these specific treaties in giving effect to constitutional rights:

- 10.1. In its initial report to the CRPD Committee, South Africa described itself as a: "leading force in the campaign for, and eventual development of [CRPD] which, in its final format, embodies the principles of the South African process set in motion in 1994 to advance the progressive realisation of the rights of persons with disabilities as equal citizens."⁷

- 10.2. Similarly, with regard to the ICESCR, in its initial report to the CESCR Committee, South Africa indicated that its "*accession to ICESCR* has and will continue to deepen the enforcement of socio-economic rights in

⁷ Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of State parties due in 2009 South Africa, CRPD/C/ZAF/1. South Africa also argues that the implementation of the CPRD "actually commenced in 1994 and not in 2007, when the Convention was officially ratified by South Africa, or in May 2008, when it came into force".

the country”.⁸

10.3. Finally, at the conclusion of the drafting of the Marrakesh Treaty, in its closing remarks South Africa underlined its “support and commitment to this treaty”, its intention to accede to the treaty and its broader support for a “**balanced approach** between intellectual property rights holders and public interest”.⁹

11. To the extent that the South African government is applying a complementary approach as required in international law, which, we submit necessarily entails the collective and consistent interpretation and application of all of South Africa’s engaged international obligations, understood as a coherent whole. The omission of, or underemphasis of South Africa’s international human rights obligations would significantly inhibit this Court’s ability to adjudicate on the constitutionality of the impugned provisions in a manner consistent with international law.

12. In this context, and in summary, the ICJ seeks to make the following submissions:

12.1. South African courts are required to consider international human rights law and standards in the interpretation of constitutional rights and legislative provisions. This includes both binding sources of international

⁸ Committee on Economic, Social and Cultural, “Consideration of Reports Submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights”, UN Doc. E/C.12/ZAF/1 (2017), para 5.

⁹ Id. Emphasis Added.

law (such as treaties South Africa is party to, such as the CRPD and the ICESCR) and so-called non-binding sources (such as the Marrakesh Treaty). Under the terms of article 27 of the VCLT, provisions of South Africa's domestic law cannot be used as justifications for failure to comply with South Africa's international human rights law obligations.

12.2. The VCLT also requires South Africa's international obligation in terms of various treaty regimes (including international human rights law, international trade law and international copyright law) to be interpreted as part of a single coherent system of law. Through a process of "systemic integration", properly understood, South Africa's obligations in terms of international human rights law should not be construed as being in conflict with its obligations in terms of international copyright law or international trade law. Indicatively , the Marrakesh Treaty itself is a reflection of an attempt to consolidate and specify States' obligations to create exceptions to copyright protections in terms of international law as a whole.¹⁰

12.3. The CRPD binds South Africa to ensure the rights to inclusive education (Article 24); participation in cultural life on an equal basis (Article 30) and accessibility (Article 9). Read together, these rights, as authoritatively interpreted by the UN Committee on the Rights of Persons with Disabilities ("CRPD Committee") in its General Comment 4 (Right to

¹⁰ WIPO, Main Provisions and Benefits of the Marrakesh Treaty (2013), available: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_flyer.pdf, p 3-4 ("the Marrakesh Treaty reinforces the need for Contracting Parties to comply with their international obligations regarding the creation of limitations and exceptions at the national level").

Inclusive Education) and General Comment 2 (Right to Accessibility), require States Parties to remove legislative barriers to access to reading materials for persons with disabilities, including barriers such as those presented by the Copyright Act.

12.4. South Africa's obligations in terms of the CRPD are complemented and reinforced by its obligations under the ICESCR by to realize the rights to education (Article 13) and to take part in cultural life (Article 15). Read together, these obligations, as authoritatively interpreted by the UN Committee on Economic, Social and Cultural Rights in its General Comments 13 (Right to Education) and its General Comment 21 (Right to Take Part in Cultural Life), also carry a requirement that South Africa act to remove legislative barriers to access reading materials for persons with disabilities including barriers such as those presented by the Copyright Act.

12.5. In terms of section 7(2) of the Constitution, the State must respect, protect, promote and fulfil the rights in the Bill of Rights. According to the jurisprudence of this Court, this requires the State to take "reasonable and effective" measures to respect, protect, promote and fulfil constitutional rights. This Court has also found that measures that fall short of international law standards may well be considered to be unreasonable.¹¹ We will therefore submit that South Africa's continued

¹¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46, para 42.

failure to remove legislative barriers to access reading materials for persons with disabilities amounts to a failure to take reasonable and effective measures to protect various constitutional rights and therefore is non-compliant with its obligations¹² in terms of binding international law and its domestic law requirements under the Constitution.

12.6. One of the objectives of the Marrakesh Treaty is to facilitate access to reading materials for persons with disabilities, and in this way it thus incorporates aspects of South Africa's existing obligations of States in terms of the CRPD and ICESCR. Although South Africa has not yet acceded to the Marrakesh Treaty, and is therefore not bound by it, the Treaty should be considered in the interpretation of the CRPD and ICESCR, as well as in the interpretation of relevant constitutional and legislative provisions. This is especially so given South Africa's participation in the diplomatic Conference that adopted by consensus the Treaty and its public support and endorsement of the treaty. The Marrakesh Treaty is also relevant to this Court's assessment of the constitutionality of the Copyright Act and the determination of a just and equitable remedy.

12.7. The arguments presented by Professor Dean, most particularly in his founding affidavit, and also in his written submissions, misconstrue the

¹² It is important to note that, from an international law perspective, legal "obligations" are owed to states and the international community as a whole, whereas domestic "responsibilities" flow directly from a State to its people. However, for the purposes these written submissions, to maintain the use of standard South African constitutional language, we refer to "obligations" held by the South African State to in terms of domestic law too.

obligation of States in terms of relevant treaties (ie. Marrakesh Treaty, the Berne Convention and TRIPS) and international law more generally. Whatever the appropriate remedy this Court should prescribe, it is not correct, as Professor Dean argues, that it is incumbent upon States in terms of international law to mechanically replicate verbatim treaty provisions in domestic instruments. Additionally, we submit that Professor Dean's arguments ignore international human rights law completely, and therefore presents an incorrect interpretation of international law understood as a coherent whole.

13. In short, and as the ICJ and Equal Education Law Centre have indicated in their submissions to Parliament in relation to the pending Copyright Amendment Bill ("Amendment Bill"),¹³ we submit here that the enactment of a provision such as the one contemplated in section 19D of the Amendment Bill is not only permissible, but legally required, in terms of South Africa's international human rights law obligations. This leads to the inevitable conclusion that the Copyright Act, as it stands, and in the absence of such amendment which the High Court has accepted has been subject to "endless delay", is both unconstitutional and in contravention of South Africa's international law obligations, both of which South Africa is required to perform "*diligently and without delay*".
14. During this lengthy period of legislative delays, postponements, extensions and deliberations, persons with print disabilities in South Africa continue to be

¹³ International Commission of Jurists and Equal Education Law Centre "In Re: Submissions on Copyright Amendment Bill [B13B-2017]" (9 July 2021), available at: <https://eelawcentre.org.za/wp-content/uploads/icj-and-eelc-submission-to-parliament-on-cab-9-july-2021.pdf>

disadvantaged and, at present, may only have access to a mere one percent of all books in accessible formats.¹⁴ This devastating human impact is well illustrated by the supporting affidavits of Mr Low,¹⁵ Justice Yacoob¹⁶ and Mr Gama, which attached to the applicant's founding papers.¹⁷

15. It is this human impact, and the human rights of persons similarly situated to Mr Low, Justice Yacoob and Mr Gama – protected both in domestic and international law – that should be at the centre of this Court's inquiry in determining both the constitutional validity of the impugned provisions and the appropriate remedy.

B. APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN SOUTH AFRICA

16. Section 39(1) of the Constitution provides that courts “*must consider international law*” in interpreting rights in the Bill of Rights. Section 39(2) of the Constitution further provides that courts must, when interpreting legislation, “*promote the spirit, purport and objects of the Bill of Rights*”.¹⁸ Furthermore, section 233 of the Constitution provides that courts must, when interpreting legislation, “*prefer any reasonable interpretation of the legislation that is consistent with international law*”

¹⁴ African Commission on Human and People's Rights “Statement of Special Rapporteur on Freedom of Expression and Access to Information in Africa on Access to Information for persons who are blind or otherwise print disabled” (10 December 2018), available at <https://www.achpr.org/pressrelease/detail?id=14>; WIPO, “The Marrakesh Treaty – Helping to end the global book famine” (2016): https://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_overview.pdf. See also: F Veriava et al “The Copyright Amendment Bill: A step closer to making rights to education and health a reality” (12 August 2021), available at: <https://www.dailymaverick.co.za/article/2021-08-12-the-copyright-amendment-bill-a-step-closer-to-making-rights-to-education-and-health-a-reality/>. Marcus Low “Ending the book famine for the blind” (10 April 2013), available at: <https://www.groundup.org.za/article/ending-book-famine-blind/>.

¹⁵ Low supporting affidavit, Vol 4, paras 24 – 34, pp 318- 324

¹⁶ Yacoob supporting affidavit, Vol 3, paras 3 – 12, pp 307-309

¹⁷ Gama supporting affidavit, Vol 4, paras 6 – 14, pp 333-336

¹⁸ Constitution, s 39(1)-(2).

over any alternative interpretation that is inconsistent with international law".¹⁹

17. It must be emphasised that these constitutional provisions on international law – peremptory in their nature – do not stipulate or limit which sources of international law must be considered and applied; the Constitution requires the courts to consider the ambit of both binding and non-binding international law as appropriate under the circumstances. Accordingly, these provisions have consistently been interpreted by South African Courts to require the consideration of both binding and non-binding sources of international human rights law in the interpretation of both legislation and provisions of the Constitution itself.²⁰
18. In this regard, in *S v Makwanyane*,²¹ this Court held that “public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation.” There have been multiple decisions since the decision in *S v Makwanyane* that have built on, and reaffirmed, this principle.²² In *Glenister*, this Court reiterated the principle in *Makwanyane* finding that although a source of law may itself not be in international law, it “can be used to interpret and give content to the obligations in the [international law]

¹⁹ Constitution, s 233.

²⁰ *Glenister*, paras 106, 192. 1. For further detailed analysis of the application of international law in the context of social and economic rights adjudication we refer the court to the International Commission of Jurists 2019 publication “A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa” (August 2019) available at: <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf>, pp 17-27 (“Constitutional Interpretation and International Law”).

²¹ 1995 (3) SA 391 at para 35.

²² *S v Williams* 1995 (3) SA 632 (CC) at 639 in which the Court considered the jurisprudence of the United Nations Human Rights Committee, the European Commission and the European Court of Human Rights on the corresponding provisions in these treaties; *Ferreira v Levin* NO 1996 (1) SA 984 (CC) at 1035-6 and 1085; *S v Rens* 1996 (1) SA 1218 (CC) at 1225 in which the Court relied on a decision of the European Court of Human Rights on fairness in appellate proceedings; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) at 660-3 in which the international human rights norms were used to uphold a constitutional challenge to imprisonment for judgment debts.

Conventions we have described.”²³

19. It is therefore clear that both binding and “non-binding” international legal standards fall to be considered by courts under the Constitution, and we submit that both will assist this Court in determining the principles of international law and in adjudicating the constitutionality of the Copyright Act.

20. Courts have, since the outset of socio-economic rights litigation, considered both binding and non-binding sources of international law in interpreting the government’s constitutional obligations. In *Grootboom*, even before South Africa had ratified the ICESCR,²⁴ the Court indicated that the General Comments of the United Nations Committee on Economic, Social and Cultural Rights (“**CESCR**”) on the right to housing are “*helpful in plumbing the meaning*” of the text of the constitutional right to adequate housing because “*there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.*”²⁵

21. The need for interpretations of constitutionally entrenched socio-economic rights that are consistent with international law was reinforced with South Africa’s ratification of the ICESCR on 12 January 2015.²⁶ The ICESCR complements both existing binding obligations relating to socio-economic rights contained in

²³ Glenister, para 187.

²⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

²⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46, para 45.

²⁶ Though South Africa had signed ICESCR as early as 3 October 1994. See: <https://treaties.dirco.gov.za/dbtw-wpd/exec/dbtwpub.dll>; https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN.

various other treaties to which South Africa is a party, including but not limited to the CRPD, Convention on the Rights of the Child²⁷ and the African Charter on Human and Peoples' Rights (African Charter)²⁸ and the Protocol to the African Charter on Human and Peoples' Rights with Disability in Africa (African Disability Rights Protocol).²⁹ Indeed, this is what the South African government sought to achieve in ratifying the ICESCR. In a report to the CESCR Committee submitted in 2017, South Africa indicated as much, noting that: "*South Africa's accession of the ICESCR has and will continue to deepen the enforcement of socio-economic rights in the country*".³⁰

22. This Court has also considered South Africa's obligations in terms of the CRPD in the interpretation of the Constitution. For instance, in *De Vos N.O and Others v Minister of Justice And Constitutional Development*, the Constitutional Court found that the CRPD "reiterates and reinforces" South Africa's constitutional obligations with respect to the right to freedom and security of the person.³¹ Pertinently in the present context, in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*, the High Court considered provisions of the CRPD relating to the right to education in

²⁷ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

²⁸ Adopted on 28 June 1981. Came into force on 21 October 1986. Ratified by South Africa on 09 July 1996. See: <https://www.achpr.org/ratificationtable?id=49>

²⁹ Adopted on 30 January 2018 and signed by South Africa: 29 April 2019. This treaty is not yet in force. Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018), available at: https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf.

³⁰ Committee on Economic, Social and Cultural, "Consideration of Reports Submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights", UN Doc. E/C.12/ZAF/1 (2017), para 5.

³¹ *De Vos N.O and Others v Minister of Justice And Constitutional Development and Others* 2015 (9) BCLR 1026 (CC), paras 29-31.

determining the State's obligations towards children with disabilities.³²

23. In addition, and reinforcing the strong position of international law emphasized by the Constitution and the subsequent jurisprudence of this Court, as a matter of international law the VCLT provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith” and that a State “may not invoke the provisions of its internal law as a justification for a failure to perform a treaty” obligation.³³ This Court itself has recently affirmed the binding nature of the “main provisions” of the VCLT as customary international law.³⁴

C. READING INTERNATIONAL LAW AS A SINGLE COHERENT SYSTEM

24. Critically, however, establishing the application of a wide range of sources of international law applicable in the exercise of legislative and constitutional interpretation is not the end of the matter. This is because there are a large number of applicable sources of international law, including, as examples, international customary law and law emanating from international agreements, both of which are explicitly acknowledged by the Constitution.³⁵

25. Moreover, international agreements themselves emanate from a range of

³² *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC), paras 23-25.

³³ Vienna Convention on the Law of Treaties, May 23, 1969 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), Articles 26-27.

³⁴ *Law Society*, paras 34-9. Para 39: “But, it is now settled that its main provisions like articles 18 and 26 are part of the customary international law envisaged in section 232 of the Constitution.” It seems indisputable that Article 27 is also such a “main provision” of VCLT as it resolves a fundamental conflict otherwise existing between the application of domestic and international human rights law.

³⁵ Constitution, ss 231-232.

different treaty making bodies, all ultimately deriving their authority from the agreement of States. Therefore, as examples, the World Trade Organization, the World Intellectual Property Organization, the World Health Organization and a range of United Nations institutions are all tasked with negotiating, monitoring and enforcing treaties.³⁶

26. As the primary international law instrument guiding treaty interpretation, the resolution of such apparent conflicts begins with the VCLT, and most particularly Article 31(3) (c), which requires “*any relevant rules of international law applicable in the relations between the parties*” to be taken into account when an interpretation process relating to a particular treaty is underway.³⁷ Though South African courts have not directly addressed the question, it is widely accepted that Article 31 of the VCLT forms part of international customary law,³⁸ and we submit that should the matter arise, this Court should acknowledge that Article 31(3)(c) forms part of international customary law binding on South Africa, in terms of section 232 of the Constitution.³⁹

27. It is not uncommon for treaty provisions adopted in divergent contexts or regimes to be in apparent conflict, as international law covers a broad range of fields and subject matter, and treaties are negotiated and agreed upon in a wide range of

³⁶ P Sands “Treaty, Custom and the Cross-fertilization of International Law” Yale Human Rights & Development Law Journal [Vol. 1], 85, p 86; 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(1) Utrecht Law Review pp. 86–100.

³⁷ Vienna Convention on the Law of Treaties, May 23, 1969 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), Article 31(3)(c).

³⁸ Report of the Study Group of the International Law Commission “Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law” A/CN.4/L.682 13 (April 2006): https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, para 168.

³⁹ Section 232 reads in full: “Customary international law. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

institutional settings or groupings of States. Article 31(3)(c) requires a similar approach to resolution of apparent conflicts between international law treaties, as section 233 of the Constitution does when it comes to apparent or purported conflicts between international law and domestic law in South Africa.⁴⁰

28. Similar to section 233, Article 31(3)(c) requires that apparently conflicting treaty provisions be interpreted, to the extent possible, in such a manner so as to “harmonise” them in light of their shared systemic objectives. It thereby requires courts, we submit, to prefer any reasonable interpretation of a specific treaty provision from one international law regime that renders it consistent with another treaty provision in another international law regime over alternative interpretations that render the different regimes of international law inconsistent.
29. This preference for a harmonised interpretation of different international instruments from different international law regimes is sometimes referred to as “systemic integration”, and has been endorsed by a study Group of the International Law Commission in a comprehensive study:⁴¹

“All legal systems are composed of rules and principles with greater and lesser generality and speciality in regard to their subject-matter and sphere of applicability. Sometimes they will point in different direction and if they do, ***it is the task of legal reasoning to establish meaningful relationships between them so as to determine whether they could be applied in a mutually supportive way...***” (Emphasis Added).

⁴⁰ Constitution s 233: “. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

⁴¹ Id, para 37 (“In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict”; para 410-423.

30. For the present purposes, the significance of the application of this principle, in line with Article 31(3)(c), is that relevant provisions from international trade law (such as the Agreement on Trade-Related Aspects of Intellectual Property Rights)⁴² and international copyright law (such as the Berne Convention for the Protection of Literary and Artistic Works)⁴³ should be read, wherever possible, as part of a single overarching regime of international law.⁴⁴ Indeed there is “substantial overlap”,⁴⁵ for instance, between these treaties and international human rights law treaties such as the ICESCR and the CRPD.
31. We therefore submit that, this Court’s overall approach to applicable international law should, at a minimum, be to ensure that international human rights law is not construed in a manner so as to subordinate it to “international copyright law” and “international trade law.”
32. Indeed, in light of the primacy given to human rights in South Africa’s Constitution, and the similar interpretative regime it entrenches,⁴⁶ the effect of the application of Article 31(3)(c) should be that courts applying these legal provisions ensure that international copyright law and international trade law are constituted and understood consistently with applicable international human

⁴² The Agreement on Trade-Related Aspects of Intellectual Property Rights, https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm, of which South Africa is automatically a party as a Member State of the WTO.

⁴³ Berne Convention for the Protection of Literary and Artistic Works <https://www.wipo.int/treaties/en/ip/berne/>, of which South Africa is a party.

⁴⁴ P Sands, ‘Treaty, Custom and the Cross-Fertilisation of International Law’ (1998) 1 Yale Human Rights and Development Law Journal 85, 95.

⁴⁵ S Samtani ‘The Right Of Access To Educational Materials And Copyright: International And Domestic Law’ (Unpublished DPhil Thesis, University of Oxford, Hilary Term 2021), p 19; S Samtani “The Domestic Effect of South Africa’s Treaty Obligations: The Right to Education and the Copyright Amendment Bill” (2020) American University Washington College of Law PIJIP Research Paper No. 61: <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1063&context=research>.

⁴⁶ Constitution, s 233 requires courts to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

rights law, as detailed below. In this way the provisions of international human rights law will be given similar standing in international law to the provisions of the Bill of Rights in South African domestic law.

33. To the extent that it might be alleged that there is such inconsistency between international human rights law and other international legal obligations, the party making such a submission must illustrate why obligations in terms international law emanating from different sources are not reasonably capable of interpretation in a manner which renders them consistent and coherent.
34. It is submitted, however, that in this matter this Court need not resolve any conflicts between different international treaties or between international human rights law and domestic constitutional law at all. Instead, we submit that:
 - 34.1. International law, properly understood and interpreted through the process of “systemic integration” consonant with Article 31(3)(c) of the VCLT requires South Africa to adopt exceptions within its copyright laws to ensure equal access to reading materials for persons with disabilities.
 - 34.2. Domestic law, in accordance with a range of constitutional rights which will be discussed below, is best interpreted consistently with this position in international law, and therefore, similarly, requires South Africa to adopt exceptions within their copyright laws to ensure equal access to reading materials for persons with disabilities.

D. SOUTH AFRICA'S OBLIGATIONS IN TERMS OF INTERNATIONAL HUMAN RIGHTS LAW

35. Although there may be other rights implicated by the impugned provisions as raised by the Applicants and various amici, our submissions focus specifically on the relevance of South Africa's international law obligations in terms of the CRPD and the ICESCR to the Court's determination of the constitutionality of the impugned provisions of the Act.

a. Convention on the Rights of Persons with Disabilities

36. The CRPD, like the Constitution, deliberately prescribes something of a "paradigm shift" in the protection of the rights of persons with disabilities globally.⁴⁷ In other words it adopts a "transformative" approach to the protection of rights of persons with disabilities which rejects the idea that persons with disabilities must simply accept their lot in lives, but instead requires States to eradicate barriers preventing persons with disabilities from enjoying "their full and effective participation in society on an equal basis with others".⁴⁸

Article 24: Right to Inclusive Education

37. The CRPD's treatment of the right to education must be understood within

⁴⁷ P Mittler, 'The UN Convention on the Rights of Persons with Disabilities: Implementing a Paradigm Shift Journal of Policy and Practice in Intellectual Disabilities' Volume 12 Number 2 pp 79–89 June 2015. Also acknowledged by the UN Special Rapporteur in "International Principles and Guidelines on Access to Justice for Persons with Disabilities on the Rights of Persons with Disabilities" (2020): https://www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf.

⁴⁸ CRPD, Preamble, (e).

context. Under Article 24 of the CRPD, South Africa must take all necessary measures to “ensure an inclusive education system at all levels and lifelong learning directed to: “the full development of human potential and sense of dignity and self-worth”; “development by persons with disabilities of their personality, talents and creativity”; and “enabling persons with disabilities to participate effectively in a free society”.⁴⁹

38. To comply with these obligations South Africa must ensure the general accessibility of education systems, in addition to providing reasonable

⁴⁹ CRPD, Article 24(1)(a) - (c). Article 24 reads in full:

- “1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:
- (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
 - (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
 - (c) Enabling persons with disabilities to participate effectively in a free society.
2. In realizing this right, States Parties shall ensure that:
- (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
 - (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
 - (c) Reasonable accommodation of the individual’s requirements is provided;
 - (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
 - (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.
3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:
- (a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
 - (b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
 - (c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.
4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

accommodations required and additional individualized support measures, where necessary.⁵⁰

39. The CRPD additionally provides that States must take specific measures to ensure that persons with disabilities “learn life and social development skills to facilitate their full and equal participation in education and as members of the community”. This requires, *inter alia*, “facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication” and ensuring that education “is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development”.⁵¹
40. The CRPD Committee’s General Comment 4 clarifies the scope of State obligations with respect to the right to inclusive education. The Committee highlights the “widespread lack of textbooks and learning materials in accessible formats and languages” and stresses that States have an obligation to “invest in the timely development of resources” to resolve this deficit making “accessibility a central aspect of education-related procurement”.⁵²

⁵⁰ Id, Article 24(2)(c)-(e). For a full explanation of the duties of South Africa in terms of Article 24 of CRPD see: Timothy Fish Hodgson “The right to inclusive education in South Africa: Recreating disability apartheid through failed inclusion policies” (2018) 135 SALJ 461, pp 474-489.

⁵¹ Id, Article 24(3)(a)-(c).

⁵² UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 4 (2016), Article 24: Right to inclusive education*, 2 September 2016, CRPD/C/GC/4, <https://www.refworld.org/docid/57c977e34.html>, para 22.

41. South African courts have repeatedly emphasized the centrality of the right to education in realizing the transformative project set out in the Constitution.⁵³ The right to education, entrenched in section 29 of the Constitution, applies to “everyone”. As a result, this Court has specifically noted that the public education system must be available to all learners without discrimination.⁵⁴
42. In establishing the right of each learner to a textbook for each subject of study they are engaged in, the Supreme Court of Appeal in *Basic Education For All* held that “it cannot be emphasized enough that basic education should be seen as a primary driver of transformation in South Africa.”⁵⁵ This is a direct indication of the centrality of access to reading materials to the process of transformation of society, which, in turn, is at the heart of the South African Constitution.
43. Despite this, the South African education system today generally continues to reflect a dual system of apartheid in respect of children with disabilities, on the grounds of both race and disability.⁵⁶ This deeply divided education system was produced and perpetuated deliberately during the apartheid regime.⁵⁷ The result is that:

“The majority of black children with disabilities were therefore either ‘simply not in school’ or ‘mainstreamed by default’, and those who did

⁵³ See for example: *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* (CCT40/09) [2009] ZACC 32; 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) (14 October 2009), para 47: “In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular.”

⁵⁴ *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng & Another* 2016 (4) SA546 (CC) para 44 (“[P]ublic schools are not rarefied spaces only for the bright, well-mannered and financially well-heeled learners. They are public assets which must advance not only the parochial interest of its immediate learners but may, by law, also be required to help achieve universal and non-discriminatory access to education.”).

⁵⁵ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA), para 40.

⁵⁶ Timothy Fish Hodgson “The right to inclusive education in South Africa: Recreating disability apartheid through failed inclusion policies” (2018) 135 SALJ, 461.

⁵⁷ Charles Ngwena ‘Developing juridical method for overcoming status subordination in disability: The place of transformative epistemologies’ (2014) 30 SAJHR 275.

attend special schools faced schooling environments that were 'systematically under resourced'.⁵⁸

44. The absence of appropriately adapted reading materials in schools including textbooks is well documented, for example, in the context of education for learners with visual impairments.⁵⁹
45. Visually impaired children were compelled to fight for years and litigate against the Department of Education to simply access Braille textbooks,⁶⁰ even after the Supreme Court of Appeal had ruled that *all* learners had a right to access to textbooks.

Article 30(3): Right to Participation in Cultural Life

46. The Constitutional Court has stressed that all rights whether characterized as “civil and political rights” or “social and economic rights” are “inter-related and mutually supporting”.⁶¹ In similar fashion, the CRPD Committee also emphasizes the importance of the relationship between the right to inclusive education and the right to participation in cultural life. The Committee indicates that in terms of the CRPD, States are required to take measures “within the educational environment to ensure opportunities for persons with disabilities to access cultural life and to develop and utilize their creative, artistic and intellectual

⁵⁸ Timothy Fish Hodgson “The right to inclusive education in South Africa: Recreating disability apartheid through failed inclusion policies” (2018) 135 SALJ, p 463.

⁵⁹ Timothy Hodgson & Silomo Khumalo “Left in the dark: Failure to provide access to quality education to blind and partially sighted learners in South Africa” SECTION27 Report (2015), available at: <https://section27.org.za/wp-content/uploads/2016/07/S27-left-in-the-dark-2015-accessible.pdf>.

⁶⁰ SECTION27, Blind and partially sighted children across South Africa finally have a chance at accessing braille textbooks, 21 September 2018, available: <https://section27.org.za/2018/09/blind-and-partially-sighted-children-across-south-africa-finally-have-a-chance-at-accessing-braille-textbooks/>.

⁶¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46, para 23.

potential”.⁶²

47. This obligation concerning the right to inclusive education must necessarily be construed consistently with the right to “participation in cultural life, recreation, leisure and sport”, entrenched in Article 30 of the CRPD. The fulfilment of this right entails taking necessary measures to ensure persons with disabilities can “enjoy access to cultural materials in accessible formats”⁶³
48. South Africa must also ensure accessibility of a range of cultural facilities, including libraries,⁶⁴ and more broadly take effective measures to secure the

⁶² Id, para 56.

⁶³CRPD, Article 30(1)(a). Article 30 of the CRPD reads in full :
“Participation in cultural life, recreation, leisure and sport

1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:
 - (a) Enjoy access to cultural materials in accessible formats;
 - (b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;
 - (c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.
2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.
3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.
4. Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.
5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:
 - (a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;
 - (b) To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;
 - (c) To ensure that persons with disabilities have access to sporting, recreational and tourism venues;
 - (d) To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;
 - (e) To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.”

⁶⁴ Id, Article 30(1)(b).

“opportunity to develop and utilize their creative, artistic and intellectual potential” for persons with disabilities, “not only for their own benefit, but also for the enrichment of society”⁶⁵

49. Moreover, and of direct application for the present purpose, Article 30(3) of the CRPD provides that States take all appropriate steps to “ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials”.⁶⁶ The Copyright Act is, at present, just such a law “protecting intellectual property rights” which amounts, we submit, to an unreasonable and discriminatory barrier to access, by persons with disabilities, to reading materials.

Article 9: Right to Accessibility

50. Finally, and reinforcing South Africa’s obligations in terms of Articles 24 and 30 of the CRPD, Article 9 of the CRPD provides for a self-standing right of “accessibility” for persons with disabilities including access to “information and communications” and all “facilities and services open or provided to the public”.⁶⁷

⁶⁵ Id, Article 30(2).

⁶⁶ Id, Article 30(4).

