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The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill

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THE DOMESTIC EFFECT OF SOUTH AFRICA'S TREATY OBLIGATIONS: THE RIGHT TO EDUCATION AND THE COPYRIGHT AMENDMENT BILL

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ABSTRACT

On 16 June 2020, the President of South Africa returned the Copyright Amendment Bill [B-13 of 2017] to Parliament, expressing reservations regarding its constitutionality and compliance with international law. In this paper, I describe the constitutional implications of compliance with international law and the binding international obligations incumbent upon South Africa in respect of copyright and international human rights law. In doing so, I argue that the Bill of Rights acts as a *magnet*, compelling all organs of state to give greater normative weight to those international obligations that map onto the Bill of Rights as compared to those that do not in their functioning. Finally, I explain how the provisions of the CAB that are specifically tailored to enable access to educational materials for all are not only permitted under South Africa's international copyright obligations, but are required by the Bill of Rights and South Africa's international human rights obligations.

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INTRODUCTION

South Africa's process of copyright reform has been underway for the past 15 years. The current Copyright Amendment Bill B-13 of 2017 (CAB), after numerous public consultations and parliamentary deliberations, passed by both houses of Parliament on 28 March 2019. The Bill was on the President's desk for assent thereafter for a period of no less than 14 months, following which the President returned the Bill to Parliament on 16 June 2020 on the basis that he had reservations regarding its constitutionality. Meanwhile, the existing copyright regime, governed by the Copyright Act 98 of 1978 and its attendant regulations, continues to apply, and continues to exclude and disadvantage persons with disabilities from accessing works

under copyright; students who cannot afford the high prices of textbooks and other educational materials; and creators who cannot sustain their livelihoods. The pandemic that has swept the world has further exacerbated these inequalities, and created new problems with the increase in online activity, as the Copyright Act 1978 is not tailored to the digital environment. The CAB seeks to remedy all of the above and has thus acquired more urgency than ever before.

At the time of writing, Parliament has yet to decide on its next steps after having received the President's referral letter. The CAB and the President's reservations are being analysed by a team of legal academics. We have collaboratively published and are currently workshopping analyses of the Bill's reversion right, fair use right, and of the Minister's Regulatory authority. This paper addresses the role of international law, particularly with respect to the educational provisions of the Bill.[2]

I explain that these reservations are outside the ambit of the constitutional provisions enabling the President to return statutes to Parliament. Moreover, even if these concerns were within the scope of the relevant provision empowering the President to return legislation, they were misplaced and based on an erroneous interpretation of the role of international law in the South African Constitution. This has serious implications for Parliament's law-making function that I outline in the course of this article.

In order to determine the proper interpretation of the applicable provisions in the Constitution, I first outline the relevant international rights and obligations at issue. I do this by mapping the network of treaty obligations that South Africa has undertaken in respect of copyright and international human rights law. I focus particularly on the right to education in international human rights law and the obligations that it imposes on South Africa. I use the Vienna Convention on the Law of Treaties to determine what these international obligations mean, the implications of these obligations binding South Africa on the international plane, and the amplitude that they offer South Africa in domestic implementation of international treaty obligations.

Second, I explain how the Constitution necessarily acts as a constraining frame for *all* legislation, including that which seeks to implement South

[2] The other concerns that the President outlined in the Referral Letter were as follows: first, whether the Copyright Amendment Bill was correctly tagged under s 75 of the Constitution; second, whether the royalty provisions in the Bill constituted an arbitrary and retrospective deprivation of property under s 25 of the Constitution; third, whether the delegation of power to the minister to promulgate regulations pursuant to the Bill on the issue of royalties was a permissible delegation of power; fourth, whether there was adequate public participation on the provisions regarding fair use and fifth, whether the copyright exceptions and limitations were constitutional. See The Presidency, Referral of the Copyright Amendment Bill [B13B-2017] and the Performers Protection Amendment Bill [B24- 2016] ('Referral Letter') available at: http://infojustice.org/wp-content/uploads/2020/06/ramaphosa06162020.pdf

Africa's international obligations on the domestic plane. In doing so, I explore how international obligations that map onto the Bill of Rights are treated by the Constitution and their consequent domestic effect. I specifically outline the difference in constitutional treatment between obligations that map onto the Bill of Rights, from international obligations that do not map onto the Bill of Rights. In short, Parliament has a greater normative constitutional imperative to give effect to obligations that map onto the Bill of Rights (in other words, international human rights obligations) as opposed to those that do not.

Finally, I discuss how the sum of South Africa's binding international obligations creates a wide berth of policy space within which Parliament is empowered to make laws. I outline how the referred provisions of the CAB fall squarely within this space. More than simply being *permitted* by international law, however, I explain how in drafting and passing the CAB, Parliament acted in several respects to discharge its constitutional duty in prioritising policy choices that accord with the Bill of Rights, and to bring the apartheid-era Copyright Act within the constitutional framework. To act otherwise would contravene the strong protections entrenched in the Bill of Rights.

I. COPYRIGHT AND HUMAN RIGHTS OBLIGATIONS

South Africa is party to two sets of international obligations that are relevant to the CAB: international copyright instruments; and international human rights law instruments, given that the creation and regulation of copyright has significant implications for a number of human rights.[3] In this section, I map both sets of international treaty obligations and implications of these obligations binding on South Africa. Although the paper deals specifically with the right to education, the analysis is replicable for other human rights obligations that are implicated, such as the freedom of expression, participation in cultural life amongst others.

On the international plane, treaties create binding international obligations upon states once states have consented to be bound by them,

[3] See, for examples of work at the intersection of copyright and human rights, Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press 2011).; Margaret Chon, 'Intellectual Property from below: Copyright and Capability for Education' (2006) 40 UC Davis L. Rev. 803.; Sharon E. Foster, 'The Conflict between the Human Right to Education and Copyright', in Paul Torremans (Ed.), Intellectual Property and Human Rights at 287-8 (Kluwer, 2008).

depending on the requirements of the treaty:[4] through signature,[5] ratification[6] or accession.[7] In South Africa, the executive branch of government is empowered to negotiate and sign a treaty without putting it before Parliament,[8] as long as the treaty complies with the Constitution.[9] Parliament is empowered to make the decision as to whether a treaty is required to be put before it prior to ratification.

After a state deposits its consent to be bound with the treaty depositary designated in the treaty, it is bound to fulfil the provisions of the treaty in good faith.[10] For those treaties that provide for both signature and ratification, in the period between signature and ratification, states' domestic constitutions may provide for internal domestic conditions to be fulfilled before states move to ratify or accede to a treaty. The South African Constitution provides for certain categories of treaties to be put before Parliament for approval *before* ratification or accession, so that Parliament may decide whether domestic action is necessary, such as updating legislation.[11] Certain other categories of treaties must be put before Parliament for approval by resolution *after* ratification or accession.[12] If any organ of state acts in contravention of the international obligations that the treaty in question imposes, another state party may hold the defaulting state responsible in the relevant international

[4] See, for an up to date explanation of consent to be bound and the various expressions that it may take, Malgosia Fitzmaurice & Panos Merkouris, Treaties in Motion: The Evolution of Treaties from Formation to Termination (CUP 2020) at 96-120.

[5] In some treaties, signature itself is an expression of consent to be bound to the broad objectives as well as specific provisions of the treaty, while others require signature *and* ratification to bind parties to specific provisions of the treaty. In circumstances where treaties require both signature and ratification, the international legal effect of signature differs from ratification and accession. Where a state signs a treaty, it is signalling its consent to be bound by the broad objectives of the treaty. The signature creates a *limited* international obligation upon the state (pending ratification) not to undertake acts that undermine or frustrate the treaty's broad aims. See Articles 10 and 18, VCLT.

[6] Arts.2 (1) (b), 14 (1) and 16, VCLT. Ratification and accession have the same international legal effect – that it *binds* the state internationally not only to the broad objectives of the treaty but also to the specific provisions of the treaty. This is subject to any reservations that the state makes to explicitly limit its consent to be bound to the treaty as detailed in Arts.2 (1) (d) and 19-23 of the VCLT.

[7] Arts.2 (1) (b), 14 (2), 15 VCLT. The Vienna Convention on the Law of Treaties sets out the rules by which treaties are to be governed in international law. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 (VCLT).

[8] Section 231(1), Constitution.

[9] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC). ('Law Society')

[10] Article 26, VCLT. Anthony Aust, *Pacta Sunt Servanda*, Max Planck Encyclopedia of Public International Law (February 2007), available at http://opil.ouplaw.com (outlining the customary international law principle of *pacta sunt servanda*, which means that agreements must be honoured in good faith).

[11] Section 231(2), Constitution.

[12] Section 231(3), Constitution.

tribunal on the international plane.[13]

This section is limited to mapping the network of treaties that internationally *bind* South Africa in the above ways. I will turn to the domestic effect that these binding treaties have in the subsequent sections.

A. *Copyright Treaties*

South Africa is party to several treaties on copyright. These treaties impose obligations upon South Africa to pass legislation to create and regulate copyright, and enable South Africa to exclude certain works and uses of works from the ambit of copyright.

The Berne Convention is the oldest multilateral treaty on copyright, dating back to 1886. South Africa is party to the Berne Convention,[14] obliging South Africa to create a domestic copyright regime that is in accordance with its obligations under this Convention so that the works of all countries that are party to the Convention are treated similarly. South Africa passed the Copyright Act 98 of 1978 to give domestic effect to the most recent revision of the Berne Convention (the Paris Act, 1971).[15] The Berne Convention *permits* member states to statutorily exclude a number of uses from the ambit of copyright– "illustrations […] for teaching" being one of them.[16] In fact, the Copyright Act 1978 uses identical language of the Berne Convention in its provision excepting the use of works under copyright for

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[13] A state would do this by ensuring that the claim satisfies the ingredients outlined in the the Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at http://www.un.org/law/ilc) adopted by the General Assembly, 8 January 2008, A/RES/62/61. See generally, James Crawford, *State Responsibility*, Max Planck Encyclopedia of Public International Law (September 2006), available at http://opil.ouplaw.com (outlining the status of the Articles of State Responsibility and their application and content).

[14] As a former colony, the Berne Convention previously applied to the territory of present-day South Africa through the United Kingdom's application in 1887. The erstwhile Union of South Africa deposited an instrument of continued application of the Berne Convention in 1928. The Berne Convention underwent several revisions, of which the erstwhile Union of South Africa ratified the Brussels Act in 1950, and the succeeding Republic of South Africa (the apartheid state) acceded to the Paris Act in 1974. Although apartheid South Africa made certain reservations to the Paris Act, by virtue of present-day South Africa's membership of the World Trade Organisation and consequent accession to the TRIPS Agreement, the substantive provisions of the Paris Act of the Berne Convention are applicable to present-day South Africa. South Africa is thus bound by the Berne Convention. The only reservation that continues to remain is South Africa's reservation to the International Court of Justice's jurisdiction to resolve disputes regarding the Berne Convention. See South Africa, Berne Convention: Treaties and Contracting Parties, WIPO, available at: https://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1026C.

[15] Republic of South Africa House of Assembly Debates, 31 March 1978, vol 77, cols 3638, 3644, 3646 (pointing to references by Members of Parliament explaining the purpose of the Copyright Act 98 of 1978 as incorporating the most recent revisions of the Berne Convention. At the time, it was a Bill passing through the House of Assembly).

[16] Article 10(2), Berne Convention.

"illustrations […] for teaching". Moreover, the Berne Convention permits states parties to legislate to exclude other uses, as long as they fulfil three criteria – that they are a certain special case; that they do not interfere with the normal exploitation of the work; and that they do not unreasonably prejudice the legitimate interests of the author.[17]

South Africa has not deposited a notification with WIPO regarding the application of the Berne Appendix. In any event, the Appendix to the Berne Convention has been widely documented[18] to be 'unrealistic',[19] a 'dead letter',[20] an 'abject failure'[21] and have effected "no real improvement in access to copyright materials".[22]

As a founding member of the World Trade Organisation (WTO), South Africa is automatically party to the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.[23] The TRIPS Agreement incorporates the substantive provisions of the Berne Convention.[24] As a result, South Africa is bound by both the substantive provisions of the Berne Convention and the TRIPS Agreement. The TRIPS Agreement obliges South Africa to

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[17] Article 9(2), Berne Convention. Known as the three-step test.

[18] See Daniel J Gervais, "Appendix 2 The Berne Appendix unpacked" in *(Re)structuring Copyright: A Comprehensive Path to International Copyright Reform*, Cheltenham, UK: Edward Elgar Publishing, 2017 (explaining the Berne Appendix and its effectiveness). See also Susan Isiko Štrba,"Special Legal Regimes for Access to Education in Developing Countries". *International Copyright Law and Access to Education in Developing Countries*. Leiden, The Netherlands: Brill | Nijhoff, 2012 (describing the circumstances around the conclusion of the Berne Appendix as one reason for its ineffectiveness, amongst others).

[19] Alberto Cerda Silva, 'Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright', PIJIP Research Paper no. 2012-08 American University Washington College of Law, Washington, D.C. (analysing the Berne Appendix and pointing to where and how the Berne Appendix has failed in enabling the dissemination of educational materials in developing countries, as well as suggesting the way forward for a new instrument that better addresses the needs of developing countries).

[20] Victor Nabhan, WIPO Standing Committee On Copyright And Related Rights, Study On Limitations And Exceptions For Copyright For Educational Purposes In The Arab Countries 56-57 (2009), available at www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_6.doc (analysing Arab countries' responses to the Berne Appendix and reasons for its disuse).

[21] Alan Story, Study on Intellectual Property Rights, the Internet, and Copyright, Study Paper 5, Commission on Intellectual Property Rights, available at: http://www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf (focusing on access to educational materials under copyright in the 50 poorest and least developed countries as identified by the WTO)

[22] Peter Drahos, Developing Countries and International IP Standard-Setting, Study Paper 8, Commission on Intellectual Property Rights, available at: http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf (discussing the extent of participation of developing countries in international intellectual property lawmaking and its impact on the law).

[23] TRIPS is Annex 1C of the Agreement Establishing the World Trade Organisation, available at: 'WTO Legal Texts', (*WTO Documents, Data, Resources*) https://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs.

[24] Article 9, TRIPS Agreement. The TRIPS Agreement explicitly incorporates Articles 1-21 of the Berne Convention into its text.

make available effective enforcement procedures for copyright (among other intellectual property rights) and remedies for infringement.[25] Moreover, the TRIPS Agreement reiterates the three-step test stating that exceptions and limitations should be confined to certain special cases that do not interfere with the normal exploitation of the work and that do not unreasonably prejudice the legitimate interests of the rights holder.[26] Additionally, when giving domestic effect to their obligations under the TRIPS Agreement, member states are empowered to take measures that protect the public interest (including socio-economic and technological development).[27] In legislating pursuant to the TRIPS Agreement, member states must ensure that the objectives outlined in the Agreement are met – technological innovation, benefiting both creators and users to support socio-economic welfare and ensuring that there is a balance of rights and obligations.[28]

South Africa ratified the World Intellectual Property Organisation Convention in 1974, thereby becoming a member of WIPO. Although South Africa signed the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty in 1997, it is only as recently as 28 March 2019 that the Parliament tabled and approved the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the Beijing Treaty on Audiovisual Performances under section 231(2) of the Constitution.[29] South Africa has not yet deposited its instrument of ratification in respect of any of these treaties. I return to this point in the next section as this is in connection with the CAB.

Most recently, although South Africa played a crucial role in the negotiations leading up to the adoption of the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled ('Marrakesh VIP Treaty'), South Africa is not yet party to the treaty. The delegate for South Africa clarified during the negotiations of the Marrakesh Treaty that

> '[t]his treaty will have a meaningful impact on the lives of millions of blind and visually impaired persons both in the developed and developing world […] South Africa is embarking on the process of reviewing its copyright legislation and will accede to the Treaty when all internal processes are concluded'.[30]

The Copyright Amendment Bill, through its provisions on making

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[25] Part III, TRIPS Agreement.

[26] Article 13, TRIPS Agreement.

[27] Article 8, TRIPS Agreement.

[28] Article 7, TRIPS Agreement.

[29] 'Parliament Passes 11 Bills', (*Parliament of South Africa*, 28 March 2019) <https://www.gov.za/speeches/parliament-passed-11-bills-today-28-mar-2019-0000> accessed on 10 May 2019.

[30] As quoted in the 'Briefing Paper, Marrakesh Treaty Implementation Guide South Africa', (*UCT IP Unit*, May 2015) <http://ip-unit.org/wp-content/uploads/2015/05/IPUnit_MarrakeshGuideSA1.pdf> accessed on 15 May 2019

accessible copyrighted works for those with print and visual disabilities amongst others, is intended to bring South Africa's domestic legislative framework in line with the Marrakesh VIP Treaty in order to facilitate ratification. The Marrakesh VIP Treaty seeks to reverse historical neglect of persons with visual and print disabilities in respect of creating and making accessible works under copyright. It invokes the UN Convention on the Rights of Persons with Disabilities in its Preamble and imposes a set of obligations upon states to enable the format shifting of works as well as cross-border exchange of such works in order to facilitate access for persons with visual and print disabilities.[31]

Before moving to the next set of obligations, a short overview of the three-step test and its relationship with other provisions in international copyright law relevant to access to educational materials is apposite. The Berne Convention, TRIPS Agreement and WIPO Internet Treaties all encapsulate variants of the three-step test.[32] The Berne Convention, as outlined above, also includes a specific exception with a *different* test for uses that fall within the definition of "illustrations…for teaching" that must be compatible with "fair practice" and "to the extent justified by the purpose".[33] Where exceptions and limitations fall outside of that definition, the three-step test is the applicable test.[34] In any event, even if it is arguable that the three-step test has blanket application across all legislated exceptions,[35] the interpretation of the three-step test is far from settled in international law.[36]

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[31] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013 available at: https://www.wipo.int/marrakesh_treaty/en/.

[32] Andrew F. Christie and Robin W. Wright, 'A Comparative Analysis of the Three-Step Tests in International Treaties', (2014) IIC - International Review of Intellectual Property and Competition Law, Vol. 45, No. 4, 2014, U of Melbourne Legal Studies Research Paper No. 715 (outlining the similarities and differences in the three-step test outlined across the international copyright treaties).

[33] Article 10(2), Berne Convention. See also, Raquel Xalabarder, Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel, WIPO Standing Committee on Copyright and Related Rights, SCCR/19/8, Nineteenth Session, Geneva, December 14-18, 2009 (making the point that the educational exceptions to copyright have existed since the very inception of the Berne Convention in 1886, only the language has varied).

[34] Article 9(2), Berne Convention. See also, Expert Report of Professor Lionel Bently in the case *of Cambridge University Press and Others v. Rameshwari Photocopy Services and Another*, CS(OS) No 2439 of 2012, on file with author at 52-53 (endorsing this interpretation of the Berne Convention and the TRIPS Agreement in respect of educational exceptions).

[35] See the argument also traversed in Edson Beas Rodrigues Jr, *The General Exception Clauses of the TRIPS Agreement: Promoting Sustainable Development* (Cambridge University Press 2012). (particularly the chapter focusing on the three-step test in Brazil).

[36] See, for a sample, Patrick Goold, 'The Interpretive Argument for a Balanced Three-Step Test? (2017) American University International Law Review', 33(1), pp. 187-230. (outlining the various possibilities available in interpreting the three-step test); Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law,' (2013). PIJIP Research Paper no. 2013-04 (explaining the various interpretations of the three-step test in the WIPO Copyright Treaty

What is clear, however, is that it may be interpreted in several ways, in line with the Vienna Convention on the Law of Treaties,[37] taking into account the object and purpose of the version being interpreted in the context of the treaty as well as surrounding context such as other international obligations and domestic priorities.[38] Moreover, it is not necessary for the language of the three-step test to be directly imported into domestic laws for a limitation pursuant to it to be valid.[39]

The referral of the Copyright Amendment Bill back to Parliament by the President specifically raises concerns regarding the Bill's compliance with the WCT, the WPPT and the Marrakesh VIP Treaty. In the analysis that follows I consider whether these concerns are well-founded and consider the implications of these treaties for Parliament in drafting the CAB.

B. *Human Rights Treaties*

Since copyright is fundamentally a restriction on the free flow of information, it inevitably attracts the application of international human rights law. The international human rights law treaties have tended to be neglected in the debates concerning the CAB. Opponents of the Bill tend to ignore them entirely, and the President did not accord them their proper interpretation as evinced in the letter referring the CAB back to Parliament.[40] As I explain, these treaties map closely onto the Bill of Rights and therefore must be given greater weight (than those treaties that do not map onto the Bill of Rights) when Parliament carries out its law-making function. I explain this significance in the section on the greater normative imperative provided by international human rights law in the South African context in my next section.

Although I focus only on the right to education in the rest of this paper,

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and the Berne Convention, as well as the WTO's interpretation of the three-step test in Panel Rep. of 15 June 2000, United States-Article 110 (5) of the US Copyright Act, WT/DS160/R);

[37] See infra Part II of this paper explaining the rules of interpretation of international treaties.

[38] Most recently, the World Trade Organisation in the Plain Packaging Litigation (Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging - Panel report - Action by the Dispute Settlement Body WT/DS467/23, 30 August 2018) held that the TRIPS Agreement must be read in light of Article 8, which enables the pursuit of societal objectives to limit the scope of trademark protection under the Agreement. In the Plain Packaging litigation, the societal objective was public health. Importantly, the decision interpreted the World Health Organisation's Framework Convention on Tobacco Control to arrive at this conclusion. This has implications for the interpretation of the limitations on copyright and other intellectual property protection under the TRIPS Agreement in light of societal objectives (such as education, for instance).

[39] See Christophe Geiger, et al. 'Max Planck declaration on a balanced interpretation of the "three-step test" in copyright law,' IIC 39.6 (2008): 707-713 (outlining the regulatory functions of the three-step test internationally, nationally and regionally).

[40] See Part II.B of this paper for a detailed outline and analysis of this aspect of the Referral Letter.

the analysis is replicable for other human rights obligations that may be relevant.[41] I briefly explore them below.

1. Right to education

South Africa is party to the core treaties in international human rights law that guarantee the right to education. At the heart of the international human rights law framework on access to educational materials is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which comprehensively guarantees the right to education.[42] Upon the approval of Parliament, South Africa ratified the ICESCR in 2015.[43] The right to education under the ICESCR includes access to educational materials as an integral part of the right.[44] The various dimensions of the right to education

[41] Since copyright restricts the free flow of literary, artistic, musical and dramatic works amongst others, the rights in respect of freedom of information and expression, culture (since cultural output across communities is expressed through literary, artistic, musical and dramatic works amongst others), education (since curricula rely on learning materials such as books, journal articles etc.), the protection of authors' moral and material interests (since copyright purports to protect authors) and access to the benefits of science and technology (since these benefits are in the form of information that may be automatically subject to copyrighted), as well as the right to equality (since all people must be able to access copyrighted materials equally, irrespective of protected characteristics such as disability, race etc.) among others are all implicated.

[42] Article 13, ICESCR. South Africa is not a party to the Optional Protocol to the ICESCR. As a result, complaints by individuals or NGOs cannot be filed at the Committee on Economic, Social and Cultural Rights. For a commentary on Article 13, see Klaus D. Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Martinus Nijhoff, 2006).

[43] However, South Africa also deposited a declaration that 'the Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13 (2) (a) and Article 14, within the framework of its National Education Policy and available resources'. The declaration is controversial as it seems to derogate from the established position that the right to basic education is immediately realisable under South African law. Regardless of the reservation the right to basic education has been immediately realisable under the Bill of Rights since it came into force so it is difficult to see what the point of the reservation might have been. However, the declaration significantly does not make any reservations regarding the *content* of the right. See Faranaaz Veriava, *Right to Basic Education* (Forthcoming, JUTA, 2019) at 48 (explaining the effect of the declaration and its correct interpretation in light of the obligations present in the Bill of Rights).

[44] Although "educational materials" does not find explicit mention in the text of Article 13, its crucial role as an input in realising the right to quality education for all has been confirmed by various Concluding Observations of the CESCR Committee in respect of the right to education under Article 13. See, amongst others, Concluding Observations in respect of: *Guinea*, 30 March 2020, E/C.12/GIN/CO/1 at 47(d) (noting the lack of teaching materials as one of the key reasons for poor quality of education); *Niger*, 4 June 2018, E/C.12/NER/CO/1 at 58(c) (noting the lack of teaching materials as one of the key reasons for poor quality of education particularly in rural areas); *Pakistan*, 23 June 2017, E/C.12/PAK/CO/1 at 79(e) (linking lack of learning materials to poor quality of education); *Burkina Faso*, 12 July 2016, E/C.12/BFA/CO/1 at 49(c) (noting the lack of teaching materials and poor quality of education); *Second Periodic Report of Honduras*, 11 July 2016, E/C.12/HND/CO/2 at 56(c) (recommending that the state take necessary measures to allocate funds towards teaching materials); the *Second Periodic Report of Lebanon*, 24 October 2016,

and their corresponding obligations under the ICESCR are encapsulated by the 4-A framework (availability, accessibility, acceptability and adaptability).[45] Cumulatively, this underscores the duty upon states to ensure that education (including educational inputs such as educational materials) is made accessible and available to all people and groups without discrimination. This entails an equality and non-discrimination enquiry, which South African courts have developed in much detail,[46] particularly in respect of discrimination on the basis of protected characteristics such as disability[47] and socio-economic status,[48] for instance. Where the education in

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E/C.12/LBN/CO/2 at 4(c) and (h) (noting the fulfilment of obligations of the state by distributing free textbooks and targeting and eliminating discriminatory textbooks); *Combined second and third periodic reports of Tajikistan*, 25 March 2015, E/C.12/TJK/CO/2-3 at 35 (noting that the lack of teaching materials is one of the reasons for poor quality of education); *Tajikistan*, 25 March 2015, E/C.12/TJK/CO/2-3 at 37 (noting the lack of textbooks in minority languages and recommending the state to take necessary measures); *Montenegro*, 15 December 2014, E/C.12/MNE/CO/1 at 25(b) (recommending that the state provide free textbooks at the primary education level); *Tanzania*, 13 December 2012, E/C.12/TZA/CO/1-3 at 26 (noting that textbooks form a part of the indirect costs in primary education and are in any event inadequately available and recommending that the state take steps to improve the availability of educational materials); *Turkmenistan*, 13 December 2011, E/C.12/TKM/CO/1 at 25 (noting the acute shortage of teaching materials and recommending that the state take measures to improve access to textbooks); *the Former Yugoslav Republic of Macedonia*, 15 January 2008, E/C.12/MKD/CO/1 at 28, 47-8 (noting the lack of textbooks in minority languages, and recommending state subsidies for textbooks and provision of minority language textbooks); *Benin*, 9 June 2008, E/C.12/BEN/CO/2 at 48 (recommending that the state take measures to fund the provision of textbooks); *Hungary*, 16 January 2008, E/C.12/HUN/CO/3 at 50 (recommending that the state allocates adequate funding towards the free provision of textbooks for disadvantaged communities); *Ukraine*, 4 January 2008, E/C.12/UKR/CO/5 at 54 (recommending that the state take special measures to subsidise textbooks and other educational tools for disadvantaged communities); *Solomon Islands*, 19 December 2002, E/C.12/1/Add.84 at 14 (noting the unaffordability of textbooks and teaching materials as a reason for inaccessibility of primary education); *Republic of the Congo*, 23 May 2000, E/C.12/1/Add.45 at 23 (noting the severe shortage of teaching materials and recommending the state funds teaching materials); *Saint Vincent and the Grenadines*, 2 December 1997, E/C.12/1/Add.21 at 27 (noting "with concern" the lack of teaching materials at the primary school level); *Mexico*, 5 January 1994, E/C.12/1993/16 at 8 (noting with approval the state's publication and distribution of textbooks but pointing out inadequacies of the governmental programme).

[45] Katarina Tomasevski, *Human rights obligations: making education available, accessible, acceptable and adaptable*, Right to Education Primers No. 3, available at: https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf (publication by the UN Special Rapporteur on Education, giving content to the four aspects of the obligations stemming from the right to education); UN Economic and Social Council, 'General Comment No. 13: The Right to Education (Art. 13 of the Covenant)' (1999) General Comment E/C.12/1999/10. at para 6.

[46] *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300.

[47] Caroline Ncube writes on the Marrakesh Treaty and equality in 'Crucial Role of Library', Pretoria News, 2015 available at: http://infojustice.org/wp-content/uploads/2015/03/Caroline-Ncube-Op-ed-Marakesh-Treaty.pdf

[48] Social Justice Coalition and Others v Minister of Police and Others (EC03/2016) [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC).

question is mandated to be free, '[b]y way of illustration, a State must […] fulfil (provide) the availability of education by […] providing teaching materials'.[49] Moreover, where the education in question is not mandated to be free, the state bears a duty to make it *affordable* to all at all levels.[50] This includes taking into account indirect costs, such as costs of educational materials and accessibility in respect of distance learning. In doing so, the state's duty extends to ensuring that education is culturally sensitive and responsive to technological and societal changes.[51]

In addition, South Africa ratified the UN Convention on the Rights of the Child in 1995, that provides for making education free and available to all children on the basis of equal opportunity.[52] South Africa has also ratified the UN Convention on the Rights of Persons with Disabilities in 2007, that obliges states party to realise the right of persons with disabilities to 'inclusive education' without discrimination.[53] Having ratified the UN Convention on the Elimination of All Forms of Discrimination against Women in 1995, South Africa bears specific obligations in respect of ensuring equal access to education for women and girl children.[54] South Africa has also ratified the UNESCO Convention against Discrimination in Education in 2000,[55] the first international instrument to extensively detail the content of the right to education. States party to this Convention undertake the obligation of promoting equality of opportunity in education and prohibit discrimination. South Africa has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1998 obliging the state to ensure that education is free from racial prejudices and serves to combat racism.[56]

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[49] UN Economic and Social Council, 'General Comment No. 13: The Right to Education (Art. 13 of the Covenant)' (1999) General Comment E/C.12/1999/10 50.

[50] ibid. at para 6.

[51] See Klaus D Beiter, 'Extraterritorial human rights obligations to "civilize" intellectual property law: Access to textbooks in Africa, copyright, and the right to education', J World Intellect Prop. 2020; 23: 232– 266 at 246-251 available at: https://doi.org/10.1111/jwip.12150 (for an overview of the obligations incumbent upon states in respect of access to educational materials under the ICESCR, both territorial and extra territorial).

[52] Articles 28, 29, Convention on the Rights of the Child. As with the ICESCR, South Africa has monitoring obligations in respect of the UNCRC, where it must deposit country reports with the respective human rights treaty body.

[53] Article 24, UN Convention on the Rights of Persons with Disabilities. Moreover, since South Africa has ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities in 2007, individuals and NGOs may submit complaints to the CRPD Committee for the committee's consideration. This is in addition to the monitoring and reporting obligations outlined in ibid.

[54] Article 10(c), UNCEDAW. South Africa has ratified the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in 2007, enabling individuals and NGOs to submit individual complaints to the CEDAW Committee.

[55] 'UNESCO Convention Against Discrimination in Education' 429 United Nations Treaty Series 93.

[56] Article 7, ICERD. South Africa has deposited a declaration pursuant to Article 14 of

South Africa's regional obligations reinforce the comprehensive right to education at all levels outlined above. South Africa signed the African Charter on the Rights and Welfare of the Child (widely known as the 'Children's Charter') in 1997 and ratified it in 2000. The Children's Charter provides for a comprehensive right to education for children and obliges states parties to take positive steps to ensuring access to education for all sectors of society, particularly to those who have been structurally disadvantaged.[57] Moreover, South Africa has ratified the African Youth Charter in 2009, which mandates states parties in particular, to take necessary steps to ensure that education is of good quality irrespective of the forms that it takes, and to minimise the "indirect costs" that accrue from pursuing education.[58] South Africa has ratified the Banjul Charter in 1996,[59] which requires states parties to ensure that every individual has access to education and, through teaching and education, for everyone to know their rights and assert them.[60]

2. Other human rights

Outside of the right to education, South Africa is also party to those treaties protecting the right to free flow of information and freedom of expression. The International Covenant on Civil and Political Rights, which protects the freedom of expression including the right to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of […] choice," was signed by South Africa in 1994 and ratified in 1998.[61] This right contains within it restrictions that may be imposed (1) by law, (2) if necessary, and only for the following specific reasons enumerated in the

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the ICERD in 1998 enabling individuals to file complaints with the CERD Committee.

[57] It also provides for the creation of the African Committee of Experts on the Rights and Welfare of the Child, which is empowered to hear complaints from individuals and non-governmental organisations in respect of violations of children's rights. See Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

[58] Article 13, African Youth Charter. As I have explained in the preceding section on international human rights obligations incumbent upon South Africa, textbook costs form a part of indirect costs.

[59] Articles 17, 25, Banjul Charter. South Africa ratified the African Charter on Human and Peoples Rights ('Banjul Charter') in 1996, which guarantees the right to education to all individuals under Article 17, African Charter on Human and Peoples' Rights (Banjul Charter), adopted on 27 June 1981 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

[60] South Africa acceded to the Protocol to the Banjul Charter which established the African Court on Human and Peoples' Rights (now the African Court of Justice and Human Rights), enabling other states parties, the African Commission, as well as inter-governmental bodies to bring human rights disputes against it in respect of the right to education amongst other rights in the Charter. South Africa has not deposited a declaration under Article 5(3) of the Protocol, and so complaints by individuals may not be filed.

[61] Article 19, ICCPR.

ICCPR: "respect of the rights or reputations of others" and "protection of national security or of public order (*ordre public*), or of public health or morals".[62] The Banjul Charter, acceded to by South Africa, also protects the right to receive and impart information freely as well as the freedom of expression.[63] The African Youth Charter, ratified by South Africa, guarantees the right of young people to speak freely and disseminate and receive information – subject to existing legal frameworks.[64]

South Africa is party to those treaties guaranteeing the right to cultural participation and development. The ICESCR particularly protects the right of every person to participate in cultural life[65] and to enjoy the benefits of progress in science and technological developments.[66] These benefits often take the form of knowledge and information, communicated through books, articles and other copyrighted materials. The ICESCR further qualifies the duties incumbent upon states parties that stem from this right, to include taking those steps that are necessary to conserve, develop and diffuse science and culture.[67] The Banjul Charter, to which South Africa is party, guarantees the right to economic, cultural and social development to all peoples, as well as imposes an obligation upon states parties to ensure the exercise of this right.[68] The African Youth Charter guarantees the same right, and qualifies the duty of the state to specifically encourage the widespread "production, exchange and dissemination of information" nationally and internationally, and to provide access to information for the development of young people's full participation in society.[69]

South Africa is party to the ICESCR which also guarantees the right of authors to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production".[70] This right has been explicitly *distinguished* from international copyright and intellectual property law by the Committee on Economic Social and Cultural Rights in its General Comment detailing the scope, content and duties related to this right.[71] In explaining this difference, the General Comment highlights that

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[62] Article 19 (3)(a) and (b), ICCPR. Moreover, in 2002, South Africa acceded to the Optional Protocol which enables individuals to file communications in respect of violations of the International Covenant on Civil and Political Rights by the state at the Human Rights Committee.

[63] Article 9, African Charter on Human and Peoples' Rights.

[64] Article 4, African Youth Charter.

[65] Article 15(1)(a), ICESCR.

[66] Article 15(1)b), ICESCR.

[67] Article 15(2), ICESCR.

[68] Article 22, African Charter on Human and Peoples' Rights.

[69] Article 10(3), African Youth Charter.

[70] Article 15(1)(c), ICESCR.

[71] 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 (article 15, paragraph 1(c) of the Covenant), E/C.12/GC/17 (12 January 2006) at 1-3, 10.

> Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments.[72]

In respect of the corresponding duty incumbent upon the state in giving effect to this right, the General Comment clarifies that the other rights present in the ICESCR (including the rights to education, participation in cultural life, benefiting from developments in science and technology) must not be obstructed. Further that this duty includes the obligation on the state party to prevent "unreasonably high costs" for accessing educational materials, amongst other public goods.[73] The right recognised by Article 15 of ICESCR is a human right so unlike copyright it cannot be enjoyed by a corporation nor can it be transferred from or alienated by its human author. No other human rights treaty that South Africa is party to guarantees this right.

Finally, South Africa is bound by all of the above treaties to give effect to the above rights *equally* to all people and without discrimination on the basis of protected characteristics such as race, gender, disability amongst others.[74] This is particularly important where certain groups experience relative disadvantage due to the lack of access to copyrighted materials thereby placing their enjoyment of the above rights in jeopardy. The Marrakesh VIP Treaty outlined in the previous section identifies the particular disadvantage that persons with visual and print disabilities experience in respect of accessing such materials and makes the crucial connection with the right to equality and non-discrimination of persons with disabilities as guaranteed by the UN Convention on the Rights of Persons with Disabilities.[75]

II. DOMESTIC APPLICATION OF TREATY OBLIGATIONS IN SOUTH AFRICA

In order to determine the domestic effect of the above international treaty obligations binding on South Africa, I first outline the constitutional provisions on relationship between international and domestic law. I limit my analysis to the constitutional provisions in respect of treaties. I then turn to the specific effect that these provisions have on the above treaties. In my analysis, I explain how the Bill of Rights acts as a magnet for policy and interpretive choices made by all organs of state.

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[72] Ibid at 2.

[73] Ibid at 35.

[74] Preamble, Articles 2(2), 3, 13(2)(c), ICESCR; Articles 2,3,19, African Charter of Human and Peoples Rights; Preamble, Article 2, 10(1), 11(2)(c), 13(4)(f), 23, 24, African Youth Charter; Article 3, 11(3)(d), 12, Children's Charter.

[75] Article 5, UNCRPD. South Africa has ratified the UNCRPD as mentioned previously.

At the outset, it is important to recall what it means for a treaty to *bind* South Africa. The consequence of South Africa being bound at international law is that other states may seek to hold South Africa responsible for alleged lack of compliance or breaches of treaty obligations in an international forum having jurisdiction in the matter.[76] An aggrieved state would need to first establish on the facts that South Africa has committed an internationally wrongful act (breach of its international treaty obligations, for instance) and that this act was attributable to the state. The international forum seized with resolving the dispute will make a determination on this, as well as the implications of such a finding (in terms of reparations to the injured state in a state-state dispute, for instance). The exact nature of this determination will depend on the forum and the dispute. This may extend to individuals, in respect of holding South Africa responsible for the domestic fulfilment of their international obligations under human rights treaty bodies in the UN Treaty Body System. This aspect is outside the scope of the paper. Rather, I focus solely on the domestic legal effect of these obligations on Parliament in respect of legislating the CAB.

What is the effect of these binding treaty obligations within the domestic South African legal system? The operation of law (and law-making) on the domestic plane is conditioned and constrained by the Constitution. The Constitution contains within it the "cornerstone of democracy" – the Bill of Rights.[77] For this reason, the effect of treaty obligations may be categorised into (1) obligations that map onto the Bill of Rights, and (2) those that do not. This importantly does not affect the binding nature of the sum of obligations on the international plane. South Africa *remains* bound to fulfil *all* its international obligations in good faith on the basis of *pacta sunt servanda*.[78] Rather, in domestically implementing its international obligations, South Africa is *required* to fulfil those international obligations that map onto the Bill of Rights.[79] This is what I term 'the Bill of Rights as a magnet'. In respect of the second category of obligations, those that do not map onto the Bill of Rights, South Africa is *permitted* a wide amplitude of policy-making space to fulfil its obligations subject, of course, to constitutional constraints. These constraints include the Bill of Rights. I explain, in detail, how the provisions on international treaty obligations in the Constitution structures the relationship that international law has with domestic law in the South African context in the next section.

At this stage it is important to zoom back out to the international plane. The effect of the above analysis is not to say that South Africa can or should, at any point in time, use its domestic law to justify a *breach* of international

[76] As described in supra note 14.

[77] Section 7(1), Constitution of South Africa, 1996 ('Constitution').

[78] As described in supra note 11.

[79] Section 7(2) and 8(1), Constitution. As I will go on to show, both *Glenister II* and *Law Society* draw on s 7(2) to pin down the duty of the state with international obligations playing an interpretive role in realising the rights in the Bill of Rights.

obligations.[80] Rather it is to acknowledge the inherently pluralistic nature of international obligations and international law's ability to generate heterogeneous norms depending on the unique cross-regime sum of international obligations of a particular state.[81] In other words, South Africa's all-things-considered sum of binding treaty obligations may generate a different normative weighted outcome from say, the US or Canada.[82] This inevitably means that international law is *not* implemented in the same exact way across the world – *nor should it be*,[83] as international treaties are often the product of political consensuses and compromises, and rely on particular local policies for effective implementation.[84] Moreover, South Africa is an active actor in international law-making and interpreting, and not just a passive recipient of international law. The implementation of international obligations must not be understood in a top-down manner as has been taking place in the discourse around the CAB's compliance with the three-step test of the TRIPS Agreement, for instance (as if the meaning of the three-step test

[80] Article 27, VCLT prohibits this. Article 46, VCLT is unlikely to be helpful as it finds very limited application. See Dörr, Oliver and Schmalenbach, Kristen (eds), 'Article 27', *Vienna convention on the law of treaties : a commentary* and 'Article 46' in *Vienna convention on the law of treaties : a commentary* (Second edition, Springer) for an explanation of the scope of Article 46 and its interaction with Article 27.

[81] See International Law Commission, Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Analysis (A/CN.4/L.682) (13 April 2006) at 410-480 (outlining the principle of harmonization or 'systemic integration' – that the sum of international obligations incumbent upon a state at the time of interpretation is relevant and must be given weight – as underlying all international treaty obligations irrespective of their specialised nature). See also Margaret Chon, A Rough Guide to Global Intellectual Property Pluralism (November 16, 2009, Seattle University School of Law Research Paper No. 09-01, Available at SSRN: https://ssrn.com/abstract=1507343 (explaining how international intellectual property law contains within it heterogeneous actors and with them, heterogeneous possibilities) and Henning Grosse Ruse-Khan, The Protection of Intellectual Property in International Law (OUP, 2016) (particularly explaining the fragmentation of international law and its impact on intellectual property treaties).

[82] See Mirna Adjami, 'African Courts, International Law, and Comparative Case-Law: Chimera or Emerging Human Rights Jurisprudence' (2002) 24 Mich J Intl L 164 (analysing the different methods of interpretation of international obligations of states from national courts in selected African countries and highlighting the important role that local priorities play in particularising states' international legal commitments).

[83] See generally Luis Eslava and Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3(1) Trade L. & Dev. 103 (2011) at 115-121 (explaining the methodological shift that Third World Approaches to International Law articulates to recognising the problematic nature of the imposed universality of international law and advocating for a meaningful pluralism instead). For a comprehensive bibliography taking stock of this approach, see James Gathii Thuo, *The Promise of International Law: A Third World View* (June 25, 2020), Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law, available at SSRN: https://ssrn.com/abstract=3635509 (cataloguing the development of these approaches from 1996-2019).

[84] See for example, Dinah Shelton (ed), International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (OUP 2011).

is static and pre-determined).[85] In other words, the *meaning* of international obligations must first be determined before they are implemented on the domestic plane,[86] or alleged to be violated by another state in an international tribunal. This 'auto interpretation' of international law, recognises that states themselves are actors in *interpreting* international law,[87] in order to determine its domestic legal effect.

A. *Determining the meaning of a treaty provision*

In determining the meaning of international treaty obligations, the Vienna Convention on the Law of Treaties (VCLT) posits certain rules of interpretation that have been widely considered to be customary international law.[88] Rules of customary international law bind *all* states, as long as the ingredients of custom are satisfied – that there is evidence of widespread state practice and *opinio juris*, that is that states are acting in furtherance of this norm with the intention to be bound.[89] Since these rules apply to all states, in

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[85] See particularly in the area of international copyright law, Martin Skladany, Copyright's Arc (CUP 2020) (explicitly rejecting a one-size-fits all approach to copyright law and exceptions and limitations, and outlining the impact that strict copyright regimes has on human rights fulfilment in developing countries). See Andre Myburgh, *Advice on the Copyright Amendment Bill to the Portfolio Committee on Trade and Industry*, 1 October 2018, on file with author (for an instance of top-down, one-size-fits all approach to the three-step test to the CAB without taking into account any other international obligations or domestic priorities). See also Jonathan Band, *Analysis of Woods and Myburgh Comments on CAB*, (2020), Joint PIJIP/TLS Research Paper Series. 55. https://digitalcommons.wcl.american.edu/research/55 (in any event, disproving Woods and Myburgh's contention of CAB's incompatibility with IP treaties on their own terms).

[86] See Dire Tladi, 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 African Human Rights Law Journal 310-338 at 311 (explaining the correct methodology of interpretation of international law in the South African context).

[87] See André Nollkaemper, 'Grounds for the Application of International Rules of Interpretation in National Courts' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts* (Oxford University Press 2016). At 35 (analysing how domestic auto interpretation of international law influences the content of international law); See also Eyal Benvenisti and George W. Downs, 'The Impact of Domestic Politics on Global Fragmentation' in Between Fragmentation and Democracy (CUP 2017) at 56-65 (explaining the significant role that domestic courts play in resolving the fragmentation of international law).

[88]Dörr, Oliver and Schmalenbach, Kristen (eds), 'Article 31', *Vienna convention on the law of treaties : a commentary* (Second edition, Springer); Dörr, Oliver and Schmalenbach, Kristen (eds), 'Article 32', *Vienna convention on the law of treaties : a commentary* (Second edition, Springer). In addition, the ICJ has repeatedly held that the interpretation provisions of the VCLT are customary international law. See, for a sample of these cases: ICJ Arbitral Award of 31 July 1989 (Judgment) [1991] ICJ Rep 53 at para 48; Kasikili Sedudu Island (Botswana v Namibia) [1999] ICJ Rep 1045 at para 18; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) 26 February 2007 at para 16; Commentary to Conclusion One of the ILC's Draft Conclusion on Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties, Chapter IV of the ILC, 'Report on the Work of its Fifty-Sixth Session' (2013) at para 4.

[89] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark;*

practice, state organs (and other entities whose acts are attributable to the state) would be charged with employing these rules to interpret the breadth of treaty obligations so that they may domestically act in a way that enables the performance of states' obligations internationally. The exact contours of the domestic effect of this obligation is determined by the domestic law of that state.

Rules of customary international law are considered to be "law in the Republic" directly, without the need for any additional legislative step.[90] Any organ of state, when interpreting international treaties, *must* apply the VCLT rules of interpretation to determine the meaning of international treaty obligations – since such rules are to be treated as domestic law applicable in the circumstances.[91]

What are these rules? The VCLT rules of interpretation are fairly straightforward – that treaty provisions must be interpreted using the text, surrounding context and in light of the object and purpose of the treaty.[92] This overlaps substantially with existing domestic law on statutory and constitutional interpretation.[93] The VCLT defines context to include those treaties that have been concluded in connection with the treaty in question.[94] Along with the context, the VCLT requires the interpreter to take into account subsequent agreements regarding the interpretation and application of the treaty,[95] *the domestic implementation of states parties to the treaty* in the form of subsequent practice,[96] as well as the development of other international law norms that may be relevant in the circumstances.[97] The pluralistic meanings of international treaties are thus, in part, created by the varied

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Federal Republic of Germany v. Netherlands) , I.C.J. Reports 1969 at p.3, International Court of Justice (ICJ), 20 February 1969 contains a widely accepted statement on the ingredients of customary international law.

[90] Section 232, Constitution.

[91] Dire Tladi, 'Interpretation of Treaties in an International Law-Friendly Framework' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts* (Oxford University Press 2016). At 140 (analysing how South African courts have interpreted international law).

[92] Article 31(1), VCLT.

[93] Supra note 86 at 141. See also Lourens du Plessis, *Interpretation* in Woolman & Bishop, Constitutional Law of South Africa, available at: https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap32.pdf (providing an in-depth overview of constitutional interpretation in South Africa). See also, Michael Bishop and Jason Brickhill, 'In the beginning was the word' : the role of text in the interpretation of statutes', South African Law Journal, Volume 129, Issue 4, Nov 2012, p. 681 – 716 (explaining the constitutionally appropriate weight that must be given to the text of statutes in their interpretation). In any event, to the extent that these rules are *different* from existing statutory and constitutional rules of interpretation, they form a part of customary international law and are hence applicable at the level of domestic law.

[94] Article 31(2), VCLT.

[95] Article 31(3)(a), VCLT.

[96] Article 31(3)(b), VCLT.

[97] Article 31(3)(c), VCLT.

domestic interpretations and implementation of states parties to the treaty.[98] In other words, South Africa is a powerful actor who not only takes part in creating international treaties through the process of negotiation and adoption of treaties, but also contributes to constituting the meanings of treaties through its manner of interpreting them, and giving domestic effect to them as a reflection of its own socio-economic realities.[99] The CAB, as this paper goes on to show, is an instance of just that.

B. *Constitutional treatment of treaty obligations*

What are the *ways* in which South Africa may domestically give effect to treaty obligations? Where does the CAB fit in this analysis? The constitutional treatment of the above listed copyright and international human rights binding treaty obligations provide some answers. South Africa follows a hybrid system in respect of its international obligations – partly monist,[100] (i.e., the constitutional provisions on customary international law)[101] and partly dualist,[102] (i.e., the provisions on treaties, that I go on to discuss).[103] Constitutionally speaking, this means that treaties *do not* have any automatic, direct effect on domestic law except for certain circumstances outlined below.

There are three ways in which *binding* treaty obligations create *domestic* legal effects for South Africa: first, *through legislation* by Parliament; second, *directly*, through self-executing provisions of treaties approved by Parliament; and third, through the creation of a normative universe for the application of *interpretive injunctions* guiding courts to (1) prefer a reasonable interpretation of domestic legislation that is in accordance with international law over one that is not, as well as the injunction to (2) take into account international law in interpreting the Bill of Rights. I go on to

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[98] See Antonios Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts* (Oxford University Press 2016). (explaining the role of domestic courts in international meaning-making)

[99] Dire Tladi, Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 310-338 (making the point that in the Al Bashir case, the Supreme Court of Appeals in South Africa incorrectly underestimates its role in international legal meaning-making by asserting that only international adjudicatory bodies like the ICJ can contribute to changing customary international law).

[100] Where international law and domestic law are treated as a part of the same system, i.e., international law is directly applicable without any steps taken in domestic law.

[101] Section 232, Constitution.

[102] Where an additional step is required for international law to be applicable within domestic systems of law.

[103] See G Ferreira and A Ferreira-Snyman, The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism, (2014) PER: Potchefstroomse Elektroniese Regsblad, 17(4), 1471-1496 (explaining the distinction between monism and dualism and South Africa's hybrid position as outlined by the Constitution).

explain the constitutional scheme in s 231 below.

Section 231 reads as follows:

> 231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Section 231 recognises the central role of Parliament in fulfilling domestic conditions for South Africa to be internationally bound by treaties. There are two roles outlined for Parliament: first, *approving* South Africa's accession/ratification to a treaty as a *condition precedent* for the executive to deposit the relevant international instrument (s 231(2)), thereby enabling the treaty to bind South Africa internationally (where the treaty requires ratification); second, in respect of 'technical, administrative or executive' treaties that do not require accession/ratification and that have already been signed by the executive, Parliament plays a *confirmatory* role – s 231(3) mandates that such treaties be tabled before Parliament within a reasonable amount of time, after it has been signed.[104] In respect of treaties that already bound South Africa before the commencement of the Constitution of South Africa, 1996, the constitutional scheme provides for their continuance in s 231(5).

According to the constitutional scheme, s 231(4) provides for only two circumstances when the treaties in ss 231(2) and 231(3) can create directly applicable domestically enforceable obligations within South Africa. These are: first, where Parliament has 'domestically incorporated' any treaty[105]

[104] This explanation is derived from J Dugard & A Coutsoudis 'The Place of International Law in South African Municipal Law' in J Dugard, M Du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective* (2019) 74-81.

[105] Ibid at 83.

(from either category listed above – ss 231(2) or (3)), by enacting national legislation to give effect to it; and second, where certain provisions of treaties approved by Parliament under s 231(2) do not require additional legislation and are thus directly applicable (self-executing) as long as they are consistent with the Constitution and existing domestic law.[106] The consequence of incorporation of treaties under s 231(4) is that after the enactment of domestic legislation, the international agreement, to the extent that it is incorporated in domestic legislation, creates rights and obligations enforceable within domestic courts as ordinary domestic law.[107]

Within the scheme of s 231, this means that the treaties that exist outside of the subset of s 231(4) and within ss 231(2), (3) and (5) are *internationally* binding upon South Africa but do not form an independent source of rights and obligations for domestic enforcement. As I go on to show, their domestic legal effect is *interpretive*.

The interpretive injunctions are of two types. First, that courts are *obliged* to prefer an interpretation of a law that is consistent with customary international law[108] and South Africa's consolidated sum of *binding* international treaty obligations under ss 231(2), (3) and (5),[109] as long as this is a reasonable interpretation of that legislation.[110] Second, that international law, *must* be considered by any 'court, tribunal or forum' seeking to interpret the Bill of Rights.[111] What does *international law* in this context mean? The Constitutional Court has held that 'international law' in terms of s 39(1)(b) includes both binding as well as non-binding international law.[112] The obligation is not for courts to interpret the Bill of Rights *consistently* with all

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[106] The Constitutional Court had an opportunity to interpret the scope of self-executing treaties in *President of the Republic of South Africa and Others v Quagliani* [2009] ZACC 1, 2009 (4) BCLR 345 (CC), 2009 (2) SA 466 (CC) but chose not to do so. Rather the Court held that pre-existing Extradition Act formed "anticipatory enactment" of the Extradition Agreement between South Africa and the US. See, for a critique, N Botha 'Rewriting the Constitution: The ''strange alchemy'' of Justice Sachs, indeed!', (2009) 34 *South African Yearbook of International Law* 253 (critiquing the judgment in *Quagliani* on the grounds of its missed opportunity to clarify the content and scope of self-executing treaties).

[107] *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at 26.

[108] Provided that such customary international law is consistent with the Constitution and existing domestic law as per s 232, Constitution.

[109] Andreas Coutsoudis and Max du Plessis, 'We are all international lawyers now: the Constitution's international law trifecta comes of age', South African Law Journal, Volume 136 Number 3, 2019, p. 433 - 462 at 438.

[110] Section 233 reads as follows: "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[111] Section 39(1) reads as follows: "(1)When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."

[112] *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 at 35 discusses the analogous s 35(1) of the Interim Constitution.

binding and non-binding international law – rather, it is to *consider* all international law. This is distinct from s 233's interpretive injunction which obliges courts to prefer a reasonable interpretation of legislation that *complies* with binding international law.[113] In other words, the treaties in ss 231(2), (3) and (5) that are neither self-executing nor domestically incorporated under s 231(4), form the normative frame within which courts must interpret legislation.[114] Legislation must be interpreted to be within the normative frame described above.

III. BILL OF RIGHTS AS A MAGNET: THE CONSTITUTIONAL IMPERATIVE TO GIVE GREATER NORMATIVE WEIGHT TO HUMAN RIGHTS TREATIES

Human rights treaties, as listed in the previous section, to the extent that they map onto the Bill of Rights, have a *greater normative imperative* to be given effect to by Parliament and courts as opposed to treaties that do not map onto the Bill of Rights.[115] In essence, the Bill of Rights acts as a *magnet* for South Africa's binding international obligations. This is due to the Constitution's foregrounding of the Bill of Rights. CAB is an instance of Parliament taking this normative imperative seriously and should be recognised as such in respect of the relevant binding international human rights treaties. I go on to establish this below.

A. *Courts and international human rights law*

I deal with the obligation on courts first. How should courts apply human rights treaties? The interpretive propositions that emerged from the previous section are: (1) that in interpreting domestic law, courts are enjoined to choose an interpretation of legislation that is consistent with binding international law provided that it is a reasonable interpretation and (2) that in interpreting the Bill of Rights, courts are enjoined to consider international law, binding and non-binding. How then, should courts treat those *binding* treaties that map onto the Bill of Rights?

To answer this question, a third proposition is helpful:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit,

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[113] *S v Okah* 2018 (4) BCLR 456 (CC); 2018 (1) SACR 492 (CC) at 38. This interpretation was recently reiterated by *Law Society* at 5.

[114] Along with relevant rules of customary international law – but this aspect is not relevant to the current enquiry and hence outside the scope of this paper.

[115] For the full repertoire of constitutional opportunities available to Parliament to give effect to international human rights law, see Lilian Chenwi 'Using International Human Rights Law to Promote Constitutional Rights: The (Potential) Role of the South African Parliament' (2011) 15 Law, Democracy and Development 314 (outlining the various roles that international human rights law can play in Parliament's law-making including the one I have outlined in this paper).

purport and objects of the Bill of Rights.[116]

Courts have held repeatedly that when interpreting legislation, courts are enjoined to prefer the *most constitutional* interpretation – to select an interpretation of the domestic law that *best* complies with the Constitution and promotes the Bill of Rights.[117]

How do all three propositions fit together for the purposes of a court charged with interpreting the CAB against the international obligations that South Africa has undertaken in respect of copyright and human rights? Courts must first consider the range of reasonable interpretations that are available to them on the basis of the text of CAB. Then, they must map and determine the meaning of the international law that binds South Africa using the VCLT rules of interpretation, in order to apply s 233 and prefer the interpretation most consistent with binding international law. In the process of this enquiry, where binding international law maps onto the Bill of Rights, typically in respect of those international human rights treaties that South Africa has acceded to/ratified under s 231(2), (3) and (5), courts are doubly enjoined by s 233 *and* s 39(2), to prefer an interpretation that best promotes the spirit, purport and objects of the Bill of Rights.[118]

B. *Parliament and international human rights law*

I now turn to the obligations incumbent upon Parliament. Apart from fulfilling constitutional pre and post conditions for international treaty obligations to bind South Africa domestically, what role, if any, does the Constitution envision for international law to play in Parliament's law-making process? Does it matter if the obligations at issue are international human rights obligations? The Constitution provides for Parliament's law-making process to be triggered by the domestic incorporation of international treaties under s 231(4).[119] This is where Parliament determines whether additional legislation is necessary to make a binding international treaty enforceable in South African courts. In practice, in the course of carrying out the process of approval for those treaties before it that have been signed but not yet ratified / acceded, Parliament surveys the existing corpus of domestic law and triggers its law-making process if it deems necessary. In respect of CAB, the inadequacy of the domestic legal framework in addressing the lack of access of copyright materials to persons with disabilities was one of the reasons for the Bill, to bring South African law in line with the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who

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[116] Section 39(2), Constitution.

[117] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001* (1) SA 545 (CC) at 22; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at 45; *Fraser v Absa Bank Ltd* [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at 43.

[118] See Part II.A & B of the paper.

[119] See Part II.A & B of the paper.

Are Blind, Visually Impaired, or Otherwise Print Disabled before South Africa could ratify it.[120]

The Constitution importantly provides for certain substantive constraints on Parliament's operation. This is a deliberate shift from parliamentary sovereignty to constitutional supremacy, moving into the democratic era.[121] Primarily, that Parliament's legislative authority is limited by the Constitution – Parliament's law-making power must be discharged at all times within the limits imposed by the Constitution.[122] There are a number of procedural and substantive constraints on Parliament's law-making power.[123] For the purposes of this paper, one of the key limitations on Parliament's law-making power is the Bill of Rights.[124] There are three ways in which the Bill of Rights frames Parliament's law-making power – first, through the general obligation upon Parliament to bring apartheid-era legislation in line with the Constitution and particularly the Bill of Rights; second through s 36, which states that no law of general application can infringe a right in the Bill of Rights, and in the event that it does, in order for the law to be constitutionally valid, it must fulfil the test that s 36 lays out; and third, through ss 7(2) and 8(1) of the Constitution that enjoin all organs of state to 'respect, protect, promote and fulfil' the rights in the Bill of Rights.

Turning to the first, Parliament has a general obligation recognised by courts, to bring apartheid-era laws in line with the Bill of Rights.[125] Courts have held that the history and context behind a law that was enacted during apartheid cannot be ignored in interpreting it.[126] Further, the Constitutional Court has recently applied the two-stage rubric through which laws are tested for consistency with the constitutional framework to apartheid-era laws as

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[120] Closing Statement by South Africa, WIPO Diplomatic Conference, available at: https://libguides.wits.ac.za/ld.php?content_id=5267475 See also, the Memorandum on the Objects of the Copyright Amendment Bill, 1.1-1.3 available at: https://www.parliament.gov.za/storage/app/media/uploaded-files/Copyright%20Amendment%20Bill%20Draft.pdf

[121] See generally Frank Michelman, The Rule of Law, Legality and the Supremacy of the Constitution in Woolman & Bishop Constitutional Law of South Africa available at: https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap11.pdf (outlining the supremacy of the Constitution as a rule and a value).

[122] Section 44(4), Constitution.

[123] See Michael Bishop & Ngwako Raboshakga, National Legislative Authority in Woolman & Bishop, Constitutional Law of South Africa (substantive constraints from 38-63, procedural constraints from 64-92) available at https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap17.pdf (outlining the constitutional constraints on Parliament)

[124] Ibid at 39.

[125] See generally *Holomisa v Holomisa* [2018] ZACC 40; 2019 (2) BCLR 247 (CC); *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) Ngcobo J at para 36.

[126] Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at 40.

well:[127] first, the law in question must be interpreted to determine its meaning (in light of its historical context as suggested above) and second, the law must be tested against the specific provisions of the Constitution that it is alleged to violate.[128] If the provisions that are infringed / threatened to be infringed are rights entrenched in the Bill of Rights, in addition to meeting the tests internal to specific rights, a s 36 limitations analysis must be carried out to establish whether the law is a justifiable limitation on the rights at issue. In passing the CAB, Parliament has taken steps to bring South Africa's copyright law in line with the Bill of Rights. The CAB contains certain provisions that particularly enable the fulfilment of the rights in the Bill of Rights that were *not* previously fulfilled or even contemplated under the Copyright Act. I return to how, in particular respect of the right to access educational materials, (1) the apartheid-era Copyright Act 98 of 1978 is unconstitutional and (2) the CAB seeks to make amendments to enable the state to fulfil its duty to respect, protect, promote and fulfil the right to basic and higher education in the Bill of Rights.

Moving to the second, the implications of s 36 for Parliament are that in carrying out its law-making function, Parliament must determine whether the law in question limits any right in the Bill of Rights. If such a limitation appears to have taken place, then s 36 provides a set of factors for Parliament to employ in an all-things-considered enquiry in assessing whether such a law would nevertheless be justifiable and likely to pass constitutional muster.[129] In order for Parliament to make such an assessment, the first step would be a *determination* of the rights that could possibly be affected. Courts have confirmed that international human rights law plays an important role in determining the scope at times,[130] and often the content of rights in the Bill of Rights.[131] In addition, international law plays a role in Parliament's consideration of the factors in s 36 – particularly interpreting 'reasonable and justifiable in an open and democratic society based on human dignity,

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[127] *Herbert N.O. and Others v Senqu Municipality* [2019] ZACC 31; 2019 (11) BCLR 1343 (CC); 2019 (6) SA 231 (CC).

[128] Ibid at 21-2.

[129] Section 36 reads as follows: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights." See the Constitutional Court's approaches to interpreting s 36 in both judgments in *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491.

[130] *Law Society* in respect of extending the scope of s 34 from domestic to international courts at para 29.

[131] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

equality and freedom' with respect to the limiting legislation.[132]

Moreover, the third constraint that Parliament is bound by are ss 7(2) and 8(1) which state that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights' and '[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state' respectively. The Constitutional Court has recently held that the proper exercise of the President's powers was 'inextricably connected' to the fulfilment of the obligation present in s 7(2) read with s 8(1) to respect, protect, promote and fulfil the rights in the Bill of Rights.[133] This would apply to Parliament as well, by virtue of the fact that it is an organ of state.

The *Glenister II* case has influenced the interpretation of these provisions.[134] In *Glenister II*, the Court had to determine first, whether a constitutional and international legal obligation existed for the state to create an anti-corruption unit; second, whether the new anti-corruption unit (Hawks) that was formed by the South African government (after its dissolution of the Scorpions) was sufficiently independent.[135] The majority decision of the Court held, in response to the first question, that although the treaty to which South Africa was party (United Nations Convention Against Corruption) was not domesticated under section 231(4), there existed an *independent constitutional obligation* upon the state to create an anti-corruption unit.[136] The obligation was sourced in s 7(2) and its application determined by s 8(1) of the Constitution. In defining the *content* of that obligation, the Court interpreted 'international law' in section 39(1)(b) to consist of the 'inter-locking grid of conventions, agreements and protocols…set out earlier'[137] that South Africa had ratified (pursuant to the procedure laid out in s 231(2)), and held that these, taken together, obliged the state to establish an anti-corruption unit that was sufficiently independent. Although the majority and main judgments differed on the outcome, they agreed that the effect of s 39(1)(b) and 233 read along with ss 7(2) and 8(1) created *a constitutional obligation* on all organs of the state to comply with South Africa's international obligations under s 231(2) that map onto the Bill of Rights in order to fight corruption.[138] The degree and extent of that obligation was once

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[132] See also Stu Woolman & Henk Botha, Limitations in Constitutional Law of South Africa at 114 available at: https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap34.pdf (providing an interpretation of the various factors in the limitations analysis under s 36).

[133] *Law Society* at para 78.

[134] There is a proliferation of literature on the various aspects of the *Glenister II* decision. A small sample of the literature is cited here: MD Stubbs 'Three-Level Games: Thoughts on Glenister, Scaw and International Law' (2011) 4 Constitutional Court Review 137; J Tuovinen 'What to Do with International Law? Three Flaws in Glenister' (2013) 5 Constitutional Court Review 435; B Meyersfeld, Domesticating International Standards: The Direction of International Human Rights Law in South Africa [2015] 16 CCR 399.

[135] *Glenister II* at 163.

[136] Ibid.

[137] *Glenister II* at 192.

[138] Ngcobo J in *Glenister II* at 97; majority at 189-202. See also, Max du Plessis and

again a bone of contention between the majority and main judgments. Whilst the majority judgment held that the obligation mandated a *specific* course of action - to create an independent anti-corruption mechanism – the main judgment was of the view that the constitutional obligation was more general, in that '[t]he Constitution is not prescriptive, however, as to the specific mechanisms through which corruption must be rooted out, and does not explicitly require the establishment of an independent anti-corruption unit.'[139]

What this means is that Parliament too, as an organ of state, must function not only in compliance with the Bill of Rights, but *actively* to protect, promote and fulfil the entrenched rights.[140] Where international human rights obligations that bind South Africa under s 231(2) map onto the Bill of Rights, they assist in filling out the content of the obligation to some extent. It is at this point that the policy options available to Parliament are engaged. As long as Parliament acts in the above fashion, to 'respect, protect, promote and fulfil' the Bill of Rights in its law-making process and legislation, it has a vast array of policy choices available before it.[141] In other words, as long as Parliament's

The Constitution, as discussed above, obliges courts to consider international law both binding and non-binding in interpreting the rights in the Bill of Rights. Moreover, the Constitution obliges courts to interpret *all* legislation to promote the spirit, object and purport of the Bill of Rights. The Constitution also requires that a reasonable interpretation of legislation that is consistent with binding international law is to be preferred over one that is inconsistent. Despite the fact that these interpretive injunctions are directed at courts, it is important to note that the Constitutional Court has confirmed that the interpretation of constitutional provisions is a *shared meaning-making exercise* across the organs of state as well as those seeking to interpret the Constitution in law schools, the legal profession, as well as the general public, amongst others.[142] Put differently, it would be absurd for courts to

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Stuart Scott 'The World's Law and South African Domestic Courts: The Role of International Law in Public Interest Litigation' in Jason Brickhill (ed) *Public Interest Litigation in South Africa*, (JUTA, 2018) 77 (giving an account of the *Glenister II* decision and its role in adding content to ss 7(2) and 8(1)).

[139] Ngcobo J in Ibid at 84.

[140] This is uncontroversial – some examples of the Constitutional Court upholding this proposition are: *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* [2002] ZACC 27, 2003 (3) SA 1 (CC) at 14; *J & Another v Director General, Department of Home Affairs* 2003 (5) BCLR 463 (CC), [2003] ZACC 3, 2003 (5) SA 62 (CC) at 25.

[141] This is a widely accepted proposition – some examples of the Constitutional Court upholding it are: *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 at 34; *S v Baloyi* [1999] ZACC 19, 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC) at 30; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* [2004] ZACC 10 2005, (3) SA 280 (CC), 2004 (5) BCLR (CC) at 35.

[142] *S v Mhlungu* at 81; *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC), 2003

construe the content of a right in the Bill of Rights differently from Parliament.

Since the text of a statute serves as the starting point[143] and 'vital constraint' for statutory interpretation,[144] Parliament is under a constitutional imperative to draft text that can support an interpretation consistent with the above propositions. In other words, the Bill of Rights acts as a constitutional magnet for Parliament's policy choices – where binding international human rights obligations under s 231(2) map onto the Bill of Rights, Parliament is bound by ss 7(2) and 8(1) to legislate to respect, protect, promote and fulfil these rights, *unless* it can justify that these rights be limited under s 36. However, within this frame, courts have been careful to protect Parliament's wide berth in making policy decisions and drafting legislation as outlined above.

1. Constitutional constraints on Parliament's law-making latitude

Upon distilling the propositions established above, the constitutional frame within which Parliament's law making power must be properly exercised is as follows:

(1) Parliament is *constitutionally required* to make policy choices and draft legislation that gives effect to the Bill of Rights;

(2) Where South Africa's binding international human rights obligations map onto the Bill of Rights, they must be considered in interpreting the content of the rights in the Bill of Rights that must be given effect to in (1), thereby doubling the normative imperative upon Parliament to not only legislate consistently with binding international human rights obligations but to give effect to them via the Bill of Rights;

(3) Parliament is *constitutionally prohibited* from limiting any right in the Bill of Rights unless Parliament is able to demonstrate that the test in s 36 to limit a right in the Bill of Rights is met;

(4) Parliament is *constitutionally permitted* to enact domestic legislation to give effect to South Africa's binding international obligations subject to (1), (2) and (3).

There is thus a key difference in the constitutional constraints on Parliament's law-making functions in respect of binding international human

(2) BCLR 154 (CC) at 14.

[143] *Diener N.O. v Minister of Justice and Correctional Services* [2018] ZACC 48; 2019 (4) SA 374 (CC); 2019 (2) BCLR 214 (CC) at 37; *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at 70. See also Bishop and Brickhill, "'In The Beginning Was The Word': The Role of Text in the Interpretation of Statutes" (2012) 129 SALJ 681 at 697-8.

[144] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20 (22 July 2020) at 47; *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at 28; *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at 37.

rights obligations that map onto the Bill of Rights and binding obligations that are not human rights obligations or that do not map onto the Bill of Rights.

IV. INTERNATIONAL LAW AS TREATED BY THE PRESIDENT'S REFERRAL LETTER

In this section, I parse the President's concern regarding the CAB's compliance with international law in his referral letter that returned the CAB back to the National Assembly. The letter outlines two allegations of non-compliance of CAB with international law: first, in respect of treaties that South Africa has signed but not yet ratified (the WIPO Copyright Treaty, Performances and Phonograms Treaty and the Marrakesh VIP Treaty), and second, in respect of treaties that are *already* binding upon South Africa in terms of s 231(2) (references to the three-step test, that is present in the Berne Convention, to which South Africa has acceded).[145]

In respect of the first allegation, the President identifies three treaties (as discussed in my first section) which South Africa has signed and is in the process of ratifying. Parliamentary *approval*, as discussed earlier in this section, is a domestic constitutional precondition that South Africa must fulfil in order to take the next step, of depositing instruments of ratification to be *internationally* bound in respect of these treaties. What does approval entail? Parliament has wide breadth to determine whether existing laws contain provisions that can be reasonably interpreted to be consistent with the international treaties in question, and if not, then to legislate to enable such consistency. The threshold for South Africa to give effect to its international obligations is *not* the incorporation of all provisions of the treaty into domestic law – s 231(4) enables Parliament to make a choice to do so in cases where it deems such domestication necessary. It is left to the independent judgment of Parliament, on the basis of the principle of separation of powers inherent in s 231,[146] to decide *whether* and *how* binding international treaty obligations are to be domestically implemented.[147] I go on to examine the decision Parliament has made at the end of this section. Parliament must then signal its approval, through the passing of a resolution, indicating that the executive may take the next step of depositing the instrument of ratification. On the substantive issues, the President's concerns in the referral letter in respect of the CAB's compliance with the WIPO Copyright Treaty, Performances and Phonograms Treaty and Marrakesh VIP Treaty are framed in extremely broad terms.[148] The letter states that "it is not clear that the Bills

[145] The letter incorrectly classifies this as a s 231(5) treaty but that does not change its domestic effect.

[146] As confirmed by Ngcobo J in *Glenister II* at 89.

[147] F Sucker 'Approval of an International Treaty in Parliament: How does Section 231(2) "Bind the Republic"?' (2013) 5 Constitutional Court Review 417 at 427 (explaining the domestic legal effect of treaties under s 231(2) of the South African Constitution).

[148] Referral letter para 21.

appropriately consider the [economic] implications […] in this regard [economic rights of performers] of the WIPO Performances and Phonograms Treaty",[149] and in respect of the WIPO Copyright Treaty and Performances and Phonograms Treaty, the referral letter states that certain exceptions and limitations (ss12A-D, 19B and 19C) may be "in conflict" with these treaties. In respect of the Marrakesh Treaty, the referral letter outlines that the same exceptions and limitations do not comply with the version of the three-step test that appears in the treaty.[150]

In respect of the second set of treaties, the President states that "there is also a contention that the Copyright Bill breaches the three-step test" as present within the Berne Convention and the Marrakesh Treaty.[151] This concern is raised in respect of the same exceptions listed above (ss12A-D, 19B and 19C). The mechanics of South Africa's accession to the Berne Convention (in part through its accession to the TRIPS Agreement) is explained in the first section of this paper. In short, South Africa is bound both domestically and internationally by the substantive provisions of the Berne Convention (Articles 1-21) under s 231(2).[152] This includes the provisions on the three-step test.

The two allegations outlined above must be dealt with slightly differently. The first speaks to treaties that are not (yet) binding on South Africa but that South Africa seeks to bind itself to by fulfilling the requirements under s 231(2) (and further, s 231(4)) through the current process. The second speaks to *existing* binding international obligations under s 231(2) and their application to Parliament's law-making process. However, it is important to first deal with the question of the *scope* of the Presidential referral. Is compliance with international law (as outlined by both allegations above) in the President's referral letter a ground in and of itself for returning the CAB to Parliament under s 79(1) of the Constitution? In other words, does an enquiry into the constitutionality of a Bill include compliance with international law as an independent ground?

Section 79(1) of the Constitution, which empowers the President to send Bills back to the National Assembly, confines this power to circumstances where the President may have "reservations about the constitutionality of the Bill". Constitutionality is a corollary of the principle of constitutional supremacy – that all law must be consistent with the Constitution.[153] At what stage, if at all, does international law enter the *constitutionality* inquiry? To answer this question, a closer look at the Constitution's provisions on

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[149] Referral letter para 18.

[150] Referral letter paras 19-20.

[151] Referral letter para 15.1 [sic].

[152] Rather than s 231(5) as stated in the President's referral letter – but both categories of treaties have the same domestic effect so its (mis)classification does have any domestic effect.

[153] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 at 6.

international law is helpful. Section 231, analysed above, provides for certain constitutional conditions to be fulfilled before international agreements can bind South Africa domestically. Should any of these requirements be contravened, a question of constitutionality of conduct that enables such contravention would arise. International law is thus inextricably connected but auxiliary to the inquiry. For instance, in *Earthlife Africa*,[154] the Western Cape High Court held that the agreement at issue did not fulfil the constitutional requirements laid out by 231(3) - that the delay in tabling the agreement before parliament was unreasonable,[155] and in any event the correct classification of the agreement was under s 231(2) and not (3) thereby mandating a different procedure to be fulfilled.[156] The court was only able to make the determination of unconstitutionality of the Minister's conduct in respect of classification of the agreement by interpreting the scope and content of the agreement at issue.[157] However, the *primary* object of inquiry was compliance with constitutional requirements under s 231.

Similar questions of compliance with constitutional requirements may arise in respect of the constitutionality of the executive's exercise of power in signing and negotiating treaties under s 231(1),[158] the fulfilment of the procedures under ss 231(2) and (3),[159] the constitutionality of a self-executing provision under s 231(4),[160] the fulfilment of procedures under s 231(4) for

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[154] *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* (19529/2015) [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC).

[155] Ibid 127, 128.

[156] Ibid 116.

[157] Ibid 135.

[158] Section 231(1), as was discussed at great length in *Law Society* in respect of the President's conduct in signing the Protocol to the SADC Treaty that stripped the SADC Tribunal of its individual jurisdiction and hence held to be contrary to the President's duty under s 7(2) to respect protect promote and fulfil the rights in the Bill of Rights.

[159] As noted above in *Earthlife Africa*.

[160] This has never been adjudicated upon so far, but there is much literature on the scope and content of self-executing provisions of treaties and South African courts' reluctance to develop a rich jurisprudence in respect of such provisions. See, for a summary of the literature, Sanya Samtani, 'International Law, Access to Courts and Non-Retrogression: *Law Society v President of RSA*', forthcoming in CCR X (2020) (explaining the missed opportunity of the Constitutional Court to clarify the meaning of self-executing treaties in relation to the SADC Tribunal). See also, Sandy Liebenberg, South Africa and the International Covenant on Economic, Social and Cultural Rights: Deepening the Synergies, at 14-5, forthcoming in South African Judicial Education Journal (2020) (for the beginnings of an argument regarding the self-executing nature of some of the provisions of the ICESCR and how domestic law may be better aligned with the rights present in the ICESCR on that basis). A further exposition of self-executing treaties is outside the scope of this paper – it suffices to state that the treatment of the obligations under the ICESCR, to the extent that they map onto the Bill of Rights, would not differ significantly with this additional analysis. The only case which has briefly touched upon this issue in the context of the ICCPR is *Claassen v Minister of Justice and Constitutional Development and Another* [2009] ZAWCHC 190, 2010 (2) SACR 451 (WCC), [2010] 4 All SA 197 (WCC) at para 36, and is supported by EM Ngolele 'The Content of the Doctrine of Self-Execution and its Limited Effect in South African Law', (2006) 31 *South African Yearbook of International Law* 153

domestically incorporating a treaty through legislation, and in respect of international obligations stemming from customary international law, the constitutionality of that rule of customary international law under s 232.

However, the President's letter does not allege any of the above constitutional problems in respect of the international law aspects of CAB – the allegations are broad and focus on the *compatibility* of CAB with international treaties as a substantive matter, rather than any failure to meet constitutional requirements. Notwithstanding the merits of the following proposition, this raises the question - is the alleged international legal incompatibility of a Bill an independent ground for constitutional invalidity ? The only provisions that speak to some extent in support of this claim would be the interpretive provisions that I have outlined in my previous section – that in interpreting domestic law, a court is obliged to prefer an interpretation consistent with binding international law insofar as that interpretation is a reasonable one. Parliament's obligations in relation to this are limited to *making it possible* for such an interpretation through creating textual hooks within its laws.[161] This is not in and of itself a ground for constitutional invalidity. In respect of international human rights law, however, as I have described in my previous section, the obligation is sourced in the Bill of Rights. Parliament's obligation extends to respecting, protecting, promoting and fulfilling the Bill of Rights. There is thus a constitutional basis for Parliament to take into account international human rights law to the extent that it maps onto the Bill of Rights. This still means, however, that any constitutional invalidity claims as against international human rights law must either be routed through a right in the Bill of Rights, or where it pertains to the Bill of Rights as a whole, sourced in s 7(2). Alleged inconsistency with international law does not provide an independent ground of referral.

Neither does the principle of legality. The Constitutional Court in the recent *Law Society*[162] decision extended the principle of legality to the international plane – holding that the exercise of public power by the executive in voting to strip the SADC Tribunal of its jurisdiction as well as participating in amending the SADC Protocol through unlawful means (unlawful in international law) was unconstitutional.[163] In short, on the legality issue,[164] the judgment holds that the President's actions on the

(discussing what self-executing treaties mean and their domestic effect in the South African context). See also, ME Olivier 'Exploring the Doctrine of Self-Execution as Enforcement Mechanism of International Obligations', 27 (2002) *South African Yearbook of International Law* 99 (on the point of outlining the specific application of self-executing treaties to the ICCPR).

[161] Under s 233, as outlined in Part II.C of this paper.

[162] For a critique of the decision (its outcome on legality as well as the methodology employed by the Court in determining the scope and content of international law), see Dire Tladi, 'The Constitutional Court's Judgment in the SADC Tribunal Case: International Law Continues to Befuddle', forthcoming in CCR X (2020).

[163] Law Society at 61.

[164] The better view in respect of this judgment is that the holding of unconstitutionality

international plane were *procedurally irrational* as he acted beyond the powers that were constitutionally conferred upon him in contravening existing international legal rules in amending the SADC Protocol.[165] In other words, irrespective of whether a public functionary acts on the international or domestic plane, they cannot act in excess of their powers and they cannot act contrary to the Constitution. In relation to international law, this means that when an organ of state represents South Africa on the international plane, they must comply with the requirements of the relevant international law instrument, in good faith. In other words, organs of state or officials must comply with the procedural requirements of that particular treaty, for example in relation to ratification, voting, withdrawal, or similar acts.

Law Society is not authority for the proposition that alleged non-compliance with international law on the international plane, constitutes non-compliance with *domestic* law. It does not make international law *automatically* directly enforceable in the domestic system. To read *Law Society* as doing this would render redundant the elaborate scheme of classification of international obligations' domestic effects present in s 231 of the Constitution.[166] The principle of legality cannot mean that *all* of South Africa's international obligations, regardless of their status, are to be treated exactly the same from the perspective of domestic law. Such a reading would render redundant ss 231, 232 and 233 that carefully outline certain circumstances where international law can be domestically enforceable, and those aspects of ss 39(1)(b) and 39(2) that enable international law to fill out the content of the rights in the Bill of Rights.

Moreover, an overbroad reading of *Law Society* as applied to Parliament would be absurd, not only for the reason of redundancy of explicit constitutional provisions, but also because it would inhibit Parliament's law-making function (and South Africa's role in giving effect to its international obligations in line with its *own* domestic priorities, as distinct from other countries' priorities). The *only* limitation on Parliament's law-making function is the Constitution.[167] *Law Socie*ty cannot be read to have created a backdoor through the principle of legality to elevate international obligations to the level of a constitutional constraint on Parliament's law-making powers

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cannot be delinked from its effect on the right of access to courts. In other words, the judgment is premised on the basis that the President did not fulfil his duty under s 7(2) to respect, protect, promote and fulfil a right in the Bill of Rights (s 34) and in fact acted retrogressively to take away access to an existing court (the SADC Tribunal) which existed to promote a culture of democracy and human rights (see para 78 *of Law Society*, for instance). For a full argument on this ground, see Sanya Samtani, 'International Law, Access to Courts and Non-Retrogression: *Law Society v President of RSA*' forthcoming in CCR X.

[165] *Law Society* at 61-71.

[166] O'Regan J in *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

[167] Section 44(4), Constitution, states: "When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution."

where the Constitution itself does not provide for it. Such a reading is contrary to s 44(4) as well as the previously quoted sections. Rather, the work that the principle of legality does is *different* – if for instance, after the executive has not followed the correct international legal procedures in depositing the instrument of ratification, *Law Society* would apply there to enable that act to be reviewable in South African courts on the basis of legality. Moreover, the principle of legality as applied to Parliament has been held to mean (1) that domestic statutes must be rationally related a legitimate governmental purpose (must not be arbitrary),[168] and in ensuring that statutes are not vague.[169]

In any event, the President has *not* invoked the principle of legality as a ground in his referral letter, and as confirmed by the Constitutional Court in *Liquor Bill*, the Bill is not up for wholesale review at this stage. Rather the review must be *confined* to the President's referral letter.[170] As described earlier (and encapsulated by s 233 of the Constitution), the correct standard for Parliament is simply to ensure that if it chooses to legislate to give effect to international obligations, the law that is made *can* be reasonably interpreted to be consistent with South Africa's binding international obligations. The obligation under s 233 has been described as an interpretive one, rather than one that enables a direct challenge.[171]

In sum, it is clear that the scope of the President's referral under s79(1) does not extend to compliance with international law in and of itself as a ground. However, this certainly does not mean that international law can be flouted (nor that in the present circumstance that it is being flouted at all). Rather, as I go on to show in any event, Parliament *has* interpreted and applied international law correctly, according to the constitutional scheme and its law-making latitude, in passing the CAB. Even if one assumes that the President's referral letter raises the international law concerns with respect to s 233, rather than on its own feet, the impugned provisions of the CAB (the exceptions and limitations under ss 12A-D, 19B and C) can be reasonably interpreted to demonstrate compatibility with the sum of South Africa's binding international law.[172] I turn to this aspect in the next section with specific reference to education, but it applies to all the impugned exceptions, given that they all give effect to particular constitutional rights.

I return now to the category of treaties under s 231(2). As described above, Parliament is in the process of fulfilling domestic constitutional

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[168] *New National Party of SA v Government of the RSA* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC), [1999] ZACC 5 at 24. See also *United Democratic Movement v President of RSA* 2003 (1) SA 488 (CC), 2002 (11) BCLR 1213 (CC), [2002] ZACC 33 at 55.

[169] *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC), [2005] ZACC 3 at 108.

[170] Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 at 13-14.

[171] Dugard and Coutsoudis at 99.

[172] The relevant obligations are outlined in Part I of the paper.

conditions under s 231(2) in respect of the WIPO Copyright Treaty, Performances and Phonograms Treaty, Marrakesh VIP Treaty and the Beijing Audio Visual Treaty.[173] In doing so, it has taken a policy decision to include certain terms from these treaties in the Copyright Amendment Bill as well as the Performers' Protection Amendment Bill.[174] I go on to establish how the WIPO Copyright Treaty, Performances and Phonograms Treaty and the Beijing Audio Visual Treaty have been incorporated *almost in their entirety*, leaving the President's concern regarding the economic rights of creators under these treaties as outlined in the referral letter somewhat baffling.

In respect of the Copyright Amendment Bill, several definitions from the above treaties have been included, including "accessible format copy", "technological protection measure", "technological protection measure circumvention device" among others.[175] Moreover, the scope of copyright protection has been expanded to include computer programmes;[176] the right of communication to the public expanded to include access to literary, musical and artistic works through the internet and at their convenience;[177] the rental right expanded to include commercial rental of audio visual works (like films, for instance) as well as sound recordings through the internet.[178] In addition, tampering with copyright management information (such as the creator's terms of use that have been set out, for instance) or technological protection measures (such as digital rights management controls which limit the use of a work under copyright to a particular platform, for instance) have been included as offences to enable the further protection of moral and economic rights of creators.[179] Further provisions for enforcement of anti-circumvention and restricted conduct in respect of the above offences have been provided for in the CAB, along with a strengthened Copyright Tribunal for redressal.[180] These provisions *directly* incorporate the obligations that the WIPO Copyright Treaty places upon its parties, to ensure that effective legal remedies are available to enforce anti-circumvention measures, as well as to enforce moral and economic rights in of creators in digital environments.[181]

Moreover, in a similar vein, the Performers' Protection Amendment Bill also incorporates the same definitions from the above treaties;[182] aims to protect the reproduction and communication right of producers of sound

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[173] See Presentation made by the Department of Trade and Industry to the Select Committee available at: http://www.thedtic.gov.za/wp-content/uploads/WIPO.pdf

[174] See recent Presentation made by the Department of Trade Industry and Competition to the Portfolio Committee available at: http://www.thedtic.gov.za/wp-content/uploads/Copyright-2020.pdf

[175] Clause 1, CAB.

[176] Clause 2, CAB (Section 2A).

[177] Clause 4, 6 CAB (Section 6, 7).

[178] Clause 8, 10 CAB (Section 8, 9).

[179] Clause 26, 27 CAB (Section 23,27).

[180] Clause 28, 29 CAB (Section 28, 28O-S).

[181] Articles 11-14, WIPO Copyright Treaty.

[182] Clause 1, PPAB.

recordings as well as enabling equal remuneration for the performers, composers and producers of commercial sound recordings;[183] to clearly define the contours of the situations where an audio visual work or a sound recording may be fixed in an audio visual format and broadcast or communicated to the public, and to include a reporting requirement as well as a royalty payment or remuneration to the performer for consenting to such fixation;[184] provides for conduct that is infringing and therefore an offence in respect of circumventing copyright management information and technological protection measures (analogous to the CAB provisions outlined above).[185] These provisions *directly* incorporate the obligations that the WIPO Performances and Phonograms Treaty as well as the Beijing Audio Visual Treaty[186] places upon its parties, to ensure that effective legal remedies are available to enforce anti-circumvention measures, as well as to enforce moral and economic rights in of performers and producers in digital environments.[187]

Crucially, this analysis is not within the ambit of s 79(1). The Constitution does not require the President to analyse whether legislation precisely accords with the text of a treaty which Parliament is attempting to domesticate. It certainly does not empower the President to return a Bill to Parliament on that basis. In any event, the above analysis shows that the operative parts of these three treaties, at the instance of Parliament, have clearly been incorporated into the CAB and PPAB, to transform them into domestic law (availing of the process in s 231(4) of the Constitution), in order to domestically enforce these rights and obligations.

A closer look at the concerns raised by the President's letter indicates that in addition to the implications regarding economic rights of performers (dealt with comprehensively above), the allegation is that the exceptions and limitations provisions of the CAB are "in conflict" with the WIPO Copyright Treaty and Performances and Phonograms Treaty, and that they do not fulfil the three-step test as outlined in the Marrakesh Treaty. In short, all three treaties contain versions of the three-step test, a version of which is also found in the Berne Convention (and TRIPS Agreement) to which South Africa is already a party. At this stage it is important to recall the earlier analysis, that Parliament must be enabled to exercise the wide policy-making berth it is constitutionally guaranteed by s 231 and s 44(4), and that *all* that is constitutionally required in respect of *international law* is for Parliament to create the possibility of a reasonable interpretation of legislation that is

[183] Clause 3, PPAB.
[184] Clause 4, PPAB.
[185] Clause 7,8 PPAB (Sections 8E-H).
[186] The President's referral letter does not mention the Beijing Audio Visual Treaty, despite its close relationship with the provisions giving effect to the WIPO Performances and Phonograms Treaty.
[187] Articles 18, 19, 23 WIPO Performances and Phonograms Treaty; Articles 15, 16, 20 Beijing Audio Visual Treaty.

compatible with South Africa's binding international obligations. In respect of international human rights, however, the normative imperative is greater given Parliament's extensive constitutional obligations in respect of the Bill of Rights. In the next section, I explain the interpretation of the three-step test as an auxiliary aspect of Parliament's primary role in giving effect to the right to education under the Bill of Rights, to the extent that copyright acts as a barrier to the realisation of this right.

V. THE COPYRIGHT AMENDMENT BILL: EDUCATIONAL EXCEPTIONS

In this section, I confine my analysis to the provisions outlined in the President's referral letter that directly pertain to access to educational materials. The subsequent analysis may be analogously conducted in respect of the other exceptions and limitations outlined by the President's referral letter, from the perspective of the affected constitutional rights-bearers, in light of South Africa's international obligations highlighted in the first section of this paper. I engage with the correct application of the South Africa's 'inter-locking' international obligations in the course of my analysis. This includes the Berne Convention, outlined in the President's letter – but is not confined to it.

I go on to establish how it is not only constitutionally *permitted* for Parliament to legislate as it has in the CAB on exceptions for educational purposes but that it is constitutionally *required* to discharge Parliament's s 7(2) duty in respect of giving effect to the right to basic and higher education in the Bill of Rights. Additionally, the CAB is the fulfilment of Parliament's independent duty to bring apartheid-era laws in line with the Bill of Rights.[188] In interpreting rights, s 39(1)(b) makes clear that courts are enjoined to consider South Africa's binding and non-binding international obligations. However, more weight is given to binding obligations.[189]

A. *The unconstitutionality of the Copyright Act 1978*

The apartheid-era Copyright Act 1978, provides in its objects that it has been enacted "to regulate copyright and to provide for matters incidental thereto."[190] This was enacted in the pre-constitutional era by the apartheid state, around the same time as a spate of information control and political censorship laws, which have been widely documented to be oppressive.[191] It

[188] *Holomisa v Holomisa* [2018] ZACC 40; 2019 (2) BCLR 247 (CC); *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) Ngcobo J at para 36.

[189] *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 at 35 discusses the analogous s 35(1) of the Interim Constitution.

[190] Copyright Act 98 of 1978, available at: https://www.gov.za/sites/default/files/gcis_document/201504/act-98-1978.pdf

[191] See generally John Dugard, "Censorship in South Africa: The Legal Framework" in Nadine Gordimer et al, What Happened to Burger's Daughter or How South African Censorship Works, Taurus (1980) (providing an overview of the apartheid legal framework that perpetuated state censorship); Gilbert Marcus, "Reasonable Censorship?" in Hugh Corder, ed., Essays on Law and Social Practice in South Africa Cape Town: Juta, 1988: 349–

was assented to just two years and four days after the June 16, 1976 Soweto uprising in which hundreds of school children were killed or wounded in protests against an education system explicitly designed to prepare them for servitude.[192] Given its historical context, it is clear that the Act was not informed by any notion of the Bill of Rights or equality of access to education for all, which was created much later by the 1996 Constitution in the democratic era. In respect of its provisions on the educational use of materials under copyright, the Act is woefully inadequate in respect of respecting, protecting, promoting and fulfilling the right to education in the Bill of Rights. The provision in the current Act that pertains to accessing copyrighted educational materials is s 12(4). It states that:[193]

> The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as well as the name of the author if it appears on the work.

This provision particularly focuses solely on literary and musical works that are used for the purposes of teaching. Whilst contains the same standards of 'fair practice' and 'extent justified by the purpose' as Article 10(2) of the Berne Convention, it excludes any other type of work, other than literary and musical works, from being employed for the purposes of teaching, even if teaching were to be defined broadly to include various forms of basic and higher education and technological advancements in learning. For works other than literary and musical works, regard must be had to s 13, a general exception that encapsulates the widely-known three-step test. It states that:

> In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

This must be read with the regulations made pursuant to s 13[194] – which states that such reproduction is permitted in terms of the current Act if not

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60. See also, Gavin Stewart, 'Perfecting the free flow of information: media control in South Africa 12 June to 18 November 1986', Index on Censorship 16(1), 29–38. https://doi.org/10.1080/03064228708534192 (recording the use of the Copyright Act, 1978 as a tool for information control alongside the spate of other political censorship laws).

[192] South African History Online, *The June 16 Soweto Youth Uprising*, available at https://www.sahistory.org.za/article/june-16-soweto-youth-uprising (explaining that one of the key reasons for the uprising was the racially differentiated quality of education made available, with inferior education for Black people as a means for furthering apartheid).

[193] Section 12(4), Copyright Act 98 of 1978.

[194] Regulations pursuant to s 13 of the Copyright Act (Copyright Regulations 1978 (as amended by GN 1375 in GG 9807 of June 28, 1985), available at: https://wipolex.wipo.int/en/text/130435.

more than one copy of "a reasonable portion of the work is made, having regard to the totality and meaning of the work" and "if the cumulative effect of the reproductions does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author." This would lead to the absurd situation that for artistic and cinematographic works (works that are *outside* the scope of s 12), even though such works may be required to be reproduced in order for students to effectively study them in their course of education, only one copy may be made by the teacher (instead of a digital course pack in respect of film studies courses, for instance). It is unclear how this would work in respect of the second constraint "regard to the totality and meaning of the work". It is also absurd as artistic works often form a part and parcel of literary works in respect of textbooks that employ diagrammatic representations, for instance.

Additionally, the regulations on the reproduction of copyrighted materials by library and archives for a user state a limit of "not more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy of a reasonable portion of any other copyrighted work" and have a further proviso that such a copy must be used only for private study or personal use. Thus although s 12(4) does not specify a numerical limit on the number of copies that can be made, the regulations under s 13 constrain the scope of s 12(4), since photocopies for educational purposes (illustrations for teaching), take place in university and public libraries.

Moreover, the current Act does not enable the creation of accessible format copies of works for persons with disabilities even in respect of accessing educational materials.

This is all to say that it is highly likely that the current Copyright Act of 1978 will *not* pass constitutional muster under s 36, on the basis that it unjustifiably limits the fulfilment of the right to basic and higher education under s 29 and is discriminatory to persons with disabilities and persons living in poverty under s 9(3). The provisions in the CAB are thus *necessary* to ensure that copyright does not inhibit access to educational materials and that the CAB enables the full enforcement of the Bill of Rights.

B. *The right to education and educational materials*

In this section I will outline the right to education in the Bill of Rights. What the President entitles "noble objectives" of the CAB to enable access to copyrighted materials for "the visually impaired, educators, students and others", are actually more than just noble objectives: they are *rights* that are protected by the Bill of Rights that give rise to obligations incumbent upon all organs of state. Here, I focus on the equal right of access to educational materials for *all* – and how CAB contains provisions that are fulfil Parliament's constitutional duty to give effect to the Bill of Rights. Additionally, I will explain how international law (both international human rights law and international copyright law as outlined in the first section) *should* be used to construct the scope of the right of access to educational

materials in the Bill of Rights and the corresponding duty that Parliament has to enact laws to ensure that the Bill of Rights is respected, protected, promoted and fulfilled.

The right to education is found in s 29 of the Constitution.[195] Given the apartheid-era historical and systemic deprivation of education for the majority of the population, courts have consistently affirmed and upheld the various aspects of this right in order to redress this systemic disadvantage.[196]

The right to a basic education is immediately realisable.[197] This is in contrast with s 29(1)(b), the right to further education, as well as other socio-economic rights, which explicitly provide that the state is obliged to take positive steps towards the progressive realisation of the right. The educational use of materials under copyright is common to both further and basic education – it is only the *extent* of obligations that are imposed upon the state that differ.

1. The right to basic education and its corresponding duties

The content of the right to basic education under Section 29(1)(a) has been litigated extensively.[198] Much of the litigation has centred around overcoming *barriers* to the realisation of the right to education and mandating the state to fulfil its obligations.[199] The litigation surrounding the deprivation of textbooks is particularly significant in relation to accessing educational materials.[200]

Courts have affirmed the *necessity* of textbooks to realising the right to basic education. Kollapen J, in the Supreme Court of Appeal, held that:[201]

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[195] The relevant part of the education guarantee under s 29(1) of the Constitution states that: "Everyone has the right— (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

[196] *MEC for Education: Kwazulu-Natal v Pillay* [2007] ZACC 21, 2008 (1) SA 474 (CC) at 121-124; *Governing Body of the Juma Musjid Primary School & Others v Essay N.O.* [2011] ZACC 13, 2011 (8) BCLR 761 (CC) at 42.

[197] Ibid (*Juma Musjid*) at 37.

[198] Cameron McConnachie, 'Litigating the Right to Basic Education' in Jason Brickhill (ed) *Public Interest Litigation in South Africa*, (JUTA, 2018) 288-297 (analysing the various streams of litigation in South African courts that led to filling out the content of the right to basic education).

[199] *Madzodzo v Minister of Basic Education* [2014] ZAECMHC 5, 2014 (3) SA 441 (ECM); *Linkside v Minister of Basic Education* [2015] ZAECGHC 36 at 2,4; *Tripartite Steering Committee v Minister of Basic Education* [2015] ZAECGHC 67, 2015 (5) SA 107 (ECG); *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* [2010] ZAWCHC 544; *Komape v Minister of Basic Education* [2018] ZALMPPHC 18; *MEC for Education in Gauteng v Governing Body of Rivonia Primary* [2013] ZACC 34, 2013 (6) SA 582 (CC).

[200] *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198, 2016 (4) SA 63 (SCA).

[201] *Section 27 v Minister of Education* 2013 (2) SA 40 (GNP), 2013 (2) SA 40 (GNP) at 25.

> [T]he provision of learner support material in the form of textbooks, as may be prescribed is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks.

This was affirmed by Tuchten J's order in the subsequent High Court proceedings,[202] which stated that the state must ensure that every learner was provided with a textbook in order to fulfill their right to a basic education.[203] The Supreme Court of Appeal dealt centrally with this issue and affirmed the principle of providing each learner with a textbook as an integral part of the right to education.[204] In late 2014, the Department of Basic Education published a Draft National Policy for the Provision and Management of Learning and Teaching Support Material (LTSM).[205] Along with other materials, this policy also dealt with the provisioning of educational materials. It split LTSM into 'core' materials, that were integral to the teaching of the curriculum of a particular grade, and 'supplementary' materials, that were meant to 'enhance a specific part of the curriculum'. The former includes essential textbooks and teacher guides whilst the latter includes provisioning of libraries with books such as reference guides, dictionaries, atlases etc.[206] As a recent study finds, the crucial role of LTSM in improving educational outcomes for all is only realised where LTSM is *accessible* to all.[207] Section 12D of CAB clearly envisions the provision of textbooks as well as other materials required for the realisation of the right to basic education.

The right to basic education, as described above, gives rise to state obligations to 'respect, protect, promote and fulfil the rights in the Bill of Rights' under s 7(2) of the Constitution. The state encompasses government funded schools as well as the organs of state. The positive duties to 'fulfil' the right to basic education include the duty to *provide* textbooks and other learning materials. This includes the construction and provisioning of

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[202] And then further affirmed by *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198.

[203] *Basic Education For All v Minister of Basic Education* [2014] ZAGPPHC 251, 2014 (4) SA 274 (GP) 82.

[204] Supra note 201 at 52.

[205] 'Draft Policy on Provision and Management of Learning and Teaching Support Material (LTSM)' (*Department of Basic Education*, September 2014) <https://www.education.gov.za/Portals/0/Documents/Policies/Draft_%20LTSM%20Policy%20for%20Public%20Comments%202014).pdf?ver=2015-01-29-170953-293> accessed on 21 June 2019.

[206] Veriava, supra note 43, 40-41.

[207] Milligan, LO, Koornhof, H, Sapire, I & Tikly, L 2019, 'Understanding the role of learning and teaching support materials in enabling learning for all', Compare : A Journal of Comparative and International Education, vol. 49, no. 4, pp. 529-547. https://doi.org/10.1080/03057925.2018.1431107 (exploring LTSM use in Rwanda and South Africa).

libraries in educational institutions, as well as the provisioning of scanning and photocopying machines to facilitate distance learning and private study. In doing so, the state bears an obligation to *protect* rights-bearers against potential violations by third parties. This is precisely what s 12D of the CAB seeks to do. Further, the negative obligation to *respect* the right requires the state not to pass obstructing legislation or to put policy in place that *prevents* access to materials for the fulfilment of the right to education. Where there are pre-existing statutory provisions that could be construed as obstructions, these provisions must first be interpreted to give full effect to the Bill of Rights, and where that is impossible, the statute must be amended to bring it in line with the Bill of Rights.

This duty also extends to private actors under s 8(2) of the Constitution, where it is required by the nature of the right and the duty.[208] Since educational materials and textbooks are published and distributed by private actors, these intermediaries play a fundamental role as gatekeepers of these aspects of the right to education.[209]

The Constitutional Court most recently in *Pridwin* confirmed that at the very least, private actors bear a duty to not inhibit the realisation of the right to education. In other words, where the right to education was being fulfilled by private actors, they could not "without appropriate justification" withdraw that fulfilment of the right. In doing so, the majority held that although in this instance it was a negative duty, this did not prevent private actors from potentially bearing positive duties in other circumstances.[210] In *Juma Musjid*, the Constitutional Court also recognised that the trust bore a negative duty (which it discharged in that specific case) to respect the learners' right to a basic education, which it characterised as the duty "not to interfere with or diminish the enjoyment of a right".[211] Though at present, it is unclear to what extent private actors may bear positive obligations in respect of the right to education (to *provide* educational materials to learners as the state does), what is clear is that these actors have *a duty not to prevent access to materials* for

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[208] See McConnachie, supra note 198 at 287; Stu Woolman & Michael Bishop, Education in Constitutional Law of South Africa at 57-9 available at https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap57.pdf (providing an overview of the content of the right and the obligations that flow from it); See also *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC) at 33 (in the context of freedom of expression and the extent of the duty imposed on private actors).

[209] The Competition Commission has recognised this as recently as August 2018 and launched an investigation into price-fixing of textbooks and other educational materials by the Publishers Association of South Africa as well as its 91 member publishers. Media Release, 'The Commission Uncovers Cartel of Book Publishers' (*Competition Commission*, 29 August 2018) available at http://www.compcom.co.za/wp-content/uploads/2018/01/Media-Release-PASA-1.pdf.

[210] AB and Another v Pridwin Preparatory School and Others [2020] ZACC 12 at 125, 180.

[211] Ibid 58, 60, 64. For an analysis of the scope of the duty see Meghan Finn, Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin, South African Law Journal (forthcoming).

the purpose of fulfilling the right to education. The *state's* duty thus extends to regulating private actors so to ensure the realisation of the right to education. Moreover, the state has been compelled to promulgate regulations in the past, in order to fulfil the right to basic education.[212] The provisions on educational purposes in CAB is an instance of the state legislating to fulfil its obligations under the Bill of Rights.

2. The right to higher education and its corresponding duties

Further education, by implication, covers all forms of education that do not fall within 'basic education'. Tuchten J, in a further round of proceedings in the Limpopo textbooks litigation, stated obiter that '[t]extbooks are essential to all forms of education'.[213] Most recently, student activists, through the Fees Must Fall protests,[214] have been making demands for the state to provide fee-free further education with a view to realising the right to further education in s 29(1)(b).[215] In order to address the grievances raised by the protestors and look into the feasibility of fee-free further education, the President set up a Commission of Inquiry into Higher Education and Training. The Commission quoted students' submissions with approval and concluded that, '[thus] it has been emphasised (and persuasively so) that tuition is for the great majority of the student body (and also for the aspirant student population) of little practical value without food, accommodation, transport, books, computers/tools/equipment, internet connectivity, health care and in many instances, family support'.[216] The Commission therefore considered educational materials a key input to realising the right to further education in South Africa (as the courts held in relation to textbooks and basic education).

Under international law, the right to education includes within it access to educational materials for all levels of education – including university level education, which falls under 'further education' in s 29(1)(b).[217] The only difference between s 29(1)(a) and (b) is the extent to which the state is obliged

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[212] Minister of Basic Education promulgated Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure on 29 November 2013 after litigation by the LRC and Equal Education.

[213] Supra note 203 at 51.

[214] Fees must fall is a national student activist protest movement that began in South Africa in mid-October 2015. Its demands were to stop further increases in university fees – more radically, that further education be free and that the curriculum be decolonised. It resulted in no university fee increases in 2016 and increased government funding for universities. See Department of Higher Education and Training, 'Report of the Commission of Enquiry into Higher Education and Training to the President of the Republic of South Africa', (*Department of Higher Education and Training*, 13 Nov 2017) 9-20 <http://www.dhet.gov.za/Commissions%20Reports/Report%20of%20Commission%20of%20Inquiry%20into%20the%20Feasibility%20of%20Making%20Higher%20Education%20and%20Training%20Fee-free%20in%20South%20Africa.pdf> ('Fee Commission Report').

[215] *Hotz v University of Cape Town* [2017] ZACC 10, 2018 (1) SA 369 (CC) at 31.

[216] Ibid at 145.

[217] See Part I of this paper.

to provide textbooks and other learning materials at different levels.

The right under s 29(1)(b) is qualified by the state's obligation to take *reasonable* measures to make further education accessible and available. This applies equally to the essential inputs to education, and specifically educational materials. The CAB is one form of fulfilment of the state's duties that does *not* require an extensive amount of resources for the provisioning of material infrastructure, like the building of new universities would, for instance – rather it is a regulatory response that does not lead to massive budgetary implications. A regulatory response to simply *make available what is already there* is well within the state's duties under s 7(2) to take reasonable measures to respect, protect, promote and fulfil the right. An invocation of the principle of progressive realisation in delaying the state's fulfilment of this obligation is not tenable given the immediacy of the need and the ease with which the state may fulfil it.[218]

C. *The Bill of Rights as a constitutional magnet for the CAB's educational exceptions*

The quoted parts of the following provisions pertain to those uses that are expressly exempted from copyright, on the basis that they fulfil educational purposes, as legislated in the CAB:

> 12A. 'General exceptions from copyright protection'
> *(a)* In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:
> (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device; […]
> (iv) scholarship, teaching and education; […]
> *(b)* In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—
> (i) the nature of the work in question;
> (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
> (iii) the purpose and character of the use, including whether—
> *(aa)* such use serves a purpose different from that of the work affected; and
> *(bb)* it is of a commercial nature or for non-profit research, library or educational purposes; and
> (iv) the substitution effect of the act upon the potential market for the

[218] See Katharine Young, 'Waiting for Rights: Progressive Realization and Lost Time' in Katharine G. Young (ed), The Future of Economic and Social Rights, Cambridge University Press (2019) (for an overview of progressive realisation and the particular effect that delays have on rights-bearers).

work in question.

12B. 'Specific exceptions from copyright protection applicable to all works'
(1) Copyright in a work shall not be infringed by any of the following acts: […]
(b) any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question; […]

12D. 'Reproduction for educational and academic activities'
(1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that the copying does not exceed the extent justified by the purpose.
(2) Educational institutions may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.
(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.
(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—
(a) where the textbook is out of print;
(b) where the owner of the right cannot be found; or
(c) where authorized copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.
(5) The right to make copies shall not extend to reproductions for commercial purposes.
(6) Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository.
(7) *(a)* The author of a scientific or other contribution, which is the

> result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a collection, has the right, despite granting the publisher or editor an exclusive right of use, to make the final manuscript version available to the public under an open licence or by 50 means of an open access institutional repository.
> *(b)* In the case of a contribution published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author's right referred to in paragraph *(a)* for up to 12 months from the date of the first publication in that periodical.
> *(c)* When the contribution is made available to the public as contemplated in paragraph *(a)*, the place of the first publication must be properly acknowledged.
> *(d)* Third parties, such as librarians, may carry out activities contemplated in paragraphs *(a)* to *(c)* on behalf of the author.
> *(e)* Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.
> (8) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies contemplated in subsections (1) to (6).

The above provisions comprehensively provide for access to educational materials taking into account the lived realities of students[219] – and the particular advancements of technologies that have transformed the educational landscape, particularly in the past few months during the global pandemic. The provisions recognise that access to educational materials takes place through course packs as well as digital learning environments. They also recognise that there may be limited circumstances for the copying of a whole textbook, but the limits of such copying are clearly enumerated. Authors' moral rights are consistently reiterated throughout these provisions. These are hardly novel creations – various countries have similar such provisions in their copyright laws such as India[220] and Canada,[221] amongst

[219] See Laura Czerniewicz, Student Practices in Copyright Culture: Accessing Learning Resources, *Learning Media and Technology*, 2017, 42-2, pp11-184 (finding that photocopying plays an indispensable role in enabling access to educational materials for students). See also, Eve Gray and Laura Czerniewicz. Access to learning resources in post-apartheid South Africa in Joe Karaganis (ed), Shadow Libraries: Access to educational materials in global higher education (2018) MIT Press (providing an overview of how students access educational materials in the post apartheid-era and the costs that families bear to educate children despite the right to education being constitutionally guaranteed).
[220] Section 52(1)(i) and (a), Indian Copyright Act, 1957. *The Chancellor, Masters & Scholars of University of Oxford & Ors v Rameshwari Photocopy Services & Ors* 160 DRJ (SN) 678 (2016) available at: https://indiankanoon.org/doc/114459608/(for an interpretation of the provisions on access to educational materials as focusing on equitable access to materials).
[221] CCH Canadian Ltd. v. Law Society of Upper Canada 2004 SCC 13; [2004] 1 SCR 339. This was further confirmed in Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright) 2012 SCC 37, [2012] 2 SCR 345

others.[222]

When legislating on a matter that has the potential to infringe upon a right in the Bill of Rights, the Constitution sets out a test in s 36 as outlined above. In statutorily creating and regulating copyright, the legislature *must* take into account any possible infringements upon rights protected by the Bill of Rights. As I outlined in my first section, there are a number of rights in the Bill of Rights that are implicated by copyright – children's rights, the right to education, freedom of expression, access to information, the right to participation in cultural activities and the right to equality that runs as a thread throughout this analysis to ensure that *everyone* has access to such materials without discrimination (particularly, persons with disabilities and those facing historical and material socio-economic disadvantage).

Sections 12A, B and D outlined above specifically exempt certain uses from being covered by the restraint of copyright in order to ensure that the CAB passes muster under s 36. *These provisions are thus tailored to realise the right to education, that would otherwise be infringed, were it not for their inclusion.* In other words, the exceptions and limitations that the President calls into question are those that would act to save the CAB in a s 36 analysis of the right of access to educational materials under the Constitution.

The President, in his referral letter, appears to be concerned about the application of the right against arbitrary deprivation of property in respect of the above exceptions as well.[223] In the first instance, it is difficult to see how the realisation of the right to education through the limitation of a statutory monopoly to apply to only those uses that are not educational in nature can amount to arbitrary deprivation of property. In other words, it is an open question as to whether statutory copyright is constitutionally protected as property. But even if it is, in its very conception copyright *excludes* those exceptional uses that are for educational purposes from its ambit. Therefore the argument that exceptions and limitations for educational purposes amounts to an arbitrary deprivation of property is based on the erroneous premise that these uses were included within the bounds of copyright's statutory monopoly in the first place.

Moreover, a careful reading of the constitutional property jurisprudence indicates that courts have never held for copyright, patents or trademarks to be constitutionally protected by s 25(1).[224] However, even if

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[222] The US' fair use provisions have been widely discussed in this debate. See for example, Sean Flynn, Peter Jaszi and Mike Carroll, Inside Views: Defending Fair Use In South Africa, Intellectual Property Watch, available at: https://www.ip-watch.org/2018/12/04/defending-fair-use-south-africa/ (explaining the contours of fair use and its origin and compatibility with the three-step test).

[223] Referral letter at 15.1.

[224] Sanya Samtani, 'The Right of Access to Educational Materials', doctoral research (forthcoming). For a snapshot of the argument, see Sanya Samtani, Parliament can uphold the Constitution by passing the Copyright Amendment Bill — again, Daily Maverick (12 July 2020), available at: https://www.dailymaverick.co.za/opinionista/2020-07-12-

one takes the property argument at its most ambitious highest, it is extremely unlikely for a court to hold that the protection of several rights in the Bill of Rights, including the right to education is an *arbitrary* deprivation of property at all.[225] This is particularly so because considering that almost all copyright laws in the world have educational exceptions and it is a well-established exemption from the reach of copyright's monopoly.

A s 36 limitations analysis must be an all-things-considered analysis[226] – and it is highly likely that s 12A-D of the CAB outlined above will pass constitutional muster on the basis that it gives effect to a number of rights in the Bill of Rights. Given that s 233 binds courts to select a reasonable interpretation of a statute that is consistent with international law the real question that is at issue is: *whether the CAB can be reasonably interpreted to be consistent with international law*.

Of course it can – in respect of the educational exceptions I have outlined above. The inter-locking network of binding treaty obligations outlined in Part I of this paper include not only the Berne Convention (which makes specific provision for access to copyrighted materials for educational purposes) but also South Africa's international human rights obligations under the ICESCR, UNCRPD, CRC amongst other binding treaties[227] that particularly highlight the importance of the right to education for human flourishing. The obligations incumbent upon South Africa in respect of both sets of treaties have been outlined in Part I. It serves to reiterate that South Africa has a positive obligation to *provide* textbooks and other learning materials and where that obligation is subject to progressive realisation, South Africa at the very least has an obligation to *enable* access to such materials under human rights law. Under international copyright law, South Africa has an obligation to create and regulate copyright and is *permitted* to craft exceptions and limitations to copyright for educational purposes subject to fair practice. Where educational uses are outside of the scope of "illustrations…for teaching", they would be subject to the three-step test. In other words, although the creation of exceptions and limitations in the relevant international copyright treaties is *permissive*, South Africa's international human rights obligations as well as constitutional obligations under the Bill of Rights *requires* the inclusion of these provisions in order to

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parliament-can-uphold-the-constitution-by-passing-the-copyright-amendment-bill-again/ (explaining the court's inconsistent property jurisprudence and outlining that intellectual property has not yet been included within the ambit of s 25). See also *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) (calling the jurisprudence of the Court on property 'a vexed question').

[225] Theunis Roux, Property, in Woolman & Bishop, Constitutional law of South Africa available at: https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap46.pdf (see particularly Roux's arbitrariness vortex).

[226] As outlined in Part II of this paper.

[227] As outlined in Part I of this paper.

ensure that the right to education at all levels is realised; that copyright does not act as a barrier to the right to education for all. In legislating on the CAB, Parliament therefore properly interprets and gives effect to the sum of South Africa's international obligations and protects constitutional rights bearers.

The contention that finds mention in the President's letter is the concern that the CAB's provisions on educational exceptions do not fulfil the three-step test. At the very outset, it is important to flag that there are *two* relevant tests at issue – first, the Berne Convention creates a specific standard for educational exceptions, that they must be compatible with "fair practice" and "to the extent justified by the purpose".[228] Second, those exceptions falling outside the ambit of this article, must comply with the three-step test.[229] The CAB's educational exceptions are compatible with fair practice – none of the provisions are absolute, most of them include levers for a reasonableness or fairness enquiry, as well as conditions that trigger their application. Most importantly, the use is only justified to the extent that it is for educational purposes.[230] In any event, even if educational exceptions are to be considered in light of the three-step test, they are highly likely compliant.[231] The three-step test, as a provision in a treaty, must be interpreted using the VCLT rules of interpretation – this necessitates taking into account other relevant rules of international law,[232] as well as subsequent practice of states parties to the TRIPS Agreement and the Berne Convention.[233] Here, those rules of international law are the right to education and obligations stemming from human rights law.[234]

Importantly, there can be no circumstance where South Africa interprets the three-step test to preclude its fulfilment of (1) other international obligations (such as its human rights obligations) or (2) constitutional

[228] Article 10(2), Berne Convention.
[229] Article 9(2), Berne Convention.
[230] This is in line with most WIPO members' legislation around the world. See, for similar legislation in other countries most recently, Daniel Seng, Copyright Limitations and Exceptions for Educational and Research Activities: Typology Analysis, SCCR/38/8, Thirty-Eight Session Geneva, April 1 to 5, 2019 (providing a typology of the educational exceptions of all 191 WIPO member states). See also, Daniel Seng, Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities, SCCR/35/5 REV. Thirty-Fifth Session, November 13 to 17, 2017 (providing a comprehensive analysis of common elements in all 191 WIPO member states' educational exceptions in copyright laws).
[231] See Tobias Schonwetter, 'Expert Opinion to the Portfolio Committee on Trade and Industry concerning ss 12A to 19D', available at: https://static.pmg.org.za/181031opinion.pdf (explaining how the provisions outlined above are compatible with the three-step test). See also, Tobias Schonwetter, 'Written Comments on the Copyright Amendment Bill [B13B – 2017]', UCT IP Unit, available at: http://infojustice.org/wp-content/uploads/2019/03/Schonwetter-NCoP-Submission-February-2019.pdf
[232] Article 31(3)(c), VCLT.
[233] Article 31(3)(b), VCLT. See Seng, supra note 230 for a comprehensive overview of the subsequent practice of states on this issue.
[234] See Part II of this paper.

obligations, stemming from the Bill of Rights and s 7(2) in particular. A restrictive interpretation of this sort is highly unlikely to be reasonable.

Since states are subjects of international law how they domestically implement their international obligations contributes to the heterogenous, pluralistic manner in which the international obligations may be interpreted.[235] In South Africa, the Constitution further creates a hierarchy where international obligations that map onto the Bill of Rights are enforceable to the extent to which they give content to the rights in the Bill of Rights or the duties that flow from such rights.

CONCLUSION: BILL OF RIGHTS AND INTERNATIONAL LAW

It is a widely accepted principle that there is wide amplitude available to countries in domestically implementing their international obligations. This is known by several names in respect of various areas of international law, the most common being "deference".[236] International obligations are often drafted at high levels of abstraction, in order to secure political consensus. The specific details of implementation are largely left to domestic authorities to best strike a balance on the basis of their constitutional, cultural and socio-economic conditions.

International law has various entry points in the above analysis: (1) in determining the overall interpretive effect of South Africa's binding, inter-locking obligations on copyright and international human rights law, which have an important bearing on the interpretation of the impugned provisions of the CAB; (2) in the interpretation of specific constitutional rights – for instance, in respect of s 29, the right to basic and higher education, and determining whether access to copyrighted materials for educational purposes is a part of the *right* as well as in determining the scope of the state's duties that flow from it.

Significantly, international law, in and of itself, *cannot* form a direct, independent constraint on Parliament's law-making powers. As explained earlier, Parliament's law-making power is only constrained by the Constitution. This does not mean that international law is irrelevant to Parliament's law-making function, but merely that the effect of international law *must* always be mediated through the provisions of the Constitution itself, in particular ss 39, 231, 233 and the rights in the Bill of Rights. As a result of these provisions, international law obligations that map onto the Bill of Rights must be given greater weight in Parliamentary law-making. The provisions of the CAB on educational exceptions are a step towards the

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[235] Margaret Chon, A Rough Guide to Global Intellectual Property Pluralism (November 16, 2009). Oxford University Press, Forthcoming, Seattle University School of Law Research Paper No. 09-01, Available at SSRN: https://ssrn.com/abstract=1507343

[236] Andrew Legg, 'Deference in International Human Rights Law,' PhD thesis, 2011, Oxford University, UK. See also, Machiko Kanetake and André Nollkaemper, The Rule of Law at the National and International Levels: Contestations and Deference, Studies in International Law, Hart Publishing, 2016.

fulfilment of Parliament's constitutional obligations – both under s 7(2) to give effect to rights in the Bill of Rights as well as to bring apartheid-era domestic statutes in line with the Bill of Rights. In drafting these provisions, South Africa is furthering a legitimate interpretation of the sum of its international copyright law obligations (including the three-step test as applied to South Africa), its international human rights obligations and its constitutional obligations. In this way, Parliament is exercising its law-making power in the field of the Bill of Rights' magnetic effect. In drafting and passing the CAB, Parliament's policy choices are closely aligned with the Bill of Rights. This is uncontroversial, given Parliament's constitutional obligation to do so. Parliament is operating firmly within the realm of possible interpretations within the framework of international copyright law, human rights law and constitutional law.