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### Developing a Human Right to Research in International Law

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# DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

*Sanya Samtani*<sup>1</sup>

## ABSTRACT

The covid-19 pandemic has highlighted issues concerning equitable access to and participation in research. But research has always been indispensable to human development. To what extent does international law guarantee access to research as well as the practice of researching? Drawing on the social anthropology definition of research as the pursuit of that which is not yet known, this paper locates a novel human right to research within the core international human rights covenants. The paper sets out the scope and content of the right and the nature and content of State obligations flowing from it. It concludes by outlining the implications of recognizing this right for intersecting legal regimes like intellectual property law.

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<sup>1</sup> Sanya Samtani, Senior Researcher, Mandela Institute, University of the Witwatersrand DPhil (Oxon.) BCL (Oxon.) BA LLB Hons. (NALSAR) ORCID: <https://orcid.org/0000-0003-0448-8798> email: [sanya.samtani@wits.ac.za](mailto:sanya.samtani@wits.ac.za) The author thanks Laurence Helfer and Christophe Geiger for their comments on early versions of this article. The article has enormously benefited from comments and suggestions at PIJIP's Right to Research Works in Progress workshops (2022, 2023), as well as at the Public Symposium on the Right to Research in Copyright Law organized by the Washington College of Law Program on Information Justice and Intellectual Property (PIJIP) (2022). The author acknowledges Shrudula Murty's excellent research assistance.

<b>ABSTRACT</b> .....	<b>1</b>
<b>INTRODUCTION</b> .....	<b>2</b>
I.    A HUMAN RIGHT TO RESEARCH: CONCEPT AND METHOD .....	5
A. <i>What is ‘research’?</i> .....	5
B. <i>Why locate this right within existing human rights law?</i> .....	8
II.   LOCATING THE HUMAN RIGHT TO RESEARCH .....	11
A. <i>Scope of application of the right to research</i> .....	14
B. <i>Normative content of the right to research</i> .....	16
C. <i>Limitations to the right to research</i> .....	20
III.  STATE OBLIGATIONS TO REALIZE THE RIGHT TO RESEARCH.....	21
A. <i>Nature and priority of obligations</i> .....	21
B. <i>Typology: Respect, protect and fulfil</i> .....	24
C. <i>International cooperation</i> .....	28
<b>CONCLUSION</b> .....	<b>29</b>

## INTRODUCTION

Research is indispensable to human development. As the worsening climate crisis and the covid-19 pandemic have demonstrated, research is crucial to identifying and addressing contemporary crises that potentially threaten human existence itself.<sup>2</sup> In common parlance, research is not limited by subject matter nor is it limited by who carries it out. Research, as defined in the Oxford English Dictionary is a noun and a verb. In its noun form, research means ‘the systematic investigation into and study of materials and sources in order to establish facts and reach new conclusions’, and in its verb

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<sup>2</sup> See, in relation to covid-19, Jenny J. Lee & John P. Haupt, *Scientific Globalism during a Global Crisis: Research Collaboration and Open Access Publications on COVID-19*, 81 HIGH EDUC 949 (2021); L. Harper et al., *The Impact of COVID-19 on Research*, 16 JOURNAL OF PEDIATRIC UROLOGY 715 (2020); Noureddine Chaachouay, Allal Douira & Lahcen Zidane, *COVID-19, Prevention and Treatment with Herbal Medicine in the Herbal Markets of Salé Prefecture, North-Western Morocco*, 42 EUROPEAN JOURNAL OF INTEGRATIVE MEDICINE 101285 (2021); Qingwei Li et al., *The Role Played by Traditional Chinese Medicine in Preventing and Treating COVID-19 in China*, 14 FRONT. MED. 681 (2020). See, in relation to the climate crisis, Felix Creutzig et al., *Upscaling Urban Data Science for Global Climate Solutions*, 2 GLOB. SUSTAIN. e2 (2019); Richard H. Moss et al., *The next Generation of Scenarios for Climate Change Research and Assessment*, 463 NATURE 747 (2010); Yadav Uprety et al., *Contribution of Traditional Knowledge to Ecological Restoration: Practices and Applications*, 19 ÉCOSCIENCE 225 (2012); Zenebe Mekonnen et al., *Traditional Knowledge and Institutions for Sustainable Climate Change Adaptation in Ethiopia*, 3 CURRENT RESEARCH IN ENVIRONMENTAL SUSTAINABILITY 100080 (2021).