⁶⁷ Article 9 reads in full:

“Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

- a. Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
- b. Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

51. States are required to ensure the “elimination of obstacles and barriers to accessibility.” This includes ensuring that “private entities that offer facilities and services which are open to or provided to the public take into account all aspects of accessibility for persons with disabilities”.⁶⁸ States are also generally required to promote “appropriate forms of assistance and support to persons with disabilities to ensure their access to information”.⁶⁹

52. The CRPD Committee has provided an authoritative interpretation of Article 9 in its General Comment 2 (Accessibility),⁷⁰ in which it confirms the application of these obligations to all “goods, products and services” which are generally “open or provided to the public”.⁷¹ Such access must be provided by States in a manner which ensures persons with disabilities “effective and equal access and respects their dignity”.⁷²

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- (a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
 - (b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
 - (c) To provide training for stakeholders on accessibility issues facing persons with disabilities;
 - (d) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
 - (e) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
 - (f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
 - (g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
 - (h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.”

⁶⁸ Id, Article 9 and Article 9(2)(b) in particular.

⁶⁹ Id, Article 9(2)(f).

⁷⁰ UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 2: Right to accessibility*, 22 May 2014, CRPD/C/GC/2, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CRPD/C/GC/2&Lang=en

⁷¹ Id, para 13.

⁷² Id.

53. In the particular context of schools, the CRPD Committee clarifies that their accessibility encompasses “not just the buildings,” but the “entire process of inclusive education,” including “all information and communication”.⁷³ In this context the Committee explicitly mentions the need for accessibility of books.⁷⁴
54. Importantly, however, access to reading materials is more broadly important for a full range of educational purposes of persons with disabilities, both inside and outside of educational environments such as schools, colleges and universities.

Conclusion: CRPD and access to reading materials

55. In summary, the right to inclusive education (Article 24), read with the rights to participation in cultural life (Article 30) and accessibility (Article 9), requires that a wide and full range of reading materials are made available to persons with disabilities to ensure a full and holistic education on an equal basis with all people. What this means is that although access to textbooks in accessible formats is important and *necessary*, provision of accessible format textbooks will not be *sufficient* for South Africa to comply with its CRPD obligations to provide reading materials to persons with disabilities for educational and other purposes.
56. It is therefore unsurprising that in its Concluding Observations to South Africa in 2018, the CRPD Committee expressed concern “about the delay in revising the Copyright Act (1978) and ratifying the Marrakesh Treaty”, and thus recommended explicitly that South Africa “expedite action to complete the

⁷³ Id, para 39.

⁷⁴ Id, para 44.

process of revising the Copyright Act (1978) and ratifying the Marrakesh Treaty”.⁷⁵

57. Uniformly, in *Glenister* this Court drew on international law principles in order to give content to the State’s obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.⁷⁶ Concluding that measures taken in compliance with these obligations must be “reasonable and effective”,⁷⁷ the Court indicated that steps in conflict with standards in international law may well be unreasonable:⁷⁸

“Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 231(2) provides that an international agreement that Parliament ratifies “binds the Republic” is of prime significance. **It makes it unreasonable for the state, in fulfilling its obligations under section 7(2), to create an anticorruption entity that lacks sufficient independence.**” (Emphasis Added).

58. We submit, in light of the above summary of its international legal obligations in terms of the CRPD, that South Africa carries a clear and positive obligation to take proactive legislative measures to eliminate barriers to accessing reading materials for persons with disabilities. Through section 7(2) of the Constitution, read with other constitutional rights, including the right to equality (section 9),

⁷⁵ Committee on the Rights of Persons With Disabilities “Concluding observations on the initial report of South Africa” (23 October 2018) CRPD/C/ZAF/CO/1, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fZAF%2fCO%2f1&Lang=en, paras 48-9.

⁷⁶ Constitution, s 7 reads:
“7. Rights.-

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

⁷⁷ *Glenister*, para 189.

⁷⁸ *Id*, para 194.

dignity (section 10), education (section 29) and cultural life (section 30), this international law obligation translates into a constitutional obligation to take reasonable and effective measures to eliminate barriers to accessing reading materials for persons with disabilities.

59. As it stands unamended, the Copyright Act is just such a barrier. Departing significantly from international best practice,⁷⁹ the Copyright Act fails to create exceptions to South Africa's copyright regime to allow for easy access to reading materials in accessible formats for persons with disabilities. As the applicant's papers show, this has the effect of significantly reducing a vast majority of reading materials readily available to a substantial number of persons with disabilities.⁸⁰

60. We therefore submit that, to the extent that the Copyright Act does not allow for reasonable and effective exceptions to copyright law to facilitate access to reading materials to persons with disabilities, it falls short of both the requirements of the CRPD and the Constitution.

b. International Covenant on Economic, Social and Cultural Rights

61. South Africa's specific obligations in terms of the CRPD are complementary to

⁷⁹ S Samtani "The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill" (2020) American University Washington College of Law PIJIP Research Paper No. 61: <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1063&context=research>, p 50 "almost all copyright laws in the world have educational exceptions and it is a well-established exemption from the reach of copyright's monopoly".

⁸⁰ Low supporting affidavit, paras 24 – 34, Vol 4, pp 318- 324; Yacoob supporting affidavit, paras 3 – 12, Vol 3, pp 307-309; Gama supporting affidavit.

by its obligations in terms of ICESCR, and the provisions of these two treaties are mutually reinforcing. Indeed, we submit, the ICESCR places similar obligations on South Africa to amend the Copyright Act to allow for exceptions to the application of copyright protections in order to ensure access to reading materials for persons with disabilities.

62. In terms of Article 2 of ICESCR, South Africa carries an obligation to take steps towards achieving the full realization of all Economic, Social and Cultural Rights (“ESCR”), including the right to education.⁸¹ In its General Comment 20, the CESCR indicates that adoption of legislation to “address discrimination is indispensable in complying with Article 2” of the ICESCR. In addition to enacting specific anti-discrimination legislation,(which South Africa has done through the enactment of the Equality Act),⁸² the CESCR also indicates that:

“Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.”⁸³

63. The ICESCR rights that are most directly engaged in the context of the present matter include the right to education (Article 13)⁸⁴ and the right to

⁸¹ Article 2(1)-(2) of ICESCR reads in full:
“Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁸² Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁸³ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, para 37 available at: <https://www.refworld.org/docid/4a60961f2.html> [accessed 27 May 2021].

⁸⁴ Article 13 of ICESCR reads in full:

- “1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall

participate in cultural life (Article 15).⁸⁵

Article 21: Right to Education

64. Article 13 of ICESCR protects the right to education, which must be directed towards “full development of the human personality and the sense of its dignity” and shall “enable all persons to participate effectively in a free society”.

strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

⁸⁵ Article 15 of ICESCR reads in full:

- “1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.”

65. The CESCR has set out the nature and scope of party the obligations of States Parties in its General Comment 13, in which it affirms that, States must ensure that education is available, accessible, acceptable and adaptable.⁸⁶ This is the same formulation that was subsequently adopted by the CRPD Committee in its General Comment 4, detailed above.⁸⁷
66. The “availability” of education explicitly requires access to teaching materials and libraries.⁸⁸ The “accessibility” of education requires access to be non-discriminatory.⁸⁹ Securing non-discriminatory access to education is a “core obligation” of immediate effect, in other words, it is not subject only to gradual progressive development.⁹⁰ The Committee is clear that violations of the right to education includes “the introduction **or failure to repeal legislation** which discriminates against individuals or groups, on any of the prohibited grounds”.⁹¹ This explicitly includes a prohibition of discrimination on the grounds of disability.
67. In a similar vein, this Court has emphasized that unlike the other social and economic rights that the Constitution protects, the right to education is “given in

⁸⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, available at: <https://www.refworld.org/docid/4538838c22.html>, para 6(a)-(d).

⁸⁷ Id, paras 20-25.

⁸⁸ Id, para 6(a). See also: S Samtani “The Domestic Effect of South Africa’s Treaty Obligations: The Right to Education and the Copyright Amendment Bill” (2020) American University Washington College of Law PIJIP Research Paper No. 61: <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1063&context=research>, p 11, Footnote 44 for Concluding Observations of the UN CESCR Committee confirming this.

⁸⁹ Id, para 6(b) read with para 36. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities*, 9 December 1994, E/1995/22, available at: <https://www.refworld.org/docid/4538838f0.html>, para 35.

⁹⁰ Id, para 57.

⁹¹ Id, para 59. Emphasis Added.

unqualified terms”⁹² and is therefore “immediately realizable”.⁹³ At a minimum, to give this immediately realisable obligation meaning, we submit that it must include immediate obligations detailed in international law, in conformity with of the CDESCR’s jurisprudence on the right to education under the ICESCR, which the affirms that there is an immediate obligation to ensure access to education without discrimination.⁹⁴

Article 15: Right to Cultural Life

68. South Africa’s immediate obligations in terms of the right to education must also be understood in light of its obligations under Article 15 of ICESCR, according to which it must take steps to realize the right of everyone to “take part in cultural life”.⁹⁵ In its General Comment 21 (Right to Take Part in Cultural Life),⁹⁶ the CDESCR affirmed that “the right of everyone to take part in cultural life is ... intrinsically linked to the right to education”.⁹⁷

69. According to the ICESCR, “cultural life” must be broadly understood as an “inclusive concept encompassing all manifestations of human existence”

⁹² *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC), para 38.

⁹³ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC), para 37.

⁹⁴ For more on the application of immediate obligations entrenched international law in the context of South African socio-economic rights litigation see: International Commission of Jurists “A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa” (August 2019) available at: <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf>, pp 45-85 (“Immediate Obligations: Minimum Core, Non-Retrogression and Non-Discrimination”).

⁹⁵ ICESCR, Article 15(1)(a).

⁹⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, available at: <https://www.refworld.org/docid/4ed35bae2.html>.

⁹⁷ *Id.*, para 2.

including, *inter alia*, “ways of life, language, oral and written literature”.⁹⁸ In order to facilitate the participation of persons with disabilities in cultural life, the CESCR clarifies that States must “recognize the right of these persons to have access to cultural materials ... in accessible forms” and to have access to cultural spaces including libraries.⁹⁹ Noting that cultural activities, goods and services have both “economic and cultural dimensions, conveying identity, values and meaning” the CESCR makes clear that they “must not be treated as having solely a commercial value” and that States should endeavour to consider the relationship between this right and the rights to information and expression and to “the need to protect the free flow of ideas by word and image”.¹⁰⁰

70. At a broad level, to give effect to the right to cultural life, States must ensure that it is available, accessible, acceptable, adaptable and appropriate.¹⁰¹ Availability includes the “presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries... [and] literature”.¹⁰² Accessibility requires that cultural goods that are available be physically and economically available to all people without discrimination, including on the basis of disability which the CESCR makes clear is “essential” for States to “provide and facilitate”.¹⁰³

71. The right to participate in cultural life carries with it a right to do so “effectively”.¹⁰⁴

⁹⁸ Id, paras 10-14.

⁹⁹ Id, para 31.

¹⁰⁰ Id, para 43.

¹⁰¹ Id, para 16(a)-(e).

¹⁰² Id, para 16(a).

¹⁰³ Id, para 16(b).

¹⁰⁴ Id.

To enable effective participation in cultural life for all persons requires positive action by States to ensure “preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods” are put in place.¹⁰⁵

72. Furthermore, the CESCR confirms that non-discriminatory participation in cultural life is a core obligation that States must fulfil with immediate effect, through legislative and other measures.¹⁰⁶ States also have an obligation of immediate effect to “eliminate any barriers or obstacles that inhibit or restrict a person’s access to the person’s own culture or to other cultures, without discrimination”.¹⁰⁷

73. In order to comply with the duty to protect participation in cultural life, States must secure “the right to seek, receive and impart information and ideas of all kinds and forms including art forms,” which “implies the right of all persons to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning”.¹⁰⁸ States must also, in accordance with this duty, take legislative and other measures to prevent any third party, including private actors, from “interfering in the exercise” with this right.¹⁰⁹

¹⁰⁵ Id, para 6.

¹⁰⁶ Id, paras 44, 55(a) and 67.

¹⁰⁷ Id para 55(d).

¹⁰⁸ Id. See also International Covenant on Civil and Political Rights, Article 19; UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34 , available at: <https://www.refworld.org/docid/4ed34b562.html>.

¹⁰⁹ Id, para 50.

74. Finally, the obligation to facilitate participation in cultural life requires States to take “*appropriate measures to remedy structural forms of discrimination*” so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life”, an obligation which applies to persons with disabilities.¹¹⁰

The CRC and education for children with disabilities

75. Persons affected by the “book famine” include children with print disabilities. In this regard, Article 23(3) of the Convention on the Rights of the Child (“CRC”) places an obligation on South Africa, amongst other things, to ensure that children with disabilities have effective access to education.¹¹¹

76. Moreover, Article 28 of the CRC places an explicit obligation on States to “promote and encourage international cooperation in matters relating to education”.¹¹² These provisions of the CRC are germane and elemental, and taken together with the CRPD and the ICESCR, give a full view of the

¹¹⁰ Id, para 52(g). Emphasis Added.

¹¹¹ Article 23(3) reads:

“Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.”

¹¹² Article 28(3) reads:

“States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.”

international obligations on South Africa.¹¹³

Conclusion: ICESCR and access to reading materials

77. In summation, it is submitted that, in order for South Africa to discharge its duties under articles 13 and 15 of the ICESCR, it is obliged to take legislative and other measures to remove barriers of discriminatory access to education and the ability to effectively participate in cultural life for persons with disabilities. Such immediate obligations require South Africa to ensure access to reading materials to all persons with disabilities for educational, recreational and other purposes, without discrimination.
78. Consequently, the Copyright Act as it stands, and when assessed for consistency with ICESCR, places an impermissible barrier to non-discriminatory access to educational and cultural facilities. South Africa has failed to take the legislative and other measures necessary to prevent third parties – in this instance the holders of copyright over reading materials – from “interfering in the exercise” of the rights of persons with disabilities.
79. As we have detailed above, in terms of the Constitution and this Court’s jurisprudence, South Africa must take reasonable and effective measures to respect, protect, promote and fulfil the rights in the Bill of Rights, the scope of which are determined with reference to South Africa’s binding international law obligations. We therefore submit that, to the extent that the Copyright Act does

¹¹³ See also UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities, 27 February 2007, CRC/C/GC/9, available at: <https://www.refworld.org/docid/461b93f72.html> [accessed 30 March 2022], paras 62-72.

not allow for reasonable and effective exceptions to copyright law to facilitate access to reading materials to persons with disabilities, it falls short of both the requirements of the ICESCR and the Constitution.

80. We therefore submit that to the extent that the Copyright Act does not allow for reasonable and effective exceptions to copyright law, it falls short of the requirements international human rights law standards, including as emanating from the CRPD, ICESCR and the CRC.

E. THE RELEVANCE OF THE MARRAKESH TREATY

81. The Marrakesh Treaty, as its full title suggests, is specifically geared towards facilitating access to reading materials for a category of persons with disabilities who, in the absence of such intervention, experience what is described as “book famine”.¹¹⁴ Though this is a global phenomenon it is particularly pronounced in its impact in developing and least developed States, including South Africa.¹¹⁵

82. The Marrakesh Treaty, which has a total of 79 Contracting Parties,¹¹⁶ recognizes the “continuing shortage of available works in accessible format copies” particularly for persons with visual and other print disabilities and sets out to improve such access.¹¹⁷ Though not yet a Contracting Party of the

¹¹⁴ WIPO, “The Marrakesh Treaty – Helping to end the global book famine” (2016): https://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_overview.pdf.

¹¹⁵ Id.

¹¹⁶ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled: <https://www.wipo.int/treaties/en/ip/marrakesh/>. See also: https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=843.

¹¹⁷ Id, Preamble.

Marrakesh Treaty, representatives of South Africa played a “constructive role” in its development.¹¹⁸

83. The key provisions of the Marrakesh Treaty and their conceptual relevance to this matter have been canvassed in some detail in the applicants’ papers. In short, the Marrakesh Treaty allows for the making of accessible copies of books without the permission of copyright holders.¹¹⁹ It also permits such accessible books to be shared across national borders. This is for the explicit and exclusive benefit of persons with visual and other print disabilities.¹²⁰ The suggested vehicle by which this is to be achieved is through measures taken by States parties to provide for “limitations or exceptions in its national copyright law”.¹²¹
84. Importantly, the Marrakesh Treaty itself takes into account that States are likely to have similar obligations to those delineated in its text from “other international treaties”,¹²² including as detailed above, including in international copyright law (such as the Berne Convention); international trade law (such as TRIPS); and critically but also treaties in international human rights law (such as the CRPD, the ICESCR and the CRC). The Marrakesh Treaty therefore itself acknowledges the same approach to interpretation of international law as is required by Article

¹¹⁸ M Low, “The Blind SA case: Watershed moment for disability rights in South Africa” (16 April 2021): <https://www.dailymaverick.co.za/article/2021-04-15-the-blind-sa-case-watershed-moment-for-disability-rights-in-south-africa/>.

¹¹⁹ “accessible format copy” is defined in Article 2 of the Treaty as:
“a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.”

¹²⁰ Id, Article 3.

¹²¹ Id, Article 4.

¹²² Id, Article 10.

31(3)(c) of the VCLT, as detailed above.

85. We recall, for example, that in giving content to the right to inclusive education the CRPD explicitly notes “the widespread lack of textbooks and learning materials in accessible formats” and indicates that States “must invest in the timely development of resources in ink or Braille, and digital formats, including through the use of innovative technology”.¹²³
86. In this specific context, the CRPD Committee itself emphasizes the “urgency” CRPD for State parties to ratify and implement the Marrakesh Treaty, in order to comply with their obligations in terms of the Convention.¹²⁴ It also makes direct mention of the importance of the Marrakesh Treaty in the context of the right to accessibility.¹²⁵
87. The important question arising for this Court’s consideration is, therefore, whether, and to what extent, the Marrakesh Treaty is relevant to the matter before it, despite South Africa’s failure so far to accede to it.
88. As a matter of both international and domestic law, the Marrakesh Treaty is *not binding* on South Africa. Nevertheless, we submit that the Marrakesh Treaty is *relevant to the Court’s consideration* of the constitutionality of the Copyright Act in at least the following ways:

¹²³ UN CRPD Committee, General Comment 4, para 22.

¹²⁴ *Id.*

¹²⁵ UN CRPD Committee, General Comment 2, para 45.

- 88.1. ***As a persuasive source of international law in interpreting and informing the content of the CRPD and ICESCR.*** This is particularly so given the CRPD Committee’s own reference to the treaty in giving content to CRPD rights. While the Marrakesh Treaty is not binding on South Africa, the CRPD is, and the CRPD Committee, as its authoritative interpreter, considers compliance with the Marrakesh Treaty critical to the realization of CRPD rights.
- 88.2. ***As a source of international human rights law that should be considered in interpreting the legislation and the rights in the Bill of Rights according to domestic law in South Africa.***¹²⁶ In accordance with the Constitutional Court’s jurisprudence detailed above, *both* binding *and* international law and non-binding legal standards *must* be considered in exercises of interpretation such as the one necessary to determine the constitutionality of the Copyright Act.
- 88.3. ***The Marrakesh Treaty is a particularly forceful non-binding source of standards in international law given South Africa’s clear commitment to, and agreement with, the content of the agreement which is reflected in the travaux preparatoires of the treaty.***¹²⁷ As

¹²⁶ *S v Makwanyane* 1995 (3) SA 391 at para 35; *S v Williams* 1995 (3) SA 632 (CC) at 639 in which the Court considered the jurisprudence of the United Nations Human Rights Committee, the European Commission and the European Court of Human Rights on the corresponding provisions in these treaties; *Ferreira v Levin NO* 1996 (1) SA 984 (CC) at 1035-6 and 1085; *S v Rens* 1996 (1) SA 1218 (CC) at 1225 in which the Court relied on a decision of the European Court of Human Rights on fairness in appellate proceedings; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) at 660-3 in which the international human rights norms were used to uphold a constitutional challenge to imprisonment for judgment debts. *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 187.

¹²⁷ Government of South Africa “Draft South African Closing Statement Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities” (27 June 2013), available at: https://libguides.wits.ac.za/ld.php?content_id=5267475, which inter alia, reads:

highlighted above, at the conclusion of the drafting of the treaty in its closing remarks, the South African delegation underlined “our support and commitment to this treaty”, South Africa’s intention to accede to the treaty; and its broader support for a “balanced approach between intellectual property rights holders and public interest”.¹²⁸

89. Indeed, South Africa is in considerable agreement with the Marrakesh Treaty to such an extent that the present proposed Amendment Act explicitly seeks, amongst other things, to ensure that South Africa complies with the provisions of the Marrakesh Treaty, which South Africa has neither signed nor acceded to or ratified.¹²⁹ In addition, the President’s reservations about the current draft of the Amendment Act, which gave rise to his referral of draft back to Parliament, explicitly refer to his apparent uncertainty that as it stands the Copyright Act complies with the requirements of the Marrakesh Treaty.¹³⁰
90. For the sake of clarity, while we do not share the President’s apparent concerns, the President’s consideration of compliance of the Bill with the Marrakesh Treaty is indicative of the importance placed on it by South Africa.

“The Marrakesh Treaty will forever be remembered as the first WIPO treaty that reaffirms exceptions and limitations in the copyright regime, but also as a means to end the book famine that has long plagued people with visual impairment and print disabilities. South Africa is embarking on the process of reviewing its copyright legislation and will accede to the Treaty when all internal processes are concluded. In conclusion, South Africa continues to attach great importance to a balanced approach between intellectual property right holders and public interest and it is within this context, that we reaffirm our support and commitment to this treaty.”
Reproduced in the record at Annexure FA 22.

¹²⁸ Id.

¹²⁹ Vol 1, pp 94-5.

¹³⁰ Vol 1, p 97.

91. With this context in mind, the Marrakesh Treaty is of clear relevance in interpreting both international and domestic law in the present matter. We submit that a proper reading of the Marrakesh Treaty further bolsters our analysis of South Africa's obligations in terms of the CRPD and ICESCR.

92. More specifically, as a matter of both domestic and international human rights law, we submit that this Court should consider the provisions of the Marrakesh Treaty in:

92.1. The interpretation of applicable international treaties to which South Africa is bound, including the CRPD (Articles 9, 24 and 30) and the ICESCR (Articles 13 and 15) and CRC (Articles 23 and 28);

92.2. The interpretation of applicable domestic constitutional provisions and the State's corresponding obligations (including sections 7(2), 9, 10, 29 and 30);

92.3. The interpretation of the Copyright Act and its constitutionality; and

92.4. The determination of an effective, just and equitable, remedy in compliance with international human rights law¹³¹ and the Constitution

¹³¹ See UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, 2005, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

Article 3 reads:

"3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(s 172).¹³²

F. PROFESSOR DEAN'S INTERVENTIONS

93. In the papers submitted to this Court by Professor Dean, various assertions about the bearing of international law on these proceedings are made.

94. First, in his affidavit Professor Dean claims that:

“As a general proposition, it is advisable and prudent that domestic laws seeking to give effect to obligations in terms of an international treaty should be worded as closely as possible to the corresponding wording of the treaty. Any divergence from the wording of the treaty raises the possibility that the altered wording does not give full effect to the terms of the treaty (particularly since treaty terms are, almost invariably, the product of careful and contested negotiations).”

95. The ICJ submits that there is no such “general proposition” in international law. Professor Dean cites no authority in support of such proposition, nor does he provide any further explanation of it in the written submissions presented on his behalf. Actually, contrary to this position, and as a general matter, while States

-
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
 - (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
 - (d) Provide effective remedies to victims, including reparation...”

See also: International Commission of Jurists “The Right to a Remedy and Reparation for Gross Human Rights Violations Practitioners Guide No. 2 (Revised Edition)” (2018) available <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-aRemedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

¹³² Constitution s 172 (1) reads in full:

“172. Powers of courts in constitutional matters.

- (1) When deciding a constitutional matter within its power, a court -
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including -
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

are required to comply with their obligations in terms of treaties, international law does not strictly prescribe how this is to be accomplished.

96. Whether a particular legal provision is enacted in order secure such compliance suffices depends on the particular treaty and specific provisions in question. Legislative drafters giving effect to international law obligations through the enactment of domestic law are required to apply their minds in good faith¹³³ as to the most appropriate and effective way to give effect to the international obligations in terms of the relevant treaties, as well as in achieving the objects and purposes of a particular treaty.¹³⁴
97. This is typically not a mechanical exercise of merely copying and pasting treaty provisions into domestic statutes. As it has been observed by the International Law Commission, treaty obligations “must not be evaded by a merely literal application of the clauses”.¹³⁵
98. International treaties, particularly those that are open for universal subscription like the Marrakesh Treaty, must be fit for application for States from every legal system and tradition from around the world, and it is therefore, we submit, simply not feasible to provide for language that will be universally transposable into all legal codes as is, even leaving aside the level of generality at which treaty language is pitched.

¹³³ Article 26 of the VCLT headed “pacta sunt servanda” reads: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

¹³⁴ Article 27(1) of the VCLT headed “general rule of interpretation” reads “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

¹³⁵ International Law Commission, Draft Articles on the Law of Treaties with commentaries, 1966, page 211.

99. Moreover, while it is true, as Professor Dean argues, that treaty terms are “almost invariably, the product of careful and contested negotiations”, it is precisely for this reason that treaty provisions frequently and deliberately leave a degree of ambiguity or discretion to allow different States some latitude in the performance of their obligations. Indeed, in *Zuma*, this Court has recent recognized this latitude recognizing as follows:

“...the main social function of international law is to supplement, not supplant, domestic law. **Thus, latitude is granted to States, the conduits through which international law is given effect**, in recognition of the fact that national institutions are better situated and equipped to implement this law domestically. And, far from reifying international law as some ultimate paragon, when measuring a State’s compliance with international obligations, **international fora exercise restraint and defer to the measures adopted by the member State.**”¹³⁶ (Emphasis Added).

100. This is particularly so where legislators, as is arguably the case in the present circumstances, seek to vary provisions of treaties when giving effect to their international law obligations in domestic law, in order to provide greater legal protection than is required in international law.

101. In short, Professor Dean’s argument favours an interpretative formalism over a purposive and contextual approach to interpretation of States’ treaty obligations. This approach runs contrary to dominant approaches to treaty interpretation in international law, and conflicts directly with approaches to legal interpretation consistently applied by this Court.¹³⁷

¹³⁶ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC), paras 118-120.

¹³⁷ See *S v Mhlungu* 1995 (3) SA 867 (CC) ; 1995 (3) SA 867 (CC), para 8; *S v Zuma & Others* 1995 (2) SA 642; 1995 (2) SA 642, paras 13-18; *Investigating Directorate: Serious Economic Offences and Others v Hyundai*

102. Furthermore, and importantly, Professor Dean’s arguments ignore the significant discretion afforded to States in the execution of their treaty obligations. Oddly, the treaties Professor Dean relies on in support of his argument, adopt a discretionary approach :

102.1. Article 1(1) of the TRIPS agreement explicitly indicates that “Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”.¹³⁸ The agreement also explicitly permits to provide “more extensive protection than is required by this Agreement”.¹³⁹

102.2. Article 36(1) of the Berne Convention requires States to “adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention”. The provision is broadly framed and clearly contemplates a large range of possible measures, which will, being made explicitly subject to compliance with domestic constitutions, vary from jurisdiction to jurisdiction.

102.3. Article 10 of the Marrakesh Treaty requires States to “adopt the measures necessary to ensure the application of this treaty” and explicitly indicates that “nothing shall prevent [States] from determining

Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC), paras 21-6.

¹³⁸ TRIPS Agreement, Article 1(1).

¹³⁹ *Id.*

the appropriate method of implementing the provisions of this Treaty within their own legal system and practice”.

103. It is therefore clear that overall, none of the instruments relied on by Professor Dean narrow appreciably the margin of discretion generally enjoyed by States in determining how best to comply with their international law obligations in good faith. All three of the instruments relied on by Professor Dean explicitly permit exceptions to copyright protections,¹⁴⁰ with the Marrakesh Treaty having such exceptions to copyright laws in favour of persons with disabilities at its very core.¹⁴¹

104. On the face of it, and even in the absence of the requirements of international human rights law, States have a degree of discretion in terms of the very treaties relied upon by Professor Dean, to enact exceptions to international copyright law protections in their national legal systems.

105. As we have consistently argued above, international human rights law cannot be ignored, and therefore TRIPS, the Berne Convention and the Marrakesh Treaty must all be interpreted, as far as possible, consistently with provisions of other international human rights treaties such as the ICESCR and the CRPD. While correctly identifying some of South Africa’s international law obligations in terms

¹⁴⁰ TRIPS, Article 13 (“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.”); Berne Convention, Article 9(2) (“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.”)

¹⁴¹ Marrakesh Treaty, Article 4.

of international copyright law and international trade law (though apparently misconstruing the specificity of such requirements), Professor Dean's arguments fail completely to refer to or consider South Africa's relevant international human rights law obligations.

106. Any such interpretation of international law, which omits, disregards, or diminishes South Africa's international human rights law obligations disregards the prescriptions of VCLT Article 31(3)(c). This dereliction results in a misinterpretation of South Africa's international law obligations in terms of all the relevant applicable instruments, including the Berne Convention and TRIPS.

G. CONCLUSION

107. In keeping with the Constitution and the jurisprudence of this Court, and having regard to both binding international legal obligations and non-binding legal standards, including in particular under international human rights law, South Africa is obliged to take reasonable and effective measures to respect, protect, promote and fulfil the rights of persons with visual or other print disability. We submit that the enactment of a provision such as the one contemplated in section 19D of the Amendment Bill is just such a reasonable measure.

Muhammad Zakaria Suleman

Sithandiwe Mdletshe

Chambers, Durban

30 March 2022