

# DECIPHERING THE “RIGHT TO READ” UNDER INTERNATIONAL HUMAN RIGHTS LAW: A NORMATIVE FRAMEWORK FOR EQUAL ACCESS

LIDA AYOUBI\*

*“We do not need pity, nor do we need to be reminded we are vulnerable.  
We must be treated as equals—and communication is the way this can be  
brought about.”<sup>1</sup>  
—Louis Braille*

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\* Lida Ayoubi is a Lecturer in Law and the Deputy Director of the Centre for Indigenous Rights and Law at Auckland University of Technology (AUT) in New Zealand. Prior to joining AUT, she completed a PhD degree focusing on the interface of copyright law and the human rights of the visually impaired persons. She holds degrees from Victoria University of Wellington, Lund University and University of Tehran. She has been teaching intellectual property law and human rights law and publishing on the various aspects of their relationship. The author would like to thank Professor Anna Nawrot from the Raoul Wallenberg Institute of Human Rights for igniting my interest in the impact of intellectual property rights on the protection of human rights as well as Professors Susy Frankel and Graeme Austin from Victoria University of Wellington for their valuable comments on the earlier drafts of this article. Any flaws remaining are the author's responsibility.

<sup>1</sup> Alan R. Morse, *Valentin Haüy and Lous Braille: Enabling Educaiton for the Blind, in FOUNDATIONS OF OPHTHALMOLOGY: GREAT INSIGHTS THAT ESTABLISHED THE DISCIPLINE* 60 (Micahel F. Marmor & Daniel M. Ablert, eds., 2017).

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## INTRODUCTION

In 2013, the Member States of the World Intellectual Property Organization (WIPO) adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty).<sup>2</sup> The Marrakesh Treaty was later ratified by twenty states and entered into force three months later, in September 2016. The Treaty currently has ninety-three signatories, forty of which have ratified the Treaty.<sup>3</sup>

The production and distribution of accessible versions of published works can result in copyright infringement, if there are no copyright limitations or exceptions in place, and no application of the fair use clause. The Marrakesh Treaty was an international attempt to harmonize flexibilities within copyright law that benefit the blind, visually impaired, and those with other print disabilities. The Marrakesh Treaty requires its signatories to adopt flexibilities in their domestic copyright laws that allow the production and distribution of accessible formats of copyrighted works for the benefit of the print-disabled. It also calls for measures that facilitate the cross-border exchange of accessible materials for authorized entities and print-disabled members of its Contracting Parties.<sup>4</sup>

Works in which copyright can subsist are protected through several international instruments. These same instruments, however, explicitly or impliedly signal that a copyright owners' exclusive rights should be balanced against the rights of the public. Article 27 of the Universal Declaration of Human Rights (UDHR) serves as the basis for a human right to the protection of one's intellectual property. Article 27 states: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.”<sup>5</sup> However, this article arguably requires the same level of protection for everyone's right to culture and science which may depend on access to copyright works and other intellectual works.<sup>6</sup> The

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<sup>2</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, WIPO (entered into force Sept. 30, 2016) [hereinafter Marrakesh Treaty].

<sup>3</sup> World Intellectual Prop. Org. [WIPO], *Marrakesh Treaty Contracting Parties*, [https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=843](https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843) (last visited March 30, 2019).

<sup>4</sup> Marrakesh Treaty, *supra* note 2, art. 4–5.

<sup>5</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 27(2) (Dec. 10, 1948) [hereinafter UDHR].

<sup>6</sup> *Id.* art. 27(1).

same approach is mirrored in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>7</sup>

Furthermore, this balance is also recognized in international intellectual property instruments—namely the Berne Convention for the Protection of Literary and Artistic Works<sup>8</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>9</sup> Finally, both the adoption of the Marrakesh Treaty at an international intellectual property forum and the subsequent scholarship on its legality<sup>10</sup> confirm its compatibility with the international copyright law’s threshold for permissible restriction of copyright owner’s rights. Therefore, this paper does not ask whether limiting copyrights in the interest of the print-disabled is justifiable. Rather, this paper focuses on why, and to what extent, such limitation is essential to the realization of visually impaired persons’ human rights.

The drive behind the “right to read” campaign that led to the adoption of the Marrakesh Treaty was a call to end the “book famine.” The global book famine refers to the lack of satisfactory access to copyrighted works, particularly books, for those with print disabilities.<sup>11</sup> Visu-

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<sup>7</sup> United Nations International Covenant on Economic, Social and Cultural Rights art. 15, *opened for signature* Dec. 16, 1966, 3 U.N.T.S. 993 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>8</sup> Berne Convention for the Protection of Literary and Artistic Works art. 9(2), *opened for signature* Sep. 9, 1886, 31 U.N.T.S. 1161 (entered into force Dec. 5, 1887) [hereinafter Berne Convention].

<sup>9</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, *opened for signature* April 15, 1994, 1869 U.N.T.S. 299 (entered into force Jan. 1, 1996) [hereinafter TRIPS].

<sup>10</sup> See e.g., LAURENCE R. HELFER ET AL., THE WORLD BLIND UNION GUIDE TO THE MARRAKESH TREATY (2017); Lida Ayoubi, *The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired*, 13 N.Z. J. PUB. & INT’L L. 255 (2015); Margot E. Kaminski & Shlomit Yanisky-Ravid, *The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty was Preferable to Soft Law*, 75 U. PITT. L. REV. 255 (2014); Jingyi Li & Niloufer Selvadurai, *Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled*, 36(10) EUR. INTELL. PROP. REV. 653 (2014).

<sup>11</sup> See, e.g., World Intellectual Prop. Org. [WIPO], *The Marrakesh Treaty – Helping to End the Global Book Famine* (2016), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_marrakesh\\_overview.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_overview.pdf). In 2007, a study commissioned by WIPO on copyright limitations and exceptions for the visually impaired estimated an availability rate of no more than 5 percent globally. See World Intellectual Prop. Org. [WIPO], *Study on Copyright Limitations and Exceptions for the Visually Impaired*, SCCR/15/7, at 14 (Feb. 20, 2007) [hereinafter WIPO Study]. See also Press Release, World Blind Union, WIPO Negotiations Treaty for Blind People (June 17, 2013), [www.worldblindunion.org/English/news/Pages/JUNE-17-Press-Release-for-WIPO-Book-Treaty.aspx](http://www.worldblindunion.org/English/news/Pages/JUNE-17-Press-Release-for-WIPO-Book-Treaty.aspx) (claiming that only some 7 percent of published books in richest countries and less than 1 percent in poorer areas becomes accessible to the visually impaired); 2014 *World Blind Union Brochure and Factsheets*, WORLD BLIND UNION,

ally impaired individuals and institutions for the blind evoked the principles of non-discrimination and equal enjoyment of human rights to justify their claims for international copyright law reform. As such, the Preamble of the Marrakesh Treaty refers to "the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society". Furthermore, it emphasized "freedom of expression," "the right to education," and "opportunities . . . to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits."<sup>12</sup>

While much has been written about the Marrakesh Treaty, its legal standing, and its content,<sup>13</sup> a detailed analysis of the human rights principles that it encompasses is not available. Furthermore, even though the Marrakesh Treaty was adopted nearly five years ago, the pace of its ratification remains low. Therefore, this paper analyzes the normative and legal foundations for the validity of the claim that lack of satisfactory access to copyrighted material is discriminatory and a violation of the visually impaired persons' human rights. This analysis highlights the need for the implementation of the Marrakesh Treaty as a key step towards provision and facilitation of better access to copyrighted works for the print-disabled. To this end, the second part of this paper provides a brief overview of the Marrakesh Treaty and its requirements. Next, this paper explores the meaning of equality of access for the visually impaired and its relationship to copyright law. The remainder of the paper examines states' obligations regarding the human rights of the visually impaired as affected by copyright law. This examination assesses what it would require for states to comply with their human rights obligations towards the visually impaired.

This analysis should help incentivize and encourage countries to ratify and implement the Marrakesh Treaty. Furthermore, this paper's

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[www.worldblindunion.org/English/resources/Pages/Global-Blindness-Facts.aspx](http://www.worldblindunion.org/English/resources/Pages/Global-Blindness-Facts.aspx) (last visited Mar. 30, 2019).

<sup>12</sup> Marrakesh Treaty, *supra* note 2, pmb1.

<sup>13</sup> See, e.g., Neil Yap, *Fitting Marrakesh Into A Consequentialist Copyright Framework*, 6(2) J. INTELL. PROP. & ENT. L. 351 (2017); Danielle Conway, *The Miracle at Marrakesh: Doing Justice for the Blind and Visually Impaired while Changing the Culture of Norm Setting at WIPO*, in DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS AND INTERSECTIONS 35 (2015); Jingyi Li, *Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled – The Gap Between National Laws and the Standards Required by the Marrakesh Treaty*, 45 INST. FOR INNOVATION & COMPETITION 740 (2014); Marketa Trimble, *The Marrakesh Puzzle*, 45 INST. FOR INNOVATION & COMPETITION 768 (2014); Simonetta Vezzoso, *The Marrakesh Spirit – A Ghost in Three Steps?*, 45 INST. FOR INNOVATION & COMPETITION 796 (2014).

application of normative interpretations of human rights in relation to availability of accessible copyrighted works should inform states' laws and policies regarding the effective implementation of the Marrakesh Treaty. This is of particular significance considering the flexibility that the Marrakesh Treaty offers for the realization of its purpose through domestic law measures.

Following this introduction, Part 2 of the paper provides a brief overview of the Marrakesh Treaty. Part 3 then discusses how lack of access to books and other copyrighted material for the visually impaired violates the principle of non-discrimination. Part 4 of the paper elaborates on how a lack of access to copyrighted materials affects the rights to education, culture and science, access to information, health, and employment. In doing so, Part 4 outlines states' obligations to respect, protect, and fulfill these rights in the context of access to copyrighted works for the visually impaired through the implementation of the Marrakesh Treaty. To avoid repetition, different variations of the phrase "blind, visually impaired, and print-disabled" are used throughout this paper to refer to those who need accessible formats of copyright protected works.

## **I. THE WIPO MARRAKESH TREATY: A BRIEF OVERVIEW**

The WIPO Marrakesh Treaty is the first, and currently only, international intellectual property instrument to focus solely on limitations and exceptions to the exclusive rights of a rightholder.<sup>14</sup> The possibility of imposing limitations and exceptions has long existed in the copyright system. However, the Treaty's significance lies in obligating its Contracting Parties to adopt limitations and exceptions for the benefit of the visually impaired, and to make cross-border exchange of accessible works possible.

The issue of access to copyright-protected works for the visually impaired have long been on the agenda of international organizations. The 1985 WIPO Study on Copyright Problems Raised by the Access by Handicapped Persons to Protected Works recommended the adoption of

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<sup>14</sup> See HELFER ET AL., *supra* note 10, at xxiii ("As the first international agreement to require exceptions to copyright to enhance the human rights of a specific population, the Marrakesh Treaty lies at the intersection of international human rights law and international intellectual property law.").

“an entirely new international instrument” to address this issue.<sup>15</sup> Such an instrument would address the lack of copyright limitations and exceptions for the benefit of the visually impaired, as well as the difficulties and complexities of cross-border exchange of accessible works.<sup>16</sup>

In 2009, Brazil, Ecuador, and Paraguay together with the World Blind Union (WBU) demanded that the WIPO Members address the issue of access for the visually impaired through adoption of a legally binding instrument. They proposed a treaty for copyright limitations and exceptions for the benefit of visually impaired persons.<sup>17</sup> The proposed treaty and the negotiations that followed<sup>18</sup> resulted in the adoption of the Marrakesh Treaty on 27 June 2013.<sup>19</sup>

The Preamble of the Marrakesh Treaty highlights the importance of an “enabling legal framework at the international level.”<sup>20</sup> Article 4(1)(a) of the Treaty requires Contracting Parties to include a limitation or exception to copyrights in their national laws to facilitate access of the visually impaired and those with other print disabilities to copyrighted works.<sup>21</sup> As per article 4(2), the limitation or exception should make production of accessible works possible without the authorization of the copyright holder. Article 4(2) also provides an example of how such limitation or exception in a national law could look.<sup>22</sup>

While Article 4(2) provides an example of how to regulate a limitation or exception in this context, the Treaty ultimately allows the Con-

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<sup>15</sup> Exec. Comm. of the Int’l Union for the Prot. of Literary & Artistic Works, *Copyright Problems Raised by the Access by Handicapped Persons to Protected Works*, 25, IGC(1971)/VI/11 – B/EC/XXIV/10 ANNEXII (June 17–25, 1985).

<sup>16</sup> *Id.* at 25–26.

<sup>17</sup> World Intellectual Prop. Org. [WIPO], *Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU)*, SCCR/18/5 (May 25, 2009).

<sup>18</sup> For a general account of the negotiating history of the Treaty, see Justin Hughes, *How the Marrakesh Treaty Was Negotiated*, 232 *MANAGING INTELL. PROP.*, Sept. 2013, at 40. For an account of the final stages of negotiating the Treaty, see Brook K. Baker, *Challenges Facing a Proposed WIPO Treaty for Persons Who are Blind or Print Disabled* (Ne. Univ. Sch. of Law Research Paper No. 142-2013).

<sup>19</sup> Marrakesh Treaty, *supra* note 2.

<sup>20</sup> *Id.* pmbl.

<sup>21</sup> *Id.* art. 4 (“[C]ontracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.”). Part (b) of art. 4(1) goes on to explain the possibility of including a limitation or exception to the right of public performance.

<sup>22</sup> *Id.* art. 4(2)(a).

tracting Parties to provide other limitations or exceptions that would lead to the same results.<sup>23</sup> The Treaty defines “other limitations and exceptions” as “judicial, administrative or regulatory determinations for the benefit of [the visually impaired] as to fair practices, dealings or uses to meet their needs.”<sup>24</sup> By 2007, close to sixty countries had already provided for limitations and exceptions for the benefit of the visually impaired in their national laws.<sup>25</sup> However, the number of accessible works at the time was low in those countries; in fact, it was similar to the remainder of the world.

The existing lack of access to books, despite the availability of copyright limitations and exceptions in many countries’ national laws, is recognized in the Treaty’s preamble:<sup>26</sup>

Recognizing that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons.

Following this recognition, it is suggested that the need for “considerable resources” together with unavoidable “duplication of efforts” to produce accessible works are to blame for the persistence of the book famine.<sup>27</sup> To address this, Articles 5 and 6 of the Treaty focus on the exchange of accessible copies of copyrighted works internationally. Article 5 requires the Contracting Parties to allow for accessible works that are produced under copyright limitations and exceptions or other laws to be shared with another country.<sup>28</sup> Similar to production and use of accessible copies under Article 4, such copies can only be shared with authorized entities or visually impaired individuals in another country.<sup>29</sup> While Article 5(2) instructs the countries on how to regulate exchange of accessible copies, Article 5(3) recognizes the Parties’ right to provide for other limitations or exceptions for the same purpose.<sup>30</sup> Finally, Article 9 of the

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<sup>23</sup> *Id.* art. 4(3). *See also id.* art. 11 (stating that any measures for application of the Marrakesh Treaty, including limitations and exceptions other than those in article 4, should be compatible with the three-step tests in the Berne Convention, the TRIPS Agreement, and the WCT).

<sup>24</sup> *Id.* art. 10(3).

<sup>25</sup> WIPO Study, *supra* note 11.

<sup>26</sup> Marrakesh Treaty, *supra* note 2, pmb1.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* art. 5(1).

<sup>29</sup> *Id.* art. 5(2)(a)–(b).

<sup>30</sup> *Id.* art. 5(3).



Treaty asks the Contracting Parties to take necessary measures to facilitate the cross-border exchange of accessible works. Such measures could include encouraging the voluntary sharing of information between authorized entities to identify each other, as well as communicating that information to the general public. To this end, WIPO would “establish an information access point” and share information “about the functioning” of the Treaty.<sup>31</sup>

Upon ratification of the Treaty, the visually impaired and the authorized entities should face fewer difficulties in reproducing and distributing accessible works. Lifting of bureaucratic burdens and time delays caused by seeking the copyright holder’s permission could help accelerate reproduction of works. Reduced production costs (if no remuneration requirements are adopted) could also contribute to an increase in the number of accessible works produced. Under the scheme of international exchange of works, initial reproduction costs would be significantly reduced (by avoiding duplication) and distribution of works would be made easier (both financially and legally).

By requiring its Contracting Parties to allow for sharing of accessible works between individuals and authorized entities, the Treaty facilitates the flow of limited and valuable resources around the world. The Contracting Parties with lingual similarities can avoid duplicate production of popular titles.<sup>32</sup> Moreover, developed countries can share their already available collections of accessible works with developing and least developed countries. Consequently, the visually impaired would enjoy improved access, both quantity and time wise, to already available accessible works.

The following Parts analyze the human rights principles referred to in the Preamble of the Marrakesh Treaty. These principles and rights directly relate to the impact of copyright law on the identified inequality of access to copyrighted works for the blind and visually impaired persons. The analysis that follows further justifies the necessity of ratification of the Marrakesh Treaty.

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<sup>31</sup> *Id.* art. 9.

<sup>32</sup> *See, e.g.*, Fredric Schroeder, Speech to the NFB Convention: Literacy for the Blind Without Borders Ending the Book Famine (July 6, 2013) (referring to the sixty English speaking countries in the world and the duplicate production of accessible versions of Harry Potter titles and other popular books).

## II. NON-DISCRIMINATION AND ACCESS FOR THE VISUALLY IMPAIRED

### A. NORMATIVE FRAMEWORK OF NON-DISCRIMINATION

The principle of non-discrimination in international human rights law requires that all human beings should be afforded the same rights and entitlements. This principle is present in the post-World War II documents that form the main body of international human rights law. Article 1 of the Universal Declaration of Human Rights (UDHR),<sup>33</sup> Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR),<sup>34</sup> and Articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) all require that their provisions should apply to all humans without distinction or discrimination of “any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>35</sup> The principle of non-discrimination is also recognized in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>36</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>37</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>38</sup> the Convention on the Rights of the Child (CRC),<sup>39</sup> and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).<sup>40</sup>

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<sup>33</sup> UDHR, *supra* note 5, art. 1.

<sup>34</sup> United Nations International Covenant on Civil and Political Rights, art. 2, para. 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>35</sup> ICESCR, *supra* note 7, art. 2, para. 2.

<sup>36</sup> United Nations International Convention on the Elimination of All Forms of Racial Discrimination art. 1, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

<sup>37</sup> United Nations Convention on the Elimination of All Forms of Discrimination against Women art. 2–5, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

<sup>38</sup> United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].

<sup>39</sup> United Nations Convention on the Rights of the Child art. 2, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

<sup>40</sup> United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families art. 1, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 1990) [hereinafter CMW].

Of particular significance to this paper is the UN Convention on the Rights of Persons with Disabilities (CRPD) that was adopted in 2007 to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities."<sup>41</sup> The Convention ensured equality and non-discrimination for the disabled by affirming recognized rights, including the right to reasonable accommodation.<sup>42</sup>

The CRPD builds on already existing human rights; as such its significance lies in its clarification of those rights as they relate to persons with disabilities. By clarifying those rights, the CRPD makes it easier for individuals and advocacy institutions to hold the Contracting Parties responsible for realization of those rights. Finally, through its negotiation process as well as its content, the CRPD gave persons with disabilities a voice to participate in decision making regarding their rights.<sup>43</sup>

The CRPD defines "discrimination on the basis of disability" as:<sup>44</sup>

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The definitions of racial and gender-based discrimination in the CERD<sup>45</sup> and the CEDAW<sup>46</sup> are almost identical to that of the CRPD. The Committee on Economic, Social and Cultural Rights (hereinafter the CESCR Committee) uses similar wording to define "disability based discrimination" with regard to the rights in the ICESCR.<sup>47</sup> Provisions

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<sup>41</sup> United Nations Convention on the Rights of Persons with Disabilities pmbl., *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force Mar. 3, 1990) [hereinafter CRPD].

<sup>42</sup> Delia Ferri, *The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective*, in EUROPEAN YEARBOOK OF DISABILITY LAW 47, 52 (Gerard Quinn & Lisa Waddington eds., 2d vol., 2010).

<sup>43</sup> Paul Harpur, *Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities*, 27 DISABILITY & SOC'Y 1, 2 (2011).

<sup>44</sup> CRPD, *supra* note 41, art. 2.

<sup>45</sup> CERD, *supra* note 36, art. 1.

<sup>46</sup> CEDAW, *supra* note 37, art 1.

<sup>47</sup> CESCR General Comment No. 5: Persons with Disabilities, U.N. Doc. E/1995/22, ¶ 15 (Dec. 9, 1994) ("For the purposes of the Covenant, 'disability-based discrimination' may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.").

against discrimination are also present in regional human rights instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>48</sup> and its Protocol 12,<sup>49</sup> the European Social Charter<sup>50</sup> and its Additional Protocol,<sup>51</sup> the American Convention on Human Rights<sup>52</sup> and its Additional Protocol in the Area of Economic, Social and Cultural Rights,<sup>53</sup> and the African Charter on Human and People's Rights.<sup>54</sup>

The common elements of the non-discrimination principle in all human rights documents can be boiled down to: (1) the non-discrimination principle prohibits a differential treatment based on prohibited grounds; (2) such differential treatment would hinder enjoyment of a number of rights; and (3) the rights in question need to be recognized human rights.<sup>55</sup> In other words, the non-discrimination principle prohibits differential treatment on the ground of disability that would hinder the enjoyment of recognized human rights.

There is arguably a case of unjustified differential treatment when a visually impaired individual cannot access a copyrighted work merely because of his or her disability. Disparities in access manifest themselves in several ways: lack of any accessible copies, the difficulty of obtaining accessible copies (geographic unavailability, high pricing, etc.), limited choice compared to the variety of options sighted people can access, etc. This differential treatment is discriminatory because it hinders the enjoyment of many human rights of that visually impaired person. These rights are discussed in detail in Part 4.

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<sup>48</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, *opened for signature* Mar. 20, 1952, E.T.S. 5 (entered into force May 18, 1954).

<sup>49</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, *opened for signature* Nov. 4, 2000, E.T.S. 177 (entered into force Apr. 1, 2005).

<sup>50</sup> European Social Charter pmb., *opened for signature* Oct. 18, 1961, E.T.S. 35 (entered into force Feb. 26, 1965).

<sup>51</sup> Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, *opened for signature* Nov. 9, 1996, E.T.S. 177 (entered into force July 1, 1998).

<sup>52</sup> American Convention on Human Rights "Pact of San José, Costa Rica" art. 1, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

<sup>53</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" art. 3, *opened for signature* Nov. 17, 1988, 28 I.L.M. 156 (entered into force Nov. 16, 1999).

<sup>54</sup> African Charter on Human and Peoples' Rights art. 2, *opened for signing* June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

<sup>55</sup> Bruce Abramson, *Article 2 the Right of Non-Discrimination*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 18–25 (André Alen et al. eds., 2008).

## B. RIGHT TO READ AND NON-DISCRIMINATION

While the wording of international human rights instruments promotes equality for all, difficulties with the notion of equality and its enforcement arise in practice. Commentators have defined the concepts of equality and non-discrimination in different ways.<sup>56</sup> Discussing all these definitions and views is beyond the scope of this paper. Therefore, the following sections only refer to approaches that help better understand the interplay of copyright protection, access for the visually impaired, and non-discrimination. The distinction and the interrelatedness of formal and substantive as well as de jure and de facto equality is analyzed to underline the scope of states’ obligations for ensuring equality for the visually impaired. Similarly, direct and indirect discrimination are also discussed as another measure for establishing what is required of states *vis-à-vis* their visually impaired populations.

## 1. Formal and Substantive Equality

The concept of equality provides a platform for defining what discrimination means.<sup>57</sup> A formal approach to equality (formal justice) prescribes that equal treatment is achieved when individuals who are in similar situations are treated the same.<sup>58</sup> According to the CESCR, “eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds.”<sup>59</sup> A formal approach to equality is compatible with equal recognition of human rights for everyone in international human rights treaties—including visually impaired persons. Therefore, formal equality

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<sup>56</sup> For a detailed analysis of different views on the definition of equality and non-discrimination, mainly in the UK, the European Union, and the common law countries, see AILEEN MCCOLGAN, *DISCRIMINATION, EQUALITY AND THE LAW* (2014).

<sup>57</sup> *Id.* at 14.

<sup>58</sup> Patrick S. Shin, *The Substantive Principle of Equal Treatment*, 15 *LEGAL THEORY* 149, 151 (2009). See also Sandra Fredman, *Equality: A New Generation?*, 30 *INDUS. L.J.* 145, 154–57 (2001); Gerard Quinn, *The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework*, in *HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS* 69, 72 (Theresa Degener & Yolán Koster-Dreese eds., 1995); Aart Hendriks, *The Significance of Equality and Non-Discrimination for the Protection of the Rights and Dignity of Disabled Persons*, in *HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS* 40, 46 (Theresa Degener & Yolán Koster-Dreese eds., 1995).

<sup>59</sup> CESCR General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, U.N. Doc. E/C.12/GC/20, ¶ 8(a) (July 2, 2009).

is arguably necessary for a complete conception of equal treatment.<sup>60</sup> However, a formal view to equality calls for the assumption that everyone has the same ability to enjoy human rights. Therefore, this approach alone fails to provide meaningful equality because it overlooks the structural inequalities that exist in treatment of persons with disabilities.<sup>61</sup>

Furthermore, a formal approach to equality may also stand in the way of adopting measures that could remedy past disadvantages.<sup>62</sup> The Constitution of South Africa tries to address this risk by recognizing formal equality while addressing the effects of past disadvantages. The Constitution recognizes that the State may take legislative or other measures that are “designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.”<sup>63</sup>

The CESCER Committee holds that for the States Parties to guarantee the exercise of the rights in the ICESCR, they must eliminate substantive inequalities<sup>64</sup> as addressing formal equality by itself is insufficient.<sup>65</sup> Achieving substantive equality calls for positive action by States.<sup>66</sup> It includes equality of opportunities, respect, and results<sup>67</sup> and goes hand in hand with the concept of accessibility accentuated by the CRPD.<sup>68</sup> Equality of opportunity is defined as involving a “process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities.”<sup>69</sup> Article 9 of the

<sup>60</sup> Shin, *supra* note 58, at 151 n.4.

<sup>61</sup> Quinn, *supra* note 58, at 72. For a critique of the formal approach to equality, see also MCCOLGAN, *supra* note 56, at 14–15.

<sup>62</sup> MCCOLGAN, *supra* note 55, at 21.

<sup>63</sup> S. AFR. CONST., 1996, § 9(2).

<sup>64</sup> CESCER General Comment No. 16: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2005/4, ¶ 8(a) (Aug. 11, 2005); CESCER General Comment No. 20, *supra* note 59, ¶ 8.

<sup>65</sup> See CESCER General Comment No. 20, *supra* note 59, ¶ 8(b).

<sup>66</sup> Sandra Fredman, *Providing Equality: Substantive Equality and the Positive Duty to Provide*, 21 S. AFR. J. HUM. RTS. 163, 167 (2005). This is in slight contrast with the categorization of models of equality by Quinn, Rioux and Riddle, and Barnard and Hepple. They place “equality of opportunities” as a middle ground between “formal equality” and “equality of outcome.” Quinn, *supra* note 56, at 74–75; Marcia H. Rioux & Christopher A. Riddle, *Values in Disability Policy and Law: Equality*, in CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW 37, 52 (Marcia H. Rioux, Lee Ann Bassar & Melinda Jones eds., 2001); Catherine Barnard & Bob Hepple, *Substantive Equality*, 59 CAMBRIDGE L.J. 562, 566 (2000).

<sup>67</sup> CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW 28 (Dagmar Schiek et al. eds., 2007).

<sup>68</sup> CRPD, *supra* note 41, art. 9, 19.

<sup>69</sup> G.A. Res. 48/96, Standard Rules on the Equalization of Opportunities for Persons with Disabilities 8 (Mar. 4, 1994). Although documents such as the Standard Rules are not legally binding,

CRPD provides valuable guidelines on how countries can pragmatically achieve equality.<sup>70</sup>

The Marrakesh Treaty has arguably brought about a paradigm shift in how equality for the disabled is viewed in order to help achieve substantive, rather than merely formal, equality. One aspect of this shift is going beyond a situational approach to disability, which views disability as limited to discrete environments.<sup>71</sup> A situational approach to disability and a formal view of equality would lead to restricted provision of accessible books for the visually impaired, through limited entities such as educational institutions or libraries. However, as disability and its implications are arguably constant and universal,<sup>72</sup> States' response to it needs to be constant and universal too. For instance, accessible textbooks, certain library titles, or commercial audio books may help the realization of a few human rights of the visually impaired. However, this limited form of providing access misses the bigger picture, which is to achieving equality of access and consequently equality regarding all human rights. A more substantive equality of access is reflected in the Marrakesh Treaty's broad definition of "accessible format copy"<sup>73</sup>, "beneficiary persons",<sup>74</sup> and "limitations and exceptions" to copyright.<sup>75</sup>

The Marrakesh Treaty addresses another requirement for achieving substantive equality for the visually impaired and others with disabilities more generally. The current legal system arguably sees the needs of the disadvantaged groups like the disabled as exceptional and not a manifestation of their human condition.<sup>76</sup> The Marrakesh Treaty, on the other hand, puts the human rights of the visually impaired front and center. As discussed in Part 2, it creates mandatory—rather than optional—exceptions to copyright for the benefit of the visually impaired.<sup>77</sup> It also highlights the importance of visually impaired persons' access to copy-

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they shape policy and law-making at national levels. *See also* Rioux, Bassier & Jones, *supra* note 64, at 419.

<sup>70</sup> *See* Ferri, *supra* note 42, at 54.

<sup>71</sup> Ani Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 Wash. L. Rev. 513, 541 (2008). Examples of a situational approach to disability in legislation include the American with Disabilities Act of 1990 (ADA), the U.S. Rehabilitation Act of 1973, and the U.S. Fair Housing Act of 1968.

<sup>72</sup> Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

<sup>73</sup> Marrakesh Treaty, *supra* note 2, art. 2.

<sup>74</sup> *Id.* art. 3.

<sup>75</sup> *Id.* art. 4.

<sup>76</sup> Satz, *supra* note 71, at 525–26.

<sup>77</sup> Marrakesh Treaty, *supra* note 2, art. 4, 5.

right works for achieving equal opportunities and their full and effective participation and inclusion in society.<sup>78</sup> As such, the Marrakesh Treaty is arguably a departure from an exceptionalist approach and is, rather, a move towards granting the visually impaired rights instead of privileges.

## 2. *De Jure and de Facto Equality*

Another way of defining non-discrimination and equality is by categorizing them as *de jure* (legal) and *de facto* (in practice). *De jure* equality may seem identical to the idea of formal equality that refers to equal treatment of similarly situated individuals and requires equality before the law.<sup>79</sup> Alternatively, *de facto* equality would be equivalent to substantive equality, which is connected to equality of results.<sup>80</sup>

Some commentators, however, argue that *de jure* equality encompasses formal and substantive equality as it relates to both equality before and in the law.<sup>81</sup> In this sense, *de jure* equality regarding access for the visually impaired is achieved when their human rights, as well as their right to access copyrighted works are legally recognized. Under this view, *de jure* equality ensures formal and substantive equality regarding the law, whereas *de facto* equality is achieved through equal access to copyrighted works for the visually impaired, in practice.

## 3. *Direct and Indirect Equality*

The CRPD prohibits direct and indirect discrimination.<sup>82</sup> For direct discrimination to occur there needs to be a less favorable treatment of an individual compared to others based on a prohibited ground. However, direct discrimination can still happen “where there is no comparable similar situation.”<sup>83</sup> On the other hand, “indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have

<sup>78</sup> *Id.* art. 2–3.

<sup>79</sup> Katarina Frostell, *Gender Difference and the Non-Discrimination Principle in the CCRP and the CEDAW*, in *NEW TRENDS IN DISCRIMINATION LAW - INTERNATIONAL PERSPECTIVES* 29 (Lauri Hannikainen & Eeva Nykänen eds., 1999).

<sup>80</sup> Frostell, *supra* note 79, at 30. *See also* CESCR General Comment No. 20, *supra* note 59, ¶ 8(b) (equating *de facto* equality to substantive equality).

<sup>81</sup> *See* WOUTER VANDENHOLE, *NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES* 35 (2005).

<sup>82</sup> *See* CRPD, *supra* note 41, art. 2.

<sup>83</sup> CESCR General Comment No. 20, *supra*, note 59, ¶ 10(a). *See generally* Schiek et al, *supra* note 67, at 185.



a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.”<sup>84</sup> By this definition, indirect discrimination arguably does not require intent but applies to situations when certain measures result in discriminatory treatment of persons with disabilities. Therefore, governments may not adopt certain copyright laws or policies with the intent of discriminating against the access of the visually impaired persons to books, or the intent to limit their human rights, as this would be directly discriminatory. Furthermore, even if the resulting discrimination is not intentional, copyright laws and policies that limit access for the visually impaired (less favorable treatment), because of their disability (a prohibited ground), are indirectly discriminatory.<sup>85</sup>

Moreover, the States Parties to the CRPD adopted the Convention to ensure the full realization of human rights of the persons with disabilities without any discrimination.<sup>86</sup> To that end, the Convention requires the States’ Parties to protect and promote the human rights of persons with disabilities in all of their policies and programs.<sup>87</sup> The Convention specifically highlights the need for ensuring that “laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”<sup>88</sup> As such, States’ Parties should consider access for the visually impaired when enacting and implementing copyright policies. This would prevent countries from enacting measures that may indirectly discriminate against visually impaired persons. Furthermore, by virtue of Article 4 of the CRPD, parties are also required to actively take measures to abolish discrimination against persons with disabilities.<sup>89</sup>

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<sup>84</sup> CESCR General Comment No. 20, *supra* note 59, ¶ 10(b).

<sup>85</sup> For an example of distinguishing between direct and indirect discrimination in national laws, see the United Kingdom Equality Act of 2010, c. 15, §§ 13(1), 15, 10(1). Section 13(1) of the Act defines direct discrimination as a less favorable treatment towards a person or group because of a protected characteristic. *Id.* As per Section 15, intent is implied in direct disability discrimination. *Id.* Finally, Section 19(1) define indirect discrimination as occurring when the less favorable treatment is in relation to, but not necessarily because of, a protected characteristic. *Id.* For a detailed discussion of indirect discrimination in the laws of the European countries, see generally Schiek et al, *supra* note 67, at 323.

<sup>86</sup> CRPD, *supra* note 41, art. 4(1).

<sup>87</sup> *Id.* art. 4(1)(c).

<sup>88</sup> *Id.* art. 30(3).

<sup>89</sup> *Id.* art. 4(1)(b).

### III. HUMAN RIGHTS OF THE VISUALLY IMPAIRED AND COPYRIGHT LAW

#### A. INTERRELATEDNESS, INTERDEPENDENCY, AND INDIVISIBILITY OF HUMAN RIGHTS

The Vienna Declaration and Programme of Action defines the connection between different human rights as follows:<sup>90</sup>

All human rights are universal, indivisible, interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Lack of access to books affects numerous human rights of visually impaired persons. Some of those rights are discussed below in detail. However, interrelatedness, interdependency, and indivisibility of human rights mean that discriminatory access to copyrighted works could affect all human rights of the visually impaired. Some of the rights that are not discussed in this paper but could be affected by lack of access to copyrighted works are the rights to religion,<sup>91</sup> to take part in the conduct of public affairs,<sup>92</sup> to vote,<sup>93</sup> and to enjoy an adequate standard of living.<sup>94</sup>

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<sup>90</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 3, U.N. Doc. A/CONF.157/23 (June 25, 1993).

<sup>91</sup> ICCPR, *supra* note 34, art. 18.

<sup>92</sup> *Id.* art. 25(a).

<sup>93</sup> *Id.* art. 25(b).

<sup>94</sup> ICESCR, *supra* note 7, art. 11. *See also* CESCR General Comment No. 5, *supra* note 47, ¶ 33 (“In addition to the need to ensure that persons with disabilities have access to adequate food, accessible housing and other basic material needs, it is also necessary to ensure that ‘support services, including assistive devices’ are available ‘for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights’”). Use of some assistive devices for reading accessible formats is affected by the copyright protection.

## B. RIGHT TO EDUCATION

1. *Significance of the Right to Education*

Education is both a right and a means of promoting peace and respect for human rights generally.<sup>95</sup> As such, the right to education is a precondition for the effective enjoyment of other human rights.<sup>96</sup> This is in line with indivisibility and interdependence of all human rights discussed above.<sup>97</sup> For example, right to culture is "intrinsically linked to the right to education," because effective education paves the way for access to culture.<sup>98</sup> Access to education is also important for the realization of right to scientific freedom, since education enables an individual to undertake scientific endeavors.<sup>99</sup> Therefore, access to books for the visually impaired in the context of education is beneficial for the realization of their other human rights, too.

The right to education as part of the economic, social, and cultural category of human rights is indispensable for a human being's dignity and the free development of his or her personality.<sup>100</sup> As highlighted in the preamble of the World Declaration on Education for All, "education is an indispensable key to, though not a sufficient condition for, personal and social improvement."<sup>101</sup> The United Nations Children's Fund (UNICEF) considers inclusion of children with disabilities in all aspects of society a matter of social justice and an essential investment in the future of that society.<sup>102</sup> More accessible material for children with disabilities could increase their chances of studying in normal schools and being better included in society.

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<sup>95</sup> See UNESCO, THE RIGHT TO EDUCATION: TOWARDS EDUCATION FOR ALL THROUGHOUT LIFE 16 (2000).

<sup>96</sup> Asbjørn Eide, *Interdependence and Indivisibility of Human Rights*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE 11, 31 (Yvonne Donders & Vladimir Volodin eds., 2007).

<sup>97</sup> See CESCR, General Comment No. 11: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C. 12/1999/4 (May 10, 1999).

<sup>98</sup> CESCR, General Comment No. 21: Right of Everyone to Take Part in Cultural Life, U.N. Doc. E/C.12/GC/21, ¶ 2 (Dec. 21, 2009).

<sup>99</sup> Eide, *supra* note 96, at 32.

<sup>100</sup> UDHR, *supra* note 5, art. 22.

<sup>101</sup> World Conference on Education for All, *World Declaration on Education for All: Meeting Basic Learning Needs* (Mar. 5–9, 1990).

<sup>102</sup> Promoting the Rights of Children with Disabilities, 13 INNOCENTI DIGEST at v [hereinafter Promoting the Rights of Children with Disabilities].

Furthermore, access to education for visually impaired persons benefits the country to which they belong. If the “human person [is] the central subject of the development,”—as stated in the Declaration on the Right to Development of 1986,<sup>103</sup>—then education is crucial as a means for full development of the humans themselves. In other words, personal and professional development of persons with disabilities through education could accelerate development of the states.

## 2. Normative Framework of the Right to Education

According to Article 26 of the UDHR “everyone has the right to education.”<sup>104</sup> To make the principles of the UDHR legally binding for its Member States, the same principle was reinstated in Article 13 of the ICESCR.<sup>105</sup> The right to education was later recognized in the UN General Assembly’s Declaration of the Rights of the Child in 1959,<sup>106</sup> the UNESCO Convention against Discrimination in Education in 1960,<sup>107</sup> the UN General Assembly Declaration on the Rights of Disabled Persons in 1975,<sup>108</sup> the UNESCO Convention on Technical and Vocational Education in 1989,<sup>109</sup> the United Nations Convention on the Rights of the Child (CRC) in 1989,<sup>110</sup> and most recently, the Convention on the Rights of Persons with Disabilities (CRPD) in 2008.<sup>111</sup>

The UN General Assembly later provided an elaborate definition of the “right to education” in Article 28 of the CRC. This Article covers compulsory primary education, provision and accessibility of secondary and higher education, availability and accessibility of educational and vocational information and guidance, and encouragement of regular

<sup>103</sup> G.A. Res. 41/128, Declaration on the Right to Development, art. 2 (Dec. 4, 1986).

<sup>104</sup> UDHR, *supra* note 5, art. 26.

<sup>105</sup> ICESCR, *supra* note 7, art. 13.

<sup>106</sup> G.A. Res. 1386(XIV), Declaration of the Rights of the Child, princ. 7 (Nov. 20, 1959).

<sup>107</sup> See generally Convention Against Discrimination in Education, *opened for signature* Dec. 14, 1960, 429 U.N.T.S. 93 (entered into force May 22, 1962). Although disability is not mentioned as a prohibited ground for discrimination in education, the Convention is still of importance regarding general prohibition of discrimination in education. This Convention needs to be studied along with the Protocol Instituting a Conciliation and Good Offices Commission to be Responsible for Seeking the Settlement of any Disputes which may arise between States Parties to the Convention against Discrimination in Education.

<sup>108</sup> G.A. Res. 3447 (XXX), Declaration on the Rights of Disabled Persons, princ. 6 (Dec. 9, 1975).

<sup>109</sup> Convention on Technical and Vocational Education, *opened for signature* Nov. 10, 1989, 1649 U.N.T.S. 143 (entered into force Aug. 21, 1991).

<sup>110</sup> CRC, *supra* note 39, art. 23(3).

<sup>111</sup> CRPD, *supra* note 41, art. 24.

school attendance.<sup>112</sup> Further, Article 29 of the CRC provides a list of goals that countries should aim for when providing child education.<sup>113</sup> Similarly, Article 24 of the CRPD “reflects a clear commitment to the principle of inclusive education as a goal. In this respect, it further advances the direction established in earlier documents.”<sup>114</sup> The CRC and CRPD have mutually inclusive principles that clarify the importance of access to free and equal education—especially for children with disabilities. Other international instruments also focus on the right to education for marginalized or vulnerable groups.<sup>115</sup> Finally, the right to education is present in many regional human rights treaties.<sup>116</sup>

Following the rising concerns throughout the 1950-80s for the rights of the disabled persons, the 1990s saw the drafting of numerous instruments that addressed a universal right to education.<sup>117</sup> These included documents that focused specifically on ensuring the right to education for the persons with disabilities.<sup>118</sup> These documents “do not have the le-

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<sup>112</sup> CRC, *supra* note 39, art. 28.

<sup>113</sup> *Id.* art. 29.

<sup>114</sup> Promoting the Rights of Children with Disabilities, *supra* note 102, at 11.

<sup>115</sup> G.A. Res. 2198 (xxi), Convention Relating to the Status of Refugees, art. 22 (Apr. 22, 1954); CERD, *supra* note 36, art. 7; CEDAW, *supra* note 37, art. 10; CMW, *supra* note 40, art. 30; A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Dec. 18, 1992); G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, art. 14, 15, 17 (Sept. 13, 2007).

<sup>116</sup> See e.g., African Charter on Human and Peoples’ Rights, *supra* note 54, art. 17; Charter of the Organization of American States art. 30, 31, 47, *opened for signature* Apr. 30, 1948, 48 U.N.T.S. 1609 (entered into force Dec. 13, 1951); American Convention on Human Rights, *supra* note 52, art. 26; Inter-American Commission on Human Rights [IACHR], American Declaration of the Rights and Duties of Man (May 2, 1948); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, *opened for signature* Mar. 21, 1952, 213 U.N.T.S. 262 (entered into force May 18, 1954); Protocol of San Salvador, *supra* note 53, art. 13; Org. of African Unity [OAU], African Charter on the Rights and Welfare of the Child art. 11, *opened for signature* July 11, 1990, CAB/LEG/24.9/49 (entered into force Nov. 29, 1999); League of Arab States, Arab Charter on Human Rights art. 34, Sept. 15, 1994; European Social Charter, *supra* note 50, art. 7; Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2, art. 14.

<sup>117</sup> DISABILITIES AND HUMAN RIGHTS DOCUMENTS 139–42 (Claudia Tofan & Relinde van Laar eds., 2008).

<sup>118</sup> See e.g., Standard Rules on the Equalization of Opportunities for Persons with Disabilities, *supra* note 69, at 4; World Conference on Special Needs Education, Salamanca Statement and Framework for Action on Special Needs Education, U.N. Doc. ED-94/WS/18 (June 7–10, 1994); *World Declaration on Education For All*, *supra* note 101; GLOBAL PARTNERSHIP ON CHILDREN WITH DISABILITIES, <http://www.gpcwd.org/> (last visited Mar. 31, 2019). United Nations Children’s Fund (UNICEF) Global Partnership on Children with Disabilities (GPc wd) is guided by the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC). The GPc wd provides a platform for collective action and advocacy to

gally binding force of treaties, but in so far as their provisions substantially overlap with existing treaties and recommendations . . . they provide an additional impulse to implementation of previous, formally agreed commitments.”<sup>119</sup>

### 3. *Right to Read and the Right to Education*

The right to education is a complex and multifaceted right. Of significance is the distinction between access to education, and the quality of education and the goals that it aims to achieve. The nature of education provides another lens through which the impact of book famine on the right to education can be analyzed. Formal education is what is taught at an institution through a structured process while informal education is acquired through resources available outside of formal institutions.<sup>120</sup> The importance of accessible books for the realization of the visually impaired persons’ right to education can be evaluated by considering states’ obligations under international human rights treaties.

#### a. Equality of Access to Education Versus Quality of Education

A recent monitoring report of the Convention on the Rights of the Child acknowledged that “the challenges faced by children with disabilities in realizing their right to education remain profound” and that they are “one of the most marginalized and excluded groups in respect of education.”<sup>121</sup>

A UNESCO Background Note suggests that 98% of children with disabilities in developing countries do not attend school.<sup>122</sup> The degree to which lack of access to accessible learning material contributes to the low rate of access to education for children with disabilities in developing countries is unclear. However, textbooks have undeniably always

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promote the rights of children with disabilities in both the child and the disability rights agenda at the global, regional and country levels.

<sup>119</sup> THE RIGHT TO EDUCATION, *supra* note 95, at 23.

<sup>120</sup> Lieve Cattrijsse, *The Rights TO, IN and THROUGH Education: Three Interrelated Imperatives*, in UNDERSTANDING CHILDREN’S RIGHTS 621 (Eugeen Verhellen ed. 2000); Manfred Nowak, *The Right to Education - Its Meaning, Significance and Limitations*, 9 NETH. Q. HUM. RTS. 418, 423 (1991).

<sup>121</sup> U.N. Secretary-General, *Status of the Convention on the Rights of the Child*, ¶ 27, U.N. Doc. A/66/230 (Aug. 3, 2011).

<sup>122</sup> UNESCO Task Force on the Global Partnership for Education, *Background Note for the Global Partnership on Children with Disabilities*, [http://www.gpcwd.org/uploads/2/6/0/9/26097656/education\\_background\\_note\\_for\\_gpcwd.pdf](http://www.gpcwd.org/uploads/2/6/0/9/26097656/education_background_note_for_gpcwd.pdf) (last accessed Mar. 31, 2019).

played an essential role in delivery of education. Therefore, it might be reasonably expected that lack of access to them is a key contributor to low attendance rates.

Moreover, availability and quality of the accessible textbooks as well as other learning material plays an important role for the educational performance of children with disabilities, even for those children present at school. Analytical work sponsored by the World Bank in 1970 suggested that textbook availability was the single most consistent correlate of academic achievement in developing countries.<sup>123</sup>

The CESCER suggests four standards for assessing the extent to which the right to education has been achieved. Those standards are the concepts of availability, accessibility, acceptability, and adaptability.<sup>124</sup> Therefore, non-discrimination in education should also be in line with these four components. These four standards are also in line with the criteria that the Secretariat of the Education for All Forum considers necessary for equitable education. The most relevant element to access of the visually impaired to copyrighted works is the requirement that "opportunities, facilities and programmes appropriate to specific needs and requirements of all people are available and used."<sup>125</sup> The report goes on to argue that equitable education for all does not mean the same for all since "the same for all can mean greater inequity."<sup>126</sup> This is the same argument that proponents of structural equality, as opposed to formal equality, put forward when discussing how to overcome disability based discrimination.<sup>127</sup>

Access to education alone does not fulfil visually impaired people's right to education. According to Article 13(1) of the ICESCR, States Parties agree that education shall contribute to "full development of the human personality and the sense of its dignity" and that it shall "enable all persons to participate effectively in a free society."<sup>128</sup> This means that the quality of the education that the visually impaired receive

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<sup>123</sup> Stephen Heyneman, *The Role of Textbooks in a Modern System of Education: Towards High Quality Education for All*, in TEXTBOOKS AND QUALITY LEARNING FOR ALL: SOME LESSONS LEARNED FROM INTERNATIONAL EXPERIENCES 31, 38 (Cecilia Braslavsky ed., 2006).

<sup>124</sup> N.Z. HUMAN RIGHTS COMM'N, DISABLED CHILDREN'S RIGHT TO EDUCATION 9 (2009).

<sup>125</sup> UNESCO, GLOBAL SYNTHESIS: EDUCATION FOR ALL 2000 ASSESSMENT 55 (2000).

<sup>126</sup> *Id.*

<sup>127</sup> Shin, *supra* note 58; Satz, *supra* note 71.

<sup>128</sup> ICESCR, *supra* note 7, art. 13(1). See also CESCER General Comment 21, *supra* note 98, ¶ 27 ("Educational programmes should also transmit the necessary knowledge to enable everyone to participate fully and on an equal footing in their own and in national communities.").

is important in measuring a State Party's success in realizing the right to education.

The views that the Standard Rules on the Equalization of Opportunities for Persons with Disabilities express in relation to equality are in line with the substantive equality approach discussed earlier. According to the definition of equalization of opportunities by the Standard Rules, visually impaired persons would not have the same opportunities as sighted persons if not provided with the same level of access to copyright protected material as the primary source of gaining information and the secondary means to access other aspects of the society.<sup>129</sup>

When it comes to accessible educational material, technological advancements help the visually impaired through assistive technologies that facilitate overcoming obstacles to reading normal print. Access to assistive technologies, such as the text-to-speech feature, that "help a child read and process information in order to participate in the classroom" is particularly important for realizing children with disabilities' right to inclusive education.<sup>130</sup> Therefore, the interaction of technological protection measures (TPMs) facilitated by copyright and the assistive technologies affects access for visually impaired students.

#### b. Formal and Informal Education

States' responsibility with regard to right to education does not end with providing visually impaired students with accessible textbooks. First, sighted students have access to many print resources outside of the formal curriculum that are only available to the sighted. Therefore, to truly provide the visually impaired persons with an equal formal education, they should be offered the same chances to access books besides textbooks. Furthermore, informal education happens outside of school and other educational institutions and, for this, visually impaired persons need accessible books other than their textbooks.

Some authors believe that the international obligation of countries regarding the right to education is limited to formal education.<sup>131</sup> However, states' responsibility in relation to informal education is more

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<sup>129</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities, *supra* note 69, at 14.

<sup>130</sup> UNICEF, *The Right of Children with Disabilities to Education: A Rights-Based Approach to Inclusive Education*, at 74–75 (2012).

<sup>131</sup> See GERALDINE VAN Bueren, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 233 (1998).



in line with the objectives and purposes of the right to education provisions that are holistic and hard to achieve solely through formal education. Moreover, the Committee on the Rights of the Child (CRC) comments on State Parties' works regarding informal education in different documents.<sup>132</sup>

#### 4. Obligations of States

The ICESCR Committee has recognized three main responsibilities for its States' Parties in its general comments.<sup>133</sup> These responsibilities are the obligation to respect, protect, and fulfil. The implications of each of these responsibilities with regards to provision of access for the visually impaired to copyrighted works are discussed below.

##### a. Obligation to Respect

The obligation to respect requires States' Parties to avoid measures that hinder or prevent the enjoyment of the right to education.<sup>134</sup> According to the CESCR, a State's failure to take measures which address de facto educational discrimination is a violation of Article 13 of the ICESCR.<sup>135</sup>

Copyright law has the potential to interfere with the visually impaired persons' right to education, through limiting their access to textbooks and other educational material under copyright protection. Copyright laws that make it impossible or unreasonably difficult for visually

<sup>132</sup> For examples of where the Committee has commented on informal education, see Committee on the Rights of the Child, *Concluding Observations: Azerbaijan*, U.N. Doc. CRC/C/AZE/CO/2 (Mar. 17, 2006); Committee on the Rights of the Child, *Concluding Observations: Mozambique*, U.N. Doc. CRC/C/15/Add.172 (Apr. 3, 2002); Committee on the Rights of the Child, *Concluding Observations: El Salvador*, U.N. Doc. CRC/C/15/Add.232, ¶58 (June 30, 2004); Committee on the Rights of the Child, *Concluding Observations: Japan*, U.N. Doc. CRC/C/15/Add.231, ¶50 (Feb. 26, 2004); Committee on the Rights of the Child, *Concluding Observations: India*, U.N. Doc. CRC/C/15/Add.115, ¶ 25 (Feb. 23, 2000); Committee on the Rights of the Child, *Concluding Observations: Gabon*, U.N. Doc. CRC/C/15/Add.171, ¶ 49 (Apr. 3, 2002); Committee on the Rights of the Child, *Concluding Observations: Nigeria*, U.N. Doc. CRC/C/15/Add.61, ¶ 38 (Oct. 30, 1996); Committee on the Rights of the Child, *Concluding Observations: Burkina Faso*, U.N. Doc. CRC/C/15/Add.193, ¶ 46 (Oct. 9, 2002); Committee on the Rights of the Child, *Concluding Observations: Madagascar*, U.N. Doc. CRC/C/15/Add.218, ¶ 53 (Oct. 27, 2003).

<sup>133</sup> See e.g., CESCR General Comment No. 5, *supra* note 47; CESCR General Comment No. 11, *supra* note 97; CESCR General Comment No. 16, *supra* note 64; CESCR General Comment No. 20, *supra* note 59; CESCR General Comment No. 21, *supra* note 98.

<sup>134</sup> CESCR, General Comment No. 13: Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶47, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

<sup>135</sup> *Id.* ¶ 59.

impaired individuals or educational institutions to produce or acquire accessible educational material are not compatible with the right to education. Therefore, to respect the right to education, countries need to ensure that their copyright law is compatible with the realization of the right to education for the visually impaired. Countries do not necessarily need to adopt the Marrakesh Treaty to achieve this goal. However, membership to the Marrakesh Treaty offers the opportunity to benefit from cross-border exchange of accessible works among the Contracting Parties, which had previously proven challenging.

b. Obligation to Protect

Under the obligation to protect, States need to stop third parties from interfering with rights.<sup>136</sup> By giving the copyright holders the possibility to unreasonably limit production and distribution of accessible works, States are failing to protect the right to education for the visually impaired persons.

c. Obligation to Fulfil

The States' obligation to fulfil includes the elements of facilitation and provision of education.<sup>137</sup>

i. *Obligation to Facilitate*

The obligation to facilitate requires States to "take positive measures that enable and assist individuals and communities to enjoy the right to education."<sup>138</sup> Part of the responsibility to facilitate is taking positive measures to ensure that education is of good quality for all.<sup>139</sup> Therefore, providing accessible educational material—as a factor that affects the quality of education for the visually impaired—is necessary for fulfilment of States' obligations.

Moreover, Article 24 of the CRPD states that education of disabled students should be delivered in the most appropriate "modes and means of communication."<sup>140</sup> The appropriateness of the modes and

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<sup>136</sup> *Id.* ¶ 47.

<sup>137</sup> *Id.* ¶ 46.

<sup>138</sup> *Id.* ¶ 47.

<sup>139</sup> *Id.* ¶ 50.

<sup>140</sup> CRPD, *supra* note 41, art. 24.

means is evaluated by their contribution to academic and social development. As far as the educational content is conveyed through copyrighted works, the most appropriate modes and means of communicating those materials for visually impaired persons is through accessible copies of those works.

ii. *Obligation to Provide*

Another aspect of the States’ obligation to fulfil the right to education is provision of “teaching materials.”<sup>141</sup> Similar to the obligation to facilitate, this aspect of fulfilment of the right to education also underlines the importance of provision of accessible material for the visually impaired students.

In the context of CRC, if Articles 28 and 29 are read together, they show that access to education alone does not fulfil the right to education if the aims of education are not achieved.<sup>142</sup> The provision of accessible educational material for the visually impaired students is arguably one of the measures that are likely to encourage regular school attendance,<sup>143</sup> and contributes to “development of the child’s personality, talents and mental and physical abilities to their fullest potential.”<sup>144</sup>

Moreover, in some countries – such as the United States – textbooks are offered to students free of charge as part of the system of public education.<sup>145</sup> In such countries, the visually impaired students should also receive free copies of teaching material in a format accessible to them. Where students are asked to pay for their textbooks, the price of the accessible textbooks should be set at a standard that is comparable to the normal copies in terms of affordability for the majority of the visually impaired.

However, providing visually impaired students with free or affordable accessible formats of textbooks does not translate to equal enjoyment of the right to education. While accessible textbooks guarantee

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<sup>141</sup> CESCR General Comment No. 13, *supra* note 134, ¶ 50.

<sup>142</sup> Mustapha Mehedi, *The Realisation of Economic, Social and Cultural Rights: The Realisation of the Right to Education, Including Education in Human Rights* 40 (UNESCO, Working Paper E/CN.4/Sub.2/1999/10).

<sup>143</sup> CRC, *supra* note 39, art. 28(1)(e).

<sup>144</sup> *Id.* art. 29(1)(a).

<sup>145</sup> See Margaret Chon, *Copyright and Capability for Education: An Approach “From Below”*, in *INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS* 218, 226 (Graham Dutfield & Tzen Wong eds., 2011).

the bare minimum, they still leave students with visual impairments at a disadvantage due to their disability.

Because of the progressive nature of the right to education, the ICESCR and the CRC focus on primary education.<sup>146</sup> However, higher education students face similar, if not bigger, difficulties. In fact, the problems that tertiary students with visual disabilities face are more complex than those encountered by primary and secondary students, due to the larger domain of books and other print material used in university level courses. In many cases, there are no set textbooks for courses and, even if there are such books, they only form part of the course resources along with other material that may change every year or so depending on the lecturer or new developments in that area of knowledge. Relevant research done in Australia shows that, generally, students with disabilities receive less support from universities in obtaining recommended readings compared to essential readings, and in cases where students are offered the recommended material in accessible formats, it is not done in a timely manner.<sup>147</sup>

Free and compulsory education for all is a progressive obligation for the States. It should however progress on an equal basis for sighted and the visually impaired. While progressive realization is designed to accommodate different levels of development and availability of resources, States have the obligation to move as expeditiously and effectively as possible towards the full realization of such rights.<sup>148</sup> Therefore, difficulties that lack of access to books creates for the right to education of visually impaired persons cannot be justified by reference to its progressive nature. States need to address lack of accessible books due to limitations caused by copyright “to the maximum extent of their available resources.”<sup>149</sup> Finally, by not taking legislative measures for bringing

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<sup>146</sup> See CESCR General Comment No. 13, *supra* note 134, ¶ 51 (“[T]he obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of article 13 (2), States parties are obliged to prioritize the introduction of compulsory, free primary education. This interpretation of article 13 (2) is reinforced by the priority accorded to primary education in article 14. The obligation to provide primary education for all is an immediate duty of all States parties.”).

<sup>147</sup> Paul Harpur & Rebecca Loudon, *The Barrier of the Written Word: Analyzing Universities’ Policies to Students With Print Disabilities*, 33 J. HIGHER EDUC. POL’Y & MGMT. 153, 160 (2011).

<sup>148</sup> CESCR, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She is the Author, ¶ 26, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006).

<sup>149</sup> CESCR General Comment No. 3: The Nature of the States Parties’ Obligations, ¶ 86, U.N. Doc. E/1991/23 (1991).

their copyright law in line with their human rights commitments, States are also in violation of their obligation for progressive fulfilment.<sup>150</sup>

In its 2012 position paper on the right of children with disabilities to education, UNICEF argued that "a right-based approach to education requires more than 'business as usual.'"<sup>151</sup> The Dakar Framework for Action acknowledged that "the learning needs of the disabled demand special attention. Steps need to be taken to provide equal access to education to every category of disabled persons as an integral part of the education system."<sup>152</sup> Therefore, providing students with disabilities affordable and accessible learning material can be considered necessary for an inclusive approach to education. Such inclusive approach has "received numerous global endorsements, including at the 1994 World Conference on Special Needs Education<sup>153</sup> and, since 2002, through the global Education for All initiative<sup>154</sup> on the right to education for persons with disabilities."<sup>155</sup> The 2007 report of the UN Special Rapporteur on the right to education<sup>156</sup> requires States' Parties to the CRPD to "ensure an inclusive education system."<sup>157</sup>

Considering the provision of access to copyrighted material for the visually impaired students as part of the right to education is in line with the Vienna Convention rules for treaty interpretation that require attention to be paid to a treaty's "object and purpose."<sup>158</sup> If the objects and purposes of the treaties that recognize the right to education are for everyone to access education and benefit from its results, then enforcement of this right calls for measures that would guarantee fulfilment of those goals and purposes. Furthermore, the implication of adhering to the principle of non-discrimination is that States should provide structural equality and not formal equality when providing equal and accessible

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<sup>150</sup> CESCR General Comment No. 21, *supra* note 98, ¶ 75.

<sup>151</sup> The Right of Children with Disabilities to Education, *supra* note 130, at 30.

<sup>152</sup> UNESCO, THE DAKAR FRAMEWORK FOR ACTION, U.N. Doc ED-2000/WS/27, 75 (Apr. 26–28, 2000).

<sup>153</sup> Promoting the Rights of Children with Disabilities, *supra* note 102, at 27.

<sup>154</sup> *The Right of Children with Disabilities to Education*, *supra* note 130, at 8; Education For All (EFA) Flagship, *The Right to Education for Persons With Disabilities: Towards Inclusion 3* (UNESCO & World Bank Conceptual Paper ED/BAS/EIE/2004/1 REV., Dec. 2004).

<sup>155</sup> UNICEF, THE STATE OF THE WORLD'S CHILDREN: CHILDREN WITH DISABILITIES 29 (2013).

<sup>156</sup> Vernor Muñoz (Special Rapporteur on the Right to Education), *The Right to Education for Persons with Disabilities*, U.N. Doc. A/HRC/4/29 (2007).

<sup>157</sup> N.Z. HUMAN RIGHTS COMM'N, *supra* note 124, at 22.

<sup>158</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

education.<sup>159</sup> Effective implementation of the Marrakesh Treaty under the guidance of overarching human rights principles contributes to meaningful realization of the right to education by States.

### C. THE RIGHTS TO CULTURE AND SCIENCE

The goal of inclusion of visually impaired persons in society will not be fulfilled without their having access to culture and the chance to participate in cultural life. This is in addition to prerequisites of the right to culture such as access to civil and political freedoms, education, health, and a reasonable standard of living.<sup>160</sup>

To participate in cultural life and enjoy the benefits of scientific progress, visually impaired individuals need access to cultural and scientific material. This section discusses those aspects of the rights to culture and science that are relevant to the discussion of copyright and access to copyright-protected material for the visually impaired.

#### 1. *The Normative Framework of the Right to Culture and Science*

The right to culture and science was first mentioned in Article 27(1) of the UDHR<sup>161</sup> and later incorporated as a binding norm in Article 15(1)(a) and (b) of the ICESCR.<sup>162</sup> Additional safeguards are dedicated to establishing the right of access to and participation in cultural life for specific individuals and communities.<sup>163</sup>

The CRC recognizes the right to participation in cultural life for children.<sup>164</sup> The Convention does not, however, refer to the right to sci-

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<sup>159</sup> See Mieke Verheyde, *Article 28: The Right to Education*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 36 (André Alen et al. eds., 2006) (discussing how article 28(1) of the Convention on the Rights of the Child subjects article 2(1) of the Convention on the Right to Education to principles of non-discrimination and therefore “more explicitly obliges the States not only to ensure formal equality but also substantive equality which often requires affirmative action policies.”).

<sup>160</sup> Boutros Boutros-Ghali, *The Right to Culture and the Universal Declaration of Human Rights*, in CULTURAL RIGHTS AS HUMAN RIGHTS 73–75 (UNESCO 1970).

<sup>161</sup> UDHR, *supra* note 5, art. 27(1).

<sup>162</sup> ICESCR, *supra* note 7, art. 15(1)(a)–(b).

<sup>163</sup> CEDAW, *supra* note 37, art. 13(c); CERD, *supra* note 36, art. 5(d)–(e); CMW, *supra* note 40, art. 43(1)(g); ICCPR, *supra* note 34, art. 27; Declaration on the Rights of Indigenous Peoples, *supra* note 115, art. 5, 8, 15; Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Int’l Labour. Org., June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention].

<sup>164</sup> CRC, *supra* note 39, art. 31.

ence. Under Article 30(1) of the CRPD, the "States Parties recognise the right of persons with disabilities to take part on an equal basis with others in cultural life."<sup>165</sup> More explicitly, Article 30(3) of the CRPD requires State Parties "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".<sup>166</sup> Additionally, these rights are mentioned in regional documents.<sup>167</sup> The importance of culture is also present in the United Nations Charter<sup>168</sup> and the UNESCO Constitution.<sup>169</sup>

## 2. Right to Read and the Right to Culture

International law does not define the meaning of cultural rights despite the recognition afforded to the right to cultural life in international human rights law.<sup>170</sup> Therefore, the right to culture is at best underdeveloped.<sup>171</sup> A common proposition regarding the definition of culture is

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<sup>165</sup> CRPD, *supra* note 41, art. 30(1).

<sup>166</sup> *Id.*, art. 30(3).

<sup>167</sup> American Declaration of the Rights and Duties of Man, *supra* note 116, art. XIII; Protocol of San Salvador, *supra* note 53, art. 14; African Charter on Human and Peoples' Rights, *supra* note 54, art. 22. *See also* EUROPEAN COURT OF HUMAN RIGHTS, CULTURAL RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 3 (2011) ("Although neither the Convention nor the Court explicitly recognise the 'right to culture' or the right to take part in cultural life, unlike other international treaties, the Court's case-law provides interesting examples of how some rights falling under the notion of 'cultural rights' in a broad sense can be protected under core civil rights, such as the right to respect for private and family life (Article 8 of the Convention), the right to freedom of expression (Article 10) and the right to education (Article 2 of Protocol No. 1)").

<sup>168</sup> U.N. Charter art. 13, 55.

<sup>169</sup> UNESCO CONST. art I.

<sup>170</sup> *See* Lyndel V. Prott, *Cultural Rights as Peoples' Rights in International Law*, in THE RIGHTS OF PEOPLES 93 (James Crawford ed., 1988).

<sup>171</sup> For more on the underdevelopment of the right to culture, see Yvonne Donders, Address at the International Forum on Diversity and Cultural Rights: Towards a Right to Cultural Identity in International Human Rights Law (Mar. 31–Apr. 2, 2004); Stephen A. Hansen, *The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related to Article 15(1)(A) of the International Covenant on Economic, Social and Cultural Rights*, in CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 279, 282–83 (Audrey Chapman & Sage Russell eds., 2002); Janusz Symonides, *Cultural Rights*, in HUMAN RIGHTS: CONCEPT AND STANDARDS 175 (Janusz Symonides ed., 2000); Danilo Türk (Special Rapporteur on the Realization of Economic, Social and Cultural Rights), *The Realization of Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/Sub.2/1992/16 (July 3, 1992).

that it has many dimensions.<sup>172</sup> The CESCR summarizes the different approaches to conceptualizing culture in its General Comment No. 21:<sup>173</sup>

The Committee considers that culture, for the purposes of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief system, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.

Based on this definition and in the context of Article 15 of the ICESCR, the Committee enumerates three components for the right to participate in cultural life: (a) participation in, (b) access to, and (c) contribution to cultural life.<sup>174</sup>

#### a. Participation

The interrelatedness of the right to culture and the right to access to information manifests itself in the definition of the CESCR of the participation element that covers everyone's right to seek and develop cultural knowledge and expressions.<sup>175</sup>

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<sup>172</sup> Culture has been defined as: "[T]he set of distinctive spiritual, material, intellectual and emotional features of society or a social group, [that] encompasses, in addition to art and literature, lifestyle, ways of living together, value systems, traditions and beliefs." UNESCO, RECORDS OF THE GENERAL CONFERENCE 31ST SESSION, annex I, 62 (2002); "[A] social phenomenon resulting from individuals joining and co-operating in creative activities . . . not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate." UNESCO, RECORDS OF THE GENERAL CONFERENCE 19TH SESSION, annex I, 29 (1976); "[C]over[ing] those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and the meanings that they give to their existence and to their development." Fribourg Declaration on Cultural Rights, art. 2(a) (May 7, 2007), <http://hrlibrary.umn.edu/instree/Fribourg%20Declaration.pdf>; "[T]he sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [and] a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life." Rodolfo Stavenhagen, *Cultural Rights: A Social Science Perspective*, in CULTURAL RIGHTS AND WRONGS 1, 4–5 (Halina Niec ed., 1998).

<sup>173</sup> CESCR General Comment No. 21, *supra* note 98, ¶ 27.

<sup>174</sup> *Id.* ¶ 15.

<sup>175</sup> *Id.* ¶ 15(a).



## b. Access

The access element is the component that best resonates with the importance of accessible cultural goods for the visually impaired. The access element of the right to cultural life links it to the right to education and information that are essential for understanding one’s culture and that of others.<sup>176</sup> The CESCR also defines access as the right to “benefit from the cultural heritage and the creation of other individuals and communities.”<sup>177</sup>

Shaver and Sganga argue that the right to culture requires the ability for the individual to consume as well as to create.<sup>178</sup> Their view is in line with the perceived definition of culture in the post-World War II discussions of cultural rights.<sup>179</sup> Therefore, the access element not only encompasses access to cultural products but also to creative opportunities.<sup>180</sup>

Accommodation for disability is among the many dimensions of access to culture.<sup>181</sup> In General Comment No. 21, the Committee emphasizes the importance of provision and facilitation of access to culture for persons with disabilities.<sup>182</sup>

## c. Contribution

According to the CESCR, contribution to cultural life means creating cultural expressions as well as participating in the “definition, elaboration and implementation of policies and decisions that have an impact on the existence of a person’s cultural rights.”<sup>183</sup> Therefore, accessible copyright-protected cultural material are primarily important for access to culture and, consequently, enable the visually impaired to contribute to the cultural life of the society.

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<sup>176</sup> *Id.* ¶ 15(b).

<sup>177</sup> *Id.*

<sup>178</sup> For more on the discussion of consumption and creation of culture, see Yvonne Donders, *The Legal Framework of the Right to Take Part in Cultural Life*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 231 (Yvonne Donders & Vladimir Volodin eds., 2007).

<sup>179</sup> UNESCO, *Cultural Rights as Human Rights*, at 11, SHC.68/XIX.3/A (1970).

<sup>180</sup> Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WIS. INT’L L.J. 637, 645–46 (2010).

<sup>181</sup> Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121, 170–71 (2010).

<sup>182</sup> CESCR General Comment No. 21, *supra* note 98, ¶ 16(b).

<sup>183</sup> *Id.* ¶ 15(c).

Moreover, this interpretation of contribution to cultural life signals the right of the visually impaired persons to have a say about the policies that affect their right to culture, meaning the copyright protection of cultural goods in the present discussion.

However, it is worth noting that creation sometimes requires consumption. One may not be able to contribute to culture and science without first familiarizing oneself with what has previously been produced, culturally and scientifically. Visually impaired persons may still be able to participate in some cultural activities or to enjoy some benefits of scientific progress without access to copyrighted works. However, availability of accessible works is crucial for the visually impaired to fully and equally access culture and science, achieve self-development, and make a meaningful cultural or scientific contribution to their society.

The creation-consumption dichotomy fits well with the model that adopts two separate approaches to culture: process-oriented and system-oriented. The former sees the individual as a producer of culture and the latter as a product of culture and one that reproduces the culture.<sup>184</sup> The system-oriented approach to culture conceptualizes it as a “coherent, self-contained set of values and symbols that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life.”<sup>185</sup>

The copyright-protected materials cover both sides of culture: the cultural creations of individuals, and the works that contain cultural values and symbols. Visually impaired persons have a right to access both these groups of materials. To successfully participate in and become part of the society, the visually impaired should be able to access and engage with cultural norms and values present in copyright protected material.<sup>186</sup> Moreover, to be able to contribute to culture and science (as mentioned before), visually impaired persons need access to the cultural products as perceived by the process-oriented approach to culture.

In its Preamble, the Marrakesh Treaty refers to the importance of enhancing opportunities for visually impaired persons to participate in the cultural life of the community. It also mentions their right to seek, receive and impart information and ideas of all kinds. This can be viewed

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<sup>184</sup> Eide, *supra* note 96, at 22.

<sup>185</sup> Stavenhagen, *supra* note 171, at 4–5.

<sup>186</sup> CESCR General Comment No. 21, *supra* note 98, ¶ 30.

as including the freedom to access cultural information and cultural goods.

### 3. *Obligations of States Regarding Right to Culture*

In its General Comment No. 21, the CESCR refers to recognition of the rights of persons with disabilities, as a group that needs special protection, for the realization of their right to culture.<sup>187</sup> States' specific obligations towards the visually impaired can be deduced from Committee's interpretation of States' general obligation regarding the right to culture.

The CESCR suggests that full realization of the right to cultural life requires the States to (a) exercise it without discrimination,<sup>188</sup> (b) take deliberate and concrete measures aimed at its full implementation,<sup>189</sup> (c) abstain from taking regressive measures,<sup>190</sup> and (d) take account of the interrelationship between different parts of the Article 15 of the ICESCR.<sup>191</sup>

Deliberate and concrete measures aimed at full implementation of the right to take part in cultural life is in line with Committee's previous remarks on ensuring minimum essential levels of each of the rights in the ICESCR.<sup>192</sup> This, again, is a confirmation that progressive nature of economic, social, and cultural rights is not an excuse for ignoring States' core obligations. This approach is also compatible with the limited resources that some countries have at their disposal.<sup>193</sup>

In addition to these general obligations, the CESCR Committee requires States to respect, protect, and fulfil the right to take part in cultural life.<sup>194</sup> These three levels of obligations mean that States have both a negative and positive obligation regarding the right to culture.

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<sup>187</sup> *Id.* ¶ 31.

<sup>188</sup> *Id.* ¶ 44.

<sup>189</sup> *Id.* ¶ 45.

<sup>190</sup> *Id.* ¶ 46.

<sup>191</sup> *Id.* ¶ 47.

<sup>192</sup> CESCR General Comment No. 3, *supra* note 149, ¶ 10.

<sup>193</sup> CESCR General Comment No. 21, *supra* note 98, ¶ 23.

<sup>194</sup> *Id.* ¶ 48.

a. Obligation to Respect

First, States need to “refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life.”<sup>195</sup> Abstention from interfering with the visually impaired persons’ right to culture is connected to equal and non-discriminatory recognition of their right. Therefore, by recognizing a right to culture for the persons with disabilities, countries partially fulfil their obligation to abstain from interference. General Comment No. 21 also defines abstention as non-interference with access to cultural goods and services.<sup>196</sup> This definition could mean that even if States do not directly interfere with visually impaired persons’ right to culture, their passing discriminatory copyright laws that limit access for the visually impaired is an example of interference. Implementation of the Marrakesh Treaty ensures that current and future domestic copyright laws do not interfere with visually impaired persons’ enjoyment of the right to take part in cultural life.

b. Obligation to Protect

The obligation to protect adds to the non-interference requirement to third parties.<sup>197</sup> According to the Committee, States should understand the obligation to protect as a duty to prevent third parties from interfering with everyone’s right to take part in cultural life.<sup>198</sup> Violations of the right to culture can occur as a result of actions by insufficiently regulated private parties in addition to States’ actions.<sup>199</sup>

Therefore, States arguably have an obligation to ensure a copyright owner’s actions do not interfere with visually impaired persons’ right to culture. The Marrakesh Treaty addresses this obligation to some extent by requiring its Contracting Parties to ensure that third parties’ TPMs do not interfere with the visually impaired persons’ access to copyrighted works.<sup>200</sup>

Moreover, the Committee refers to the importance of preserving cultural rights as part of the States’ obligation to protect.<sup>201</sup> Producing ac-

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* ¶ 6.

<sup>197</sup> *Id.* ¶ 48.

<sup>198</sup> *Id.* ¶ 50.

<sup>199</sup> *Id.* ¶ 62.

<sup>200</sup> Marrakesh Treaty, *supra* note 2, art. 7.

<sup>201</sup> CESCR General Comment No. 21, *supra* note 98, ¶ 62.

cessible copies of copyright protected goods is not merely about provision of access for the visually impaired at the present time; it also contributes to preservation of culture in a way that is accessible to all the members of future generations including visually impaired persons.

c. Obligation to Fulfil

Finally, the obligation to fulfil particularly imposes a positive obligation on States to facilitate, promote and provide for everyone’s right to take part in cultural life.<sup>202</sup>

i. *Obligation to Facilitate and Promote*

There is no clear guideline in international human rights law on what facilitation and promotion of cultural life through copyright protected material mean. Countries have different policies and practices that are shaped mainly by their resources, social and political norms and historical backgrounds.

However, arguably what every country does in terms of facilitation and promotion of cultural life through copyright protected content can be used as a frame of reference for assessing visually impaired persons’ entitlements. This standard is also compatible with the progressive realization of economic, social, and cultural rights. The copyright protected cultural material available to the sighted for purposes of facilitation and promotion of cultural life should also be made available to the visually impaired.

Under the obligation to facilitate, the Committee refers to erasing structural forms of discrimination.<sup>203</sup> Remedying structural forms of discrimination against visually impaired persons’ right to culture requires taking appropriate measures that guarantee equal access for the blind to copyright protected cultural materials. In its General Comment No. 5, the Committee states that “the right to full participation in cultural and recreational life for persons with disabilities requires that communication barriers be eliminated to the greatest extent possible.”<sup>204</sup>

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<sup>202</sup> *Id.* ¶ 51.

<sup>203</sup> *Id.* ¶ 52(g).

<sup>204</sup> CESCR General Comment No. 5, *supra* note 47, ¶ 37 (stating that useful measures for elimination of communication barriers “might include ‘the use of talking books, papers written in simple language and with clear format and colours for persons with mental disability, [and] adapted television and theatre for deaf persons.’”).

ii. *Obligation to Provide*

The CESCR argues that States have the obligation to “provide all that is necessary for fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realise this right for themselves.”<sup>205</sup> The Committee provides some examples of how States can satisfy this obligation. The most relevant and significant example for visually impaired persons is the States’ obligation to provide all necessary measures to “guarantee access for all, without discrimination on grounds of financial or any other status, to museums, libraries, cinemas and theatres and to cultural activities, services and events.”<sup>206</sup>

The Committee does not use the term “cultural goods” when discussing the obligation to fulfil. However, guaranteed access to copyright protected cultural goods that are unavailable to the visually impaired persons due to their disability is implied by the reference to libraries. Moreover, the Committee refers to preventing access to cultural goods as an example of the violation of the right to culture.<sup>207</sup> Finally, the Committee defines positive action required by States as “facilitation and promotion of cultural life, and access to and preservation of cultural goods.”<sup>208</sup>

#### 4. *Right to Read and the Right to Science*

Compared to the right to culture, there is even less clarity on the meaning and scope of right to science. The right to science is arguably “so obscure and its interpretation so neglected that the overwhelming majority of human rights advocates, governments, and international human rights bodies appear to be oblivious to its existence.”<sup>209</sup>

The 2012 report of the UN Special Rapporteur in the field of cultural rights on the right to enjoy the benefit of scientific progress and its

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<sup>205</sup> CESCR General Comment No. 21, *supra* note 98, ¶ 54.

<sup>206</sup> *Id.* ¶ 54(d).

<sup>207</sup> *Id.* ¶ 62.

<sup>208</sup> *Id.* ¶ 6.

<sup>209</sup> Audrey R. Chapman, *Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Application*, 8 J. HUM. RTS. 1, 1 (2009). *See also*, William A. Schabas, *Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and Its Application*, in Donders & Volodin, *supra* note 96, at 274 (stating that this right not only “suffer[s] from the more general marginalization of economic, social and cultural rights” but also “within that category of human rights it has received little attention”).

application further clarifies this underdeveloped right.<sup>210</sup> According to this report, the right to science connotes a right of access to scientific knowledge.<sup>211</sup> Chapman, a legal scholar, also argues that first element of this right is “access to beneficial scientific and technological developments.”<sup>212</sup> In this sense, access arguably means access to information about scientific and technological advancements as well as the results or potential products of such advancements.

Chapman also refers to the United Nations Development Programme (UNDP) 2001 on Making New Technologies Work for Human Development in arguing that benefits of scientific progress can contribute to human development in two ways. One is through improving the living standards of human beings and enabling them to participate more actively in the life of their community.<sup>213</sup>

A recent development in defining the scope of the right to science lead to adoption of the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications (Venice Statement). The Venice Statement notes that science should be used for the “benefit of all humanity without discrimination, particularly with regard to disadvantaged and marginalized persons and communities.”<sup>214</sup> Moreover, the Venice Statement regards States as responsible for ensuring ‘support for scientific inquiry and dissemination of scientific knowledge.’<sup>215</sup> Article 15(2) of the ICESCR requires States to take the necessary measures for ‘diffusion of science’ for realization of the right to science.<sup>216</sup>

Since the principle of non-discrimination applies to all the rights recognized in international human rights instruments, “dissemination of scientific knowledge” should cover visually impaired persons.<sup>217</sup> Such

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<sup>210</sup> Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *The Right to Enjoy the Benefits of Scientific Progress and Its Applications*, U.N. Doc. A/HRC/20/26 (May 14, 2012).

<sup>211</sup> *Id.* ¶ 26.

<sup>212</sup> Audrey Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress and Access to the Benefits of Science*, WIPO, at 9 (1999), [www.wipo.int/edocs/mdocs/tk/en/wipo\\_unhchr\\_ip\\_pnl\\_98/wipo\\_unhchr\\_ip\\_pnl\\_98\\_5.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_5.pdf).

<sup>213</sup> *Id.*

<sup>214</sup> UNESCO, Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Application, SHS/RSP/HRS-GED/2009/PI/H/1, at 14 (July 16–17, 2009) (hereinafter Venice Statement).

<sup>215</sup> *Id.*

<sup>216</sup> ICESCR, *supra* note 7, art. 15(2).

<sup>217</sup> Venice Statement, *supra* note 214, at 15–16 (stating that “[a] human rights-based approach requires that science and its applications are consistent with fundamental human rights principles such as non-discrimination . . . and that particular attention should be paid to the needs of disadvantaged and marginalized groups,” and “normative content should be directed towards . . . equal

dissemination partly happens through publication of books, journals, and other copyright protected material. This highlights the importance of accessible copyrighted works for realization of the visually impaired persons' right to science.<sup>218</sup>

### 5. *Obligations of States Regarding the Right of Access to the Benefits of Scientific Progress*

The Committee on Economic, Social, and Cultural Rights has not yet adopted a General Comment on the right to science. However, the Venice Statement, the UN Special Rapporteur, and other scholars follow the practice of the CESCR in identifying the obligations of States regarding the right to science as the obligation to respect, protect, and fulfil. One proposal is that under the obligation to respect, "states should respect access and participation in science, including access to important sources such as libraries and the internet" and refrain from obstructing the "free flow of information and dissemination of scientific results."<sup>219</sup>

According to the Venice Statement, countries should have an obligation to respect the freedom to "seek, receive, and impart" scientific information.<sup>220</sup> By this definition, the obligations of States in this regard are similar to their obligation to respect the right of the visually impaired to access information.

Under the obligation to fulfil, the Statement requires States to "promote access to the benefits of science and its applications on a non-discriminatory basis."<sup>221</sup> The UN Special Rapporteur in the field of cultural rights also holds the view that "scientific knowledge, information and advances must be made accessible to all."<sup>222</sup> States need to eliminate

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access and participation of all public and private actors."). See also, Richard Pierre Claude, *Scientists' Rights and the Human Right to the Benefits of Science*, in CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 260 (Audrey Chapman & Sage Russell eds., 2002) ("[T]he egalitarian phrasing of the provision reinforces the proposition that the human right to the benefit of the science is not only for scientists.").

<sup>218</sup> See Venice Statement, *supra* note 214, at 15 (reasoning that in case of a potential tension between the right to science and intellectual property rights "prioritization of profit for some over benefit for all" is unacceptable).

<sup>219</sup> Yvonne Donders, *The Right to Enjoy the Benefits of Scientific Progress: In Search of State Obligations in Relation to Health*, 14 MED., HEALTH CARE & PHIL. 371, 377 (2011).

<sup>220</sup> Venice Statement, *supra* note 214, at 14(a).

<sup>221</sup> *Id.* at 16(b). See also Donders, *supra* note 219, at 377 ("The State should further ensure access to scientific and technological knowledge, including through access to the Internet [and] provide information on scientific progress.").

<sup>222</sup> Shaheed, *supra* note 210, at 9.



de jure and de facto barriers that stand in the way of access for persons with disabilities to scientific information, processes, and products.<sup>223</sup>

As mentioned before, new technologies have made reproduction and distribution of accessible copyrighted material easier and cheaper. Therefore, the visually impaired have a right to enjoy these new technologies as a product of scientific progress to access copyright protected content more easily.<sup>224</sup> For example, a new technology can enable a visually impaired individual to reproduce various accessible formats of the same title to be used via different devices for extra convenience. Therefore, copyright law and TPMs that stand in the way of access for the visually impaired could be incompatible with their right to enjoyment of scientific progress.

#### D. RIGHT TO ACCESS TO INFORMATION

Right to access to information accompanies the right to freedom of expression and opinion. Similar to the right to education, the right to access information is at the core of realization of other human rights. Visually impaired individuals would be more successful in claiming their human rights once they are aware of their rights. Second, access to relevant information facilitates realization of other human rights.<sup>225</sup>

##### 1. Normative Framework of the Right to Access to Information

Under international human rights law, the right to “freedom of opinion and expression” and to “seek, receive and impart information and ideas” was first recognized in Article 18 of the UDHR<sup>226</sup> and later reiterated, almost word for word, in Article 19(2) of the ICCPR.<sup>227</sup>

The same wording was later used in Article 13 of the CRC<sup>228</sup> and Articles 9(1)(b) and 21 of the CRPD.<sup>229</sup> While there are no articles in the

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<sup>223</sup> *Id.* at 10.

<sup>224</sup> See Venice Statement, *supra* note 214, at 13(b).

<sup>225</sup> See CESCR, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34, ¶ 2 (Sept. 12, 2011) (“Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society.”). See also LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE, 221–27 (2011).

<sup>226</sup> UDHR, *supra* note 5, art. 18.

<sup>227</sup> ICCPR, *supra* note 34, art. 19(2).

<sup>228</sup> CRC, *supra* note 39, art. 13.

CEDAW that specifically recognize the right to information, multiple articles refer to access to information that is necessary for realization of different rights, such as the right to education,<sup>230</sup> family,<sup>231</sup> and child birth.<sup>232</sup> The CERD refers to the right to “freedom of opinion and expression” that arguably implies the right to information.<sup>233</sup> Similar to the other rights discussed, the right to access to information is also present in regional instruments.<sup>234</sup>

## 2. *Right to Read and the Right to Access to Information*

Access to information is crucial for forming opinions and ideas which then can be analyzed and freely expressed. Therefore, the visually impaired need accessible informative content to form ideas and opinions that they can choose to express if they wish. The importance of access to information to freedom of expression and opinion is apparent from the categorization of the two rights together.

Access to information is intertwined with the enjoyment of other human rights such as the right to education, science, and culture. Similarly, access to health information contributes to everyone’s right to the enjoyment of the highest attainable standard of physical and mental health.<sup>235</sup>

Finally, accessible informative content would increase awareness of the visually impaired regarding their human rights. Human rights education need not be through formal and traditional education. It can be achieved through other venues of dispersing information.

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<sup>229</sup> CRPD, *supra* note 41, art. 9(1)(b), 21.

<sup>230</sup> CEDAW, *supra* note 37, art. 10(h).

<sup>231</sup> *Id.* art. 2(b).

<sup>232</sup> *Id.* art. 16(1)(e).

<sup>233</sup> CERD, *supra* note 36, art. 5(d)(viii).

<sup>234</sup> European Social Charter, *supra* note 50, art. 21; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 48, art. 10. *See also* Youth Initiative for Human Rights v. Serbia, (No. 48135/06), Eur. Ct. H.R. 20, 24 (June 25, 2013) (“[T]he notion of ‘freedom to receive information’ embraces the right of access to information.”); American Convention on Human Rights, *supra* note 52, art. 13; African Charter on Human and Peoples’ Rights, *supra* note 54, art. 9.

<sup>235</sup> UDHR, *supra* note 5, art. 23.

### 3. *Obligations of States*

The approach of the CRPD to the right to freedom of expression and access to information is unique in two ways. First, the Convention discusses equality for the disabled in accessing information. Second, it places the right to information in the context of disability accessibility.<sup>236</sup> Article 9(1) requires States’ Parties to take appropriate measures to ensure access to information for persons with disabilities on an equal basis with others.<sup>237</sup> It goes on to require States to eliminate obstacles and barriers to accessibility of information.<sup>238</sup>

The Convention provides detailed instructions on how States can ensure equality and accessibility for persons with disabilities in enjoying their right to information. Article 9(2) suggests measures such as providing training for stakeholders on accessibility,<sup>239</sup> and promoting “other appropriate forms of assistance and support to persons with disabilities to ensure their access to information.”<sup>240</sup>

Similarly, Article 21 of the CRPD calls for measures that enable the disabled persons to “seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.”<sup>241</sup> Article 2 of the Convention defines communication as “[b]raille, tactile communication, large print, accessible multimedia as well as written, audio, . . . human-reader and augmentative and alternative modes, means and formats . . . and accessible information and communication technology.”<sup>242</sup> When read together, Articles 2 and 21 justify the claim that States have an obligation to provide visually impaired persons with the accessible copyright content that they need for realization of their right to freedom of expression and to information.

The right to access to information is interconnected with right to health. For example, Article 17 of the CRC addresses the importance of access of the child to information and material that is aimed at the promotion of his or her physical and mental health.<sup>243</sup> To that end, the Convention urges States to encourage “international co-operation in the pro-

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<sup>236</sup> CRPD, *supra* note 41, art. 9(1), 21(a).

<sup>237</sup> *Id.* art. 9(1).

<sup>238</sup> *Id.* art. 9(1)(b).

<sup>239</sup> *Id.* art. 9(2)(c).

<sup>240</sup> *Id.* art. 9(2)(f).

<sup>241</sup> *Id.* art. 21.

<sup>242</sup> *Id.* art. 2.

<sup>243</sup> CRC, *supra* note 39, art. 17.

duction, exchange and dissemination” of such information and “production and dissemination of children’s books.”<sup>244</sup>

Based on the principle of non-discrimination, countries need to make sure that visually impaired children are included in sharing the results of the measures required by Article 17 of the CRPD. In other words, countries need to encourage international co-operation in the production, exchange and dissemination of accessible information and production and dissemination of accessible children’s books. Article 24 of the Convention makes a more direct reference to the connection of access to information and right to health. It requires States’ Parties to take appropriate measures to “ensure that parents and children are informed” of different issues that affect child health.<sup>245</sup> Therefore, providing accessible health related information is a requisite of both right to information and right to health. By requiring its Contracting Parties to facilitate the international exchange of accessible works, the Marrakesh Treaty helps those Parties that have ratified the CRC to achieve the recommendations of the CRC Committee.

## E. RIGHT TO HEALTH

### 1. Normative Framework of the Right to Health

Before appearing in international human rights instruments, the right to health was recognized in the Constitution of the World Health Organization (WHO). The Preamble of the WHO Constitution states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.”<sup>246</sup> Later, Article 25(1) of the UDHR, and Article 12 of the ICESCR also recognized the right for everyone to “a standard of living adequate for the health of himself and his family,”<sup>247</sup> and “to the enjoyment of the highest attainable standard of

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<sup>244</sup> *Id.* art. 17(b), (c).

<sup>245</sup> *Id.* art. 24(2)(e).

<sup>246</sup> U.N. World Health Org. Const. pmb., 2 Official Records of the World Health Org., Jul. 22, 1946, (entered into force Apr. 7, 1948).

<sup>247</sup> UDHR, *supra* note 5, art. 25(1).

physical and mental health.”<sup>248</sup> Regional human rights instruments also include provisions on the right to health.<sup>249</sup>

## 2. *Obligations of States*

The CESCR has commented on the right to health as incorporated in Article 12 of the ICESCR. The Committee considered the right to health as closely related to and dependent on other human rights such as the right to education, access to information and work.<sup>250</sup> The Committee interpreted the right to health “as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as . . . access to health-related education and information, including on sexual and reproductive health.”<sup>251</sup>

The impact of copyright law on visually impaired persons’ right to health relates to their ability to “seek, receive and impart information and ideas concerning health issues.”<sup>252</sup> Therefore, the connection between access to copyrighted works and the right to health is similar to that of access and the right to information.

To fully respect, protect, and fulfil the right to health for the visually impaired requires provision of equal access to health-related information. As highlighted by the Committee, such access is indirectly satisfied upon realization of other human rights of the visually impaired. On the other hand, access to health-related information that improves a visually impaired individual’s health can potentially have a positive effect on realization of his or her other human rights.<sup>253</sup>

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<sup>248</sup> ICESCR, *supra* note 7, art. 12.

<sup>249</sup> See European Social Charter, *supra* note 50, art. 11; Protocol of San Salvador, *supra* note 53, art. 10; African Charter on Human and Peoples’ Rights, *supra* note 54, art. 16; African Charter on the Rights and Welfare of the Child, *supra* note 116, art. 14.

<sup>250</sup> CESR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4, ¶ 3 (Aug. 11, 2000). See also Audrey R. Chapman, *The Interrelationships Between the Human Right to the Benefits of Scientific Progress and the Human Right to Health* 8 (Aug. 15, 2007) (unpublished manuscript) (on file with author).

<sup>251</sup> CESCR General Comment No. 14, *supra* note 250, ¶ 11.

<sup>252</sup> *Id.* ¶ 12(b).

<sup>253</sup> See Stephen P. Marks, *The Emergence and Scope of the Human Right to Health*, in *ADVANCING THE HUMAN RIGHT TO HEALTH* 3, 9–17 (José M. Zuniga, Stephen P. Marks & Lawrence O. Gos eds., 2013) (discussing the connection between the right to health and other human rights).

## F. RIGHT TO WORK

1. *Normative Framework of the Right to Work*

Article 23 of the UDHR recognizes everyone's right to work, free choice of employment, just and favorable conditions of work, and protection against unemployment.<sup>254</sup> In connection to right to work, Article 26(1) of UDHR requires that technical and professional education should be made generally available.<sup>255</sup> The ICESCR puts the wording of Articles 23 and 26 of the UDHR in a single article. Article 6(1) addresses the recognition of the right to work for everyone and Article 6(2) considers provision of "technical and vocational guidance and training programmes" as one of the steps that States Parties can take for full realization of right to work.

The recognition of the right to work in the CERD<sup>256</sup> and the CEDAW is with regards to elimination of discrimination in the field of employment.<sup>257</sup> Article 27 of the CRPD recognizes the right of persons with disabilities to work, on an equal basis with others.<sup>258</sup> The right to work is equally recognized in regional instruments.<sup>259</sup>

2. *Right to Read and the Right to Work*

According to a RNIB report, as of 2018, only 1 in 4 registered blind and partially sighted people of working age in the UK are in paid employment.<sup>260</sup> While many factors affect the employment of visually impaired persons, it is essential to provide them with the same chances as sighted persons to access employment. Access to copyright protected material can increase their chances of seeking satisfactory employment by providing them with accessible education and training resources.

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<sup>254</sup> UDHR, *supra* note 5, art. 23.

<sup>255</sup> ICESCR, *supra* note 7, art. 6(1), (2).

<sup>256</sup> CERD, *supra* note 36, art. 5(e)(i).

<sup>257</sup> CEDAW, *supra* note 37, art. 11.

<sup>258</sup> CRPD, *supra* note 41, art. 27(1).

<sup>259</sup> European Social Charter, *supra* note 50, at 2; African Charter on Human and Peoples' Rights, *supra* note 54, art. 15; Protocol of San Salvador, *supra* note 53, art. 6.

<sup>260</sup> JOHN SLADE & EMMA EDWARDS, EYE HEALTH AND SIGHT LOSS STATS AND FACTS 13 (2018), <https://www.rnib.org.uk/sites/default/files/Eye%20health%20and%20sight%20loss%20stats%20and%20facts.pdf>.

### 3. *Obligations of States*

The CRPD requires the States to “enable persons with disabilities to have effective access to general technical and vocational guidance programmes . . . and vocational and continuing training.”<sup>261</sup> Accessible books are an important part of a technical or professional education. Moreover, books and other copyright content, even outside of an educational framework, are important for gaining professional information to seek employment or to improve one’s working condition. Professional information gives individuals more options when competing for employment opportunities. Provision of professional education and information is also part of realizing everyone’s right “to the opportunity to gain his living by work which he freely chooses or accepts.”<sup>262</sup>

General Comment No. 5 of the CESCR states that to provide equal opportunities for enjoyment of the right to work “it is particularly important that artificial barriers to integration in general, and to employment in particular, be removed.”<sup>263</sup> The CRPD also holds that States should “ensure that reasonable accommodation is provided to persons with disabilities in the workplace.”<sup>264</sup> Barriers that copyright law creates for access to information can be just as problematic as physical barriers in society and in the workplace. Enforcement of the Marrakesh Treaty helps erase these barriers and enrich the professional lives of the visually impaired.

## IV. CONCLUSIONS

The issue of “book famine” partly relates to the interface of copyright law and the visually impaired persons’ human rights. This paper evaluated what the principles of non-discrimination and equal enjoyment of human rights, referred to in the 2013 Marrakesh Treaty, mean in the context of access to copyrighted works for the visually impaired. In addition, this paper demonstrated how lack of access to copyright protected works affects the realization of the visually impaired persons’ human rights, such as the right to education, culture and science, information, health, and work.

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<sup>261</sup> CRPD, *supra* note 41, art. 27(1)(d).

<sup>262</sup> ICESCR, *supra* note 7, art. 6(1).

<sup>263</sup> CESCR General Comment No. 5, *supra* note 47, ¶ 22.

<sup>264</sup> CRPD, *supra* note 41, art. 27(1)(i).

A set of measures for ensuring that states fully meet their obligations to respect, protect, and fulfil the human rights of the visually impaired were discussed. These include taking action to (a) equally recognize the human rights of the visually impaired that are dependent on access to copyrighted works (formal equality); (b) ensure that states consider the substantive inequalities that can arise from treating the visually impaired in the same way as sighted people; and, (c) ensure that copyright law does not hinder the provision of de facto equality of access to copyrighted works for the visually impaired persons.

The 2013 Marrakesh Treaty recognizes the importance of striking a balance between the rights of copyright owners and the print-disabled for their effective and timely access to copyrighted works. The Treaty acknowledges that lack of access to copyright-protected works for the visually impaired is against the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in the society. The Preamble of the Marrakesh Treaty also refers to the importance of visually impaired people's rights to freedom of expression, education, participation in the cultural life of the community, and to share scientific progress and its benefits. Adoption of the Marrakesh Treaty and its contribution to human rights is a positive step by the international community toward fulfilling its obligations under international human rights law to the extent it is affected by copyright. Minimum mandatory flexibilities for the benefit of the visually impaired and facilitation of international exchange of accessible works can help address the inequality of access to copyrighted works that exists for the visually impaired persons due to the difficulties that copyright law creates in this regard.

The Marrakesh Treaty only recently came into force and more than half of the Contracting Parties have not ratified the Treaty yet. This can be partly attributed to the burden of necessary legal reform in the signatory countries, both those with and without copyright flexibilities in their domestic legislation. Another plausible reason for the slow ratification of the Treaty, which may have also stopped some countries from signing the Treaty, is that access for the persons with disabilities is often associated with piracy risks. This is arguably the reason why some right holders "have regularly locked people with print disabilities out of the electronic book market."<sup>265</sup>

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<sup>265</sup> JAMES R. FRUCHTERMAN, BENETECH, COMMENTS IN RESPONSE TO THE NOTICE OF INQUIRY AND REQUEST FOR COMMENTS ON THE TOPIC OF FACILITATING ACCESS TO COPY RIGHTED



This paper’s analysis of the normative framework of the claim for equality of access to copyrighted works highlighted states’ obligation to strike a better balance between copyright protection and the realization of visually impaired persons’ human rights that are dependent on such access. By introducing minimum mandatory copyright flexibilities and measures to facilitate cross-border exchange of accessible copyrighted works, the Marrakesh Treaty is an important instrument for provision of better and equal access for the visually impaired. Therefore, the assessment of the human rights obligations of states regarding a right to read for the visually impaired should provide further incentive for ratification of the Marrakesh Treaty as a tool for fulfilling those obligations. Furthermore, the analysis should contribute to ensuring the compatibility of the Contracting Parties’ adopted measures in their domestic laws with the overarching international human rights principles that are directly or indirectly enshrined in the Treaty’s Preamble.

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WORKS FOR THE BLIND OR PERSONS WITH OTHER DISABILITIES 1, (2009) <https://www.copyright.gov/docs/sccr/comments/2009/fruchterman.pdf>. See also Paul Harpur & Nicolas Suzor, *Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm*, 36(3) U.N.S.W. L.J. 745, 761–68 (2013) (summarizing resistance to adoption and implementation of the Marrakesh Treaty).