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

form, it means the carrying out of such an investigation.<sup>3</sup> Any conception of a ‘right to research’ must be concerned with both aspects of the meaning of research. To this end, this paper asks: to what extent does international law guarantee access to research as well as the practice of researching?

Recent attempts have been made to identify a ‘right’ to research within the international intellectual property regime.<sup>4</sup> This body of work is concerned primarily with crystallizing the content of the exceptions and limitations to intellectual property law that relate to research.<sup>5</sup> For instance, a typical example of this proposition is the following definition of the ‘right’ to research: ‘any research-related use *permitted* by states in their respective national copyright laws’ (emphasis added).<sup>6</sup> The characterization of uses that are not restricted (and hence permitted) by copyright on the basis of public policy as ‘users rights’ has a long history.<sup>7</sup> However, the characterization of what the copyright regime terms permissions/defenses in the nature of

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<sup>3</sup>Research, Oxford Dictionaries Online <https://solo.bodleian.ox.ac.uk/permalink/f/89vilt/LGDBaz/31804084> (last visited 9 Feb., 2022).

<sup>4</sup> See, for an early instance of this, *Civil Society Proposed Treaty On Copyright Exceptions And Limitations For Educational And Research Activities*, INFOJUSTICE (2018) <http://infojustice.org/wp-content/uploads/2018/11/TERA-11272018.pdf>.

<sup>5</sup> See, for instance, Cheng-Davies, Tania. “Erasmian Perspectives on Copyright: Justifying a Right to Research,” (2023). PIJIP/TLS Research Paper Series no. 94. <https://digitalcommons.wcl.american.edu/research/94> (even though Cheng-Davies draws on Desiderius Erasmus and his contemporaries, the purpose for doing so is to reinterpret contemporary copyright law specifically to further access to and participation in research); Patricia Aufderheide, “The Chilling Effect of Copyright Permissions on Academic Research: The Case of Communication Researchers” (2020). Joint PIJIP/TLS Research Paper Series. 49. <https://digitalcommons.wcl.american.edu/research/49> (last visited 20 Aug., 2022). See also, See *Right to Research Coalition*, SPARC <https://sparcopen.org/our-work/r2rc/#:~:text=The%20Right%20to%20Research%20Coalition%20is%20an%20initiative%20of%20SPARC,Open%20Education%2C%20and%20Open%20Data> (last visited May 10, 2022). See also, See, the proposal of the African group at the recent discussions at WIPO regarding new exceptions and limitations for libraries, archives and research institutions, WIPO, PROPOSAL BY THE AFRICAN GROUP FOR A DRAFT WORK PROGRAM ON EXCEPTIONS AND LIMITATIONS, SCCR/42/4 (2022) [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=568491](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=568491). See also, Sean Flynn, Luca Schirru, Michael Palmedo and Andrés Izquierdo, “Research Exceptions in Comparative Copyright.” (2022) PIJIP/TLS Research Paper Series no. 75. <https://digitalcommons.wcl.american.edu/research/75> (last visited 20 Aug., 2022).

<sup>6</sup> Naama Daniel, “Lost In Transit: How Enforcement of Foreign Copyright Judgements Undermines the Right to Research” (2023). Joint PIJIP/TLS Research Paper Series. 85. <https://digitalcommons.wcl.american.edu/research/89>. See also, Okorie, Chijioke I. “Government Role in Realising A ‘Right’ to Research in Africa,” PIJIP/TLS Research Paper Series no. 96. <https://digitalcommons.wcl.american.edu/research/96> conceptualising a right to research as within copyright exceptions.

<sup>7</sup> As noted by Daniel at fn 3, *ibid.* For a brief overview of the concept of ‘users rights’, see, David Vaver, *Copyright Defenses as User Rights*, 60 JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A. 661 (2013).

research-related uses as a ‘right’ *simpliciter*<sup>8</sup> without recognizing its overlap with human rights law excludes certain modes of analysis that are central to its conceptualization.<sup>9</sup> For instance, the duties of the State in relation to research are completely ignored when research-related uses are considered within the permissive/defensive copyright paradigm. Consider, for instance, access to published research for educational purposes. Within the international copyright framework, this falls within the exceptions paradigm. While this exception may be strengthened through giving it clear and precise content, when viewed from an internal copyright perspective, it remains internally an exception to the dominant paradigm of copyright’s exclusivity, and continues to entrench the priority of market access in the first instance without considering the role of the State. The conceptualization of a right to research solely (or indeed primarily) within the intellectual property law paradigm is thus necessarily constrained by the limits of that regime.

In this paper, I argue that the appropriate paradigm to conceptualize the existence of a ‘right’ to research is international human rights law.<sup>10</sup> Research, in its conduct and access, I argue, entails the exercise of various *human* rights.<sup>11</sup> Those people and communities conducting or accessing research are simultaneously ‘users’ and ‘authors’. Copyright law’s structuring of the relationship between users and authors is thus of limited value at the conceptual level.<sup>12</sup>

I begin my inquiry by dealing with conceptual issues in Part I. I offer a working conceptual definition of ‘research’ and explain my choice of method. In Part II, I locate various aspects of the right to research in several

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<sup>8</sup> For a distinction between ‘simple rights’ and ‘human rights’, see, Cross-Cutting Observations, , in THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 5, 5 (Andreas von Arnould, Kerstin von der Decken, & Mart Susi eds., 2020).

<sup>9</sup> Moreover, the explicit nature of its status in copyright law as a permission or a defence often leads to the shrinkage of the content and substance of ‘users rights’ and consequently the public domain. See, for instance, Lea Shaver, *The Right to Science and Culture*, 1 WISCONSIN LAW REVIEW 121 (2010); Elizabeth L Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 UNIVERSITY OF COLORADO LAW REVIEW 561 (2015).

<sup>10</sup> See, for instance, a similar re-paradigm being conducted in the European context, Geiger, Christophe, and Jütte, Bernd Justin. "Conceptualizing a 'Right to Research' and Its Implications for Copyright Law: An International and European Perspective." (2022) PIJIP/TLS Research Paper Series no. 77. <https://digitalcommons.wcl.american.edu/research/77>

<sup>11</sup> This paper deliberately re-centres the human in human rights in response to accounts of the neoliberal capture of human rights by corporations. See, for instance, JESSICA WHYTE, THE MORALS OF THE MARKET: HUMAN RIGHTS AND THE RISE OF NEOLIBERALISM (2019). See also, for a discussion on the extent to which a constitutional right to ‘human dignity’ can or cannot extend to found a claim of corporate defamation, *Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others* [2022] ZACC 38; 2023 (2) SA 404 (CC) (14 November 2022).

<sup>12</sup> See, for a comprehensive explanation of the subjectivity of copyright as structuring the relations between authors, users and pirates, JAMES MEESE, AUTHORS, USERS, AND PIRATES: COPYRIGHT LAW AND SUBJECTIVITY (2018).

# DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

rights in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, as international human rights are indivisible and interdependent. I particularly focus on the crucial role played by the right to science and culture in the International Covenant on Economic, Social and Cultural Rights in guaranteeing a right to research. In Part III, I discuss the nature and extent of State obligations to realize the right to research. I discuss the various ways in which States may act to fulfil these obligations.

## I. A HUMAN RIGHT TO RESEARCH: CONCEPT AND METHOD

To analyze whether and to what extent international law regulates research, I first set out a working conceptual definition of research itself. Then, I explain my methodology.

### A. *What is 'research'?*

Etymologically, research is derived from the French word *rechercher* which means 'to seek out, search closely'.<sup>13</sup> Key to its French roots (whether as a noun or verb) is its method. The Oxford English dictionary definition also emphasizes that research involves a 'systematic investigation'.<sup>14</sup> The Merriam-Webster definition focuses on the method used to conduct such research, in that it is a 'studious inquiry or examination' that requires 'investigation or experimentation' for the purposes of 'discovery and interpretation of facts, revision of accepted theories or laws in the light of new facts, or practical application of such new or revised theories or laws'.<sup>15</sup>

There is tremendous scholarly literature on various research methods and methodology employed across various disciplines. However, as noted by Appadurai, "since research is the optic through which we typically find out about something as scholars today, it is especially hard to use *research* to understand research".<sup>16</sup> There is, accordingly, sparse literature on the definition of research itself. Using anthropological methods, Appadurai advances a definition of research that resonates with the etymological definition in its focus on methods – 'research may be defined as the systematic pursuit of the not yet known'.<sup>17</sup>

This methods-focused definition implies the existence of a community of those who utilize systematic investigations / experimentation / inquiries, and

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<sup>13</sup> *Research*, Online Etymology Dictionary, [https://www.etymonline.com/word/research?ref=etymonline\\_crossreference#etymonline\\_v\\_48065](https://www.etymonline.com/word/research?ref=etymonline_crossreference#etymonline_v_48065) (last visited May 10, 2022).

<sup>14</sup> *Research* supra note 3.

<sup>15</sup> *Research*, Merriamwebster.com, <https://www.merriam-webster.com/dictionary/research> (last visited May 10 2022).

<sup>16</sup> A Appadurai, *The Research Ethic and the Spirit of Internationalism*, 51(4) *Items pt.* 1 (1997) 55. (Emphasis added)

<sup>17</sup> *Id.* at 56.

those who recognize the use of the such methods to create ‘new knowledge’.<sup>18</sup> Knowledge production is indispensable to research in that it is one of its key purposes.<sup>19</sup> Scholarly literature has also studied issues of equality and inequality in knowledge production.<sup>20</sup> With the global shift over the past three decades to an ‘information society’, society has increasingly commodified knowledge in the form of ‘knowledge goods’ that can be bought and sold on the market, entailing economic return on the process of knowledge production,<sup>21</sup> and constructing the ‘knowledge economy’.<sup>22</sup> This has transitively impacted research, the ‘incentives’ for conducting research,<sup>23</sup> and the conditions in which research is being conducted.<sup>24</sup> It has also entrenched concerns surrounding whose knowledge ‘counts’,<sup>25</sup> leading to the marginalization of certain bodies of knowledge and epistemic practices often classified as ‘indigenous’ or ‘traditional’<sup>26</sup> and consequently methods of

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<sup>18</sup> *Id.* at 57.

<sup>19</sup> There is significant literature on epistemology, which focuses on understanding and defining the different types of knowledge, its architecture, its basis and justifications, as well as its relationship to power and the structuring of society. See, for a famous example, MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (Editions Gallimard, 1969) tr Tavistock Publications, 1972; *See also*, for an overview of the field, THE ROUTLEDGE COMPANION TO EPISTEMOLOGY, (Sven Bernecker & Duncan Pritchard eds., 2011); ROBERT AUDI, *EPISTEMOLOGY* (2010).

<sup>20</sup> Raewyn Connell, *Southern theory and world universities*, 36 HIGHER EDU. RES. & DEV. 4–15 (2017); Raewyn Connell et al., *Toward a global sociology of knowledge: Post-colonial realities and intellectual practices*, 32 INT’L SOCIOLOGY 21–37 (2017); RK SIDHU, *UNIVERSITIES & GLOBALIZATION: TO MARKET, TO MARKET* (2006); *DECOLONISATION IN UNIVERSITIES: THE POLITICS OF KNOWLEDGE*, (Jonathan D. Jansen ed., 2019); *Decolonizing the University*, in *KNOWLEDGES BORN IN THE STRUGGLE: CONSTRUCTING THE EPISTEMOLOGIES OF THE GLOBAL SOUTH* (Boaventura de Sousa Santos & Maria Paula Meneses eds., 1st ed. 2019).

<sup>21</sup> MANUEL CASTELLS, *THE NETWORK SOCIETY: A CROSS-CULTURAL PERSPECTIVE* (2004); Peter Fleissner, *The “Commodification” of Knowledge in the Global Information Society*, 7 TRIPLEC 228 (2009).

<sup>22</sup> P DRAHOS AND BRAITHWAITE J, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (1st ed., 2002).

<sup>23</sup> Luke Hawksbee, Martin McKee & Lawrence King, *Don’t Worry about the Drug Industry’s Profits When Considering a Waiver on Covid-19 Intellectual Property Rights*, BMJ e067367 (2022).

<sup>24</sup> *See*, for example, Joseph E Stiglitz & Arjun Jayadev, *Medicine for tomorrow: Some alternative proposals to promote socially beneficial research and development in pharmaceuticals*, 7 J. OF GENERIC MED. 217–226 (2010); Suerie Moon, Jorge Bermudez & Ellen ’t Hoen, *Innovation and Access to Medicines for Neglected Populations: Could a Treaty Address a Broken Pharmaceutical R&D System?*, 9 PLOS MED e1001218 (2012).

<sup>25</sup> Francesca Ribenfors, *Whose Knowledge Counts? Rewriting the Literature Review to Include Marginalised Voices*, 14 ETHICS AND SOCIAL WELFARE 230 (2020).

<sup>26</sup> The division between scientific knowledge and indigenous knowledge has been widely critiqued in the literature. The basis for this critique is that all forms of knowledge are relational, including scientific knowledge, and require understanding in their contexts. *See*, Lesley J. F. Green, *‘Indigenous Knowledge’ and ‘Science’: Reframing the Debate on Knowledge Diversity*, 4 ARCHAEOLOGIES 144 (2008); Arun Agrawal, *Indigenous Knowledge and the Politics of Classification*, 54 INTERNATIONAL SOCIAL SCIENCE JOURNAL 287 (2002); Arun Agrawal, *Dismantling the Divide Between Indigenous and Scientific Knowledge*, 26

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

research.<sup>27</sup> Literature on the access to knowledge mobilization problematizes how intellectual property laws have led to limitations on access to knowledge and knowledge production process.<sup>28</sup> An understanding of the impact of intellectual property laws on research is key – and while this paper considers it crucial to conceptualize research outside of the restrictive IP framework, in its final Part, it also discusses the intersections with IP, as do other contributions in this symposium.<sup>29</sup>

The definition of research advanced by Appadurai rests on the exercise of a fundamental capacity, that is ‘the capacity of the individual to make independent inquiries about their own lives and worlds’.<sup>30</sup> This capacity enables the ‘deparochialisation’ of research from its technocratic understanding as the province of the super specialized<sup>31</sup> and resonates with the human development literature – in particular with the capabilities approach.<sup>32</sup> In response to utilitarian economics and aggregate approaches to welfare,<sup>33</sup> the capabilities approach shifts the focus from the distribution of primary goods to what these primary goods enable each person to *do* and to *be*.<sup>34</sup> A version of ‘research’, understood as independent inquiry, appears in Nussbaum’s list of ten interrelated human capabilities that she regards as central to human development.<sup>35</sup> The list particularly includes the capability

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DEVELOPMENT AND CHANGE 413 (1995). For an understanding of relationality to context of scientific truth claims, see MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-1979* tr Graham Burchell (Palgrave Macmillan 2008).

<sup>27</sup> See, for an overview, Edward Shizha, *Indigenous Knowledges and Knowledge Codification in the Knowledge Economy*, in *HANDBOOK OF RESEARCH ON THEORETICAL PERSPECTIVES ON INDIGENOUS KNOWLEDGE SYSTEMS IN DEVELOPING COUNTRIES*: (Patrick Ngulube ed., 2017). See also, on the point of marginalisation of traditional and indigenous knowledges and knowledge systems, the special issue of the *American Indian Quarterly*: Waziyatawin Angela Wilson, *Introduction: Indigenous Knowledge Recovery Is Indigenous Empowerment*, 28 *AMERICAN INDIAN QUARTERLY* 359 (2004).

<sup>28</sup> See, for an overview, *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY*, (Amy Kapczynski & Gaëlle Krikorian eds., 2010). See also, critical race IP scholarship on the limitations of IP, Anjali Vats & Deidré A. Keller, *Critical Race Theory as Intellectual Property Methodology*, in *HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH* 777 (Irene Calboli & Maria Lillà Montagnani eds., 1 ed. 2021).

<sup>29</sup> See, for instance, Geiger, Christophe, and Jütte, Bernd Justin. "Conceptualizing a 'Right to Research' and Its Implications for Copyright Law: An International and European Perspective." (2022) PIJIP/TLS Research Paper Series no. 77. <https://digitalcommons.wcl.american.edu/research/77>.

<sup>30</sup> Arjun Appadurai, *The Right to Research*, 4 *GLOBALISATION, SOCIETIES AND EDUCATION* 167, 173 (2006).

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

<sup>32</sup> MC NUSSBAUM, *CREATING CAPABILITIES* 17 (2011).

<sup>33</sup> Amartya Sen, *Equality of What ?*, in MCMURRIN S TANNER LECTURES ON HUMAN VALUES, 205–213 (1979); MC NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 71–72 (2006).

<sup>34</sup> Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE*, 30 (Martha Nussbaum & Amartya Sen eds., 1993).

<sup>35</sup> MC NUSSBAUM, *supra* note 32 at 31. This list is as follows : life; bodily health; bodily



of ‘senses, imagination and thought’ which she describes as ‘being free to imagine, think and reason’ as well as ‘access cultural experiences, literature, art and so on and being able to produce one’s own expressive work’.<sup>36</sup> This, Nussbaum regards as central to human dignity.

Drawing on the above literature, this paper adopts a working definition of research as a systematic inquiry into what is hitherto unknown.<sup>37</sup> While it is outside the scope of this paper to discuss, in full, the relationship between epistemology and research, the paper recognises that epistemic commitments and cultures significantly influence the choice of research methods and resulting bodies of knowledge,<sup>38</sup> as well as their recognition by particular epistemic communities.<sup>39</sup> Bearing this in mind, I now turn to an explanation of why this paper chooses to first analyze the extent of existing international human rights law guarantees with regard to the right to research instead of proposing a ‘new’ right.

B. *Why locate this right within existing human rights law?*

The multiples crises that the world is faced with underscore the salience of recognizing a right to research at this contemporary moment.<sup>40</sup> There is significant literature on the virtues and drawbacks of proposing the stand-alone existence of an entirely new right as well as on locating a new right within existing rights.<sup>41</sup> This paper adopts the latter approach. Although it has been described as ‘less ambitious’,<sup>42</sup> it is one that is widely practiced in

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integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment.

<sup>36</sup> *Id.* at 33.

<sup>37</sup> Resonating with this definition of research are descriptions of epistemological knowledge production processes as ‘ways of knowing’ in J V PICKSTONE, *WAYS OF KNOWING : A NEW HISTORY OF SCIENCE, TECHNOLOGY AND MEDICINE* (2001). and as ‘styles of knowledge’ in CHUNGLIN KWA, *STYLES OF KNOWING: A NEW HISTORY OF SCIENCE FROM ANCIENT TIMES TO THE PRESENT* (2011).

<sup>38</sup> Céline Granjou & Isabelle Arpin, *Epistemic Commitments: Making Relevant Science in Biodiversity Studies*, 40 *SCIENCE, TECHNOLOGY, & HUMAN VALUES* 1022, 1025–1033 (2015).

<sup>39</sup> See, for an explanation of epistemic cultures, KARIN KNORR CETINA, *EPISTEMIC CULTURES: HOW THE SCIENCES MAKE KNOWLEDGE* (1999). See also, Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 *INTERNATIONAL ORGANIZATION* 377 (1989).

<sup>40</sup> See, for a similar salience being accorded to a clean and healthy environment by asserting a right to the same, in UN Human Rights Council, Resolution adopted by the Human Rights Council on 8 October 2021, the human right to a clean healthy and sustainable environment, A/HRC/RES/48/13. The recently adopted UNGA Resolution also took the same approach. UNGA, Resolution adopted by the General Assembly on 28 July 2022, The human right to a clean, healthy and sustainable environment, UNGA 76<sup>th</sup> Session, A/76/L.75.

<sup>41</sup> See a recent survey of these methods conducted in Brandon L Garrett, Laurence R Helfer, & Jayne C Huckerby, *Closing International Law's Innocence Gap*, 95 *SOUTHERN CAL. L. REV.* 311, 327–351 (2021).

<sup>42</sup> Pierre Thielbörger, *Something Old, Something New, Something Borrowed and Something Blue: Lessons to Be Learned from the Oldest of the ‘New’ Rights—the Human Right to Water*, in *THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION,*

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

several jurisdictions across the world; most closely accords with the rules of treaty interpretation as applied to international human rights treaties and the interrelatedness and indivisibility of human rights; and does not contribute to the further fragmentation of international law.

Implied or unenumerated rights have been recognized in several jurisdictions across the world.<sup>43</sup> Every jurisdiction has its own (sometimes several) theoretical justification for identifying rights that are not explicit in the text. In justifying the identification of implied rights, these jurisdictions recognize codification's inherent limitations. Some of these justifications include: pointing to another constitutional provision that expressly permits this practice;<sup>44</sup> characterizing the right as emanating from the penumbra of a codified right;<sup>45</sup> drawing on a theory of 'incipient rights',<sup>46</sup> and an understanding that the implied right is an integral part of a codified right and that its exercise is necessary for the codified right to be effective;<sup>47</sup> an understanding that the fulfillment of the right is necessary for the realization of the codified Bill of Rights as a whole;<sup>48</sup> characterizing the right as filling gaps in the codified Bill of Rights;<sup>49</sup> and in providing rights guarantees where there is no codified Bill of Rights.<sup>50</sup>

Moreover, international human rights law treaties have been understood to have been drafted at a sufficient level of generality to lend themselves to an evolutionary interpretation where good faith requires it, to adapt to

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NOVELTY, RHETORIC 73 (Andreas von Arnould & Kerstin von der Decken eds.2020).

<sup>43</sup> But see, Ronald Dworkin's provocation that 'the distinction between enumerated and unenumerated rights, as it is commonly used in constitutional theory, makes no sense, because it confuses reference with interpretation' Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 THE UNIVERSITY OF CHICAGO LAW REVIEW 381, 390 (1992). See also, ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2002) 56.

<sup>44</sup> US Constitution, Ninth Amendment; Irish Constitution, Art 40.3; Portuguese Constitution, Art 16. See, ANTHONY SANDERS, BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS (2022).

<sup>45</sup> See, for instance, *Griswold v Connecticut*, 381 US 479 (1965) at 484.

<sup>46</sup> As cited in *KS Puttaswamy v Union of India* (2017) 10 SCC 1 (right to privacy).

<sup>47</sup> See, for a sample of unenumerated rights in India, *Maneka Gandhi v Union of India* 1978 SCR (2) 621 (right to travel abroad); *Mohini Jain Vs. State of Karnataka* (1992) 3 SCC 666 and *Unni Krishnan, JP v State of Andhra Pradesh* (1993) 1 SCC 645 (right to education); *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545 (right to livelihood), *MC Mehta v Kamal Nath* (2000) 6 SCC (right to a healthy environment), *Subhash Kumar v State of Bihar and Ors* AIR 1991 SC 420 (right to water).

<sup>48</sup> See, for instance, a right against corruption formulated as a State obligation to create an independent anti-corruption unit, *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6.

<sup>49</sup> See, for instance, in Canada, *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 SCR 3; *Reference Re Secession of Quebec* [1998] 2 SCR 217.

<sup>50</sup> See, for instance in Australia, *Nationwide News Pty Ltd v Wills* [1992] HCA 46 (right to freedom of political communication).

changing circumstances.<sup>51</sup> For instance, although there is no explicit textual right to water in the ICESCR, the CESCR Committee located an implied right to water within the right to an adequate standard of living, in recognition of its fundamental nature to realising an adequate standard of living.<sup>52</sup> The recognition of implied rights in international human rights law is thus common practice.<sup>53</sup>

Locating a right to research at the confluence of several existing rights underscores the interrelatedness and indivisibility of human rights.<sup>54</sup> It promotes the underlying concept that all human rights must be interpreted with regard to one another in a mutually reinforcing manner, and that the sum of interpreting individual rights is greater than their constituent parts. In this way, it takes a holistic approach to the realization of all human rights instead of reinforcing the various categories/generations of rights.<sup>55</sup>

Proposing an entirely new right to research in circumstances where it already emanates from or constitutes an integral part of existing human rights, contributes to the fragmentation of international law.<sup>56</sup> The horizontal nature of international law and the existence of societies built on different value systems inevitably leads to the generation of varied functionally differentiated norms across functionally differentiated international institutional contexts, all of which are equally legally binding upon common States parties.<sup>57</sup> Purely legalistic solutions and the proliferation of more law

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<sup>51</sup> Başak Çali, *Human Rights*, in THE OXFORD GUIDE TO TREATIES (Duncan B. Hollis ed., 1st ed. 2012).

<sup>52</sup> CESCR, General Comment No 15: The Right to Water (arts 11 and 12) (2002) E/C12/2002/11. See also, CESCR, General Comment No 6: The Economic, Social and Cultural Rights of Older Persons (1995) E/1996/22.

<sup>53</sup> See, for an analysis of several UN human rights treaty bodies' recognition of implied rights, Federico Lenzerini, *Practice and Ontology of Implied Human Rights in International Law*, 15 INTERCULTURAL HUMAN RIGHTS LAW REVIEW 73 (2020).

<sup>54</sup> Jérémie Gilbert, *The Human Right to Land: 'New Right' or 'Old Wine in a New Bottle'?*, in THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 97 (Andreas von Arnould & Kerstin von der Decken eds., 2020) as cited in Brandon L. Garrett et al., *Closing International Law's Innocence Gap*, 95 SOUTHERN CAL. L. REV. 352 (2021).

<sup>55</sup> Gauthier de Beco, *The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities*, 68 INT'L & COMP. L. Q. 141–160 (2019); L Minkler & S Sweeney, *On the Indivisibility and Interdependence of Basic Rights in Developing Countries*, 33 HUM. RTS. Q. 381–390 (2011).

<sup>56</sup> There is immense literature on the fragmentation of international law. See, for a small sample providing an overview of this literature, Margaret A Young, *Introduction: The Productive Friction between Regimes*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 1–20 (Margaret A Young ed., 2012); TOMER BROUDE & YUVAL SHANY, MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW (2011); Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1–30 (2007); Anne Peters, *The refinement of international law: From fragmentation to regime interaction and politicization*, 15 INT'L J. OF CONST. L. 671–704 (2017).

<sup>57</sup> See Int'l L. Comm. (ILC), *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group*,

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

cannot fully resolve the complexities, contradictions and confusion that the fragmentation of international law brings. Rather, the role of the law must be restricted to ensuring that there is some form of normative compatibility across autonomous systems.<sup>58</sup> Proposing the creation of an entirely new right to research could potentially cause contradictions and confusion with the scope and content of existing rights that I analyse below.

Finally, it must be noted that the symbolic and enforcement gains that the literature advocates with respect to creating a self-standing enumerated right<sup>59</sup> are equally gained in this unenumerated / implied approach, given that the urgency of couching research in the language of rights remains as well as the States parties obligations that derive from the recognition of a right to research. In particular, a right to research can be 'claimed' from the State, rather than understood as the 'benevolence' of the State, even through its identification as an implied right.<sup>60</sup> At the same time, the paper recognises that the textual limitations of existing rights serve also as a limit to the conceptualisation of the new right. This, of course, does not preclude the rise of a free-standing human right to research in future.

### II. LOCATING THE HUMAN RIGHT TO RESEARCH

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are two of the most widely ratified treaties in the world. The ICCPR has 113 States parties<sup>61</sup> and 6 signatory States<sup>62</sup> while the ICESCR has 111 States parties<sup>63</sup> and 4 signatory States.<sup>64</sup> Having developed a working definition of research and explained the decision to examine existing human rights, I identify enumerated rights in the core covenants from which the right to research

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A/CN.4/L.682 (Apr. 13, 2006).

<sup>58</sup> Andreas Fischer-Lescano & Gunter Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law* 25 Mich. J. of Int'l L. 999, 1045-6 (2004).

<sup>59</sup> See, for instance, VA Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 24, 36, 39 (1994); Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHICAGO J. OF INT'L L. 121, 128 (2001); see also, The advocacy leading up to UNGA Resolution on the Human Rights of Older Persons, A/HRC/48/L.5/Rev.1 (Oct. 5, 2021).

<sup>60</sup> See, in the context of water, Benjamin Mason Meier, Georgia Lyn Kayser, Urooj Quezon Amjad & Jamie Bartram, *Implementing an Evolving Human Right Through Water and Sanitation Policy*, 15 WATER POL'Y 117 (2013).

<sup>61</sup> See, for a full list of parties, the UNTC database <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en)>

<sup>62</sup> China, Comoros, Cuba, Nauru, Palau, St Lucia.

<sup>63</sup> See, for a full list of parties, the UNTC database <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en)>

<sup>64</sup> Comoros, Cuba, Palau, USA.

emanates, and to which the right to research is integral.

Turning to the ICCPR, article 19 guarantees to everyone the right to hold an opinion, as well as the right to freedom of expression, including ‘the freedom 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 his choice’.<sup>65</sup> The right to hold an opinion extends to all forms of opinion,<sup>66</sup> and would also extend to opinions arrived at through the process of conducting research. The freedom to seek, receive and impart information and ideas protects ‘all forms of expression and the means of their dissemination’.<sup>67</sup> This central to knowledge generation, and thus relates to both the creation of bodies of research as well as conducting and disseminating research. This right can only be limited through restrictions that are prescribed by law, compatible with the aims and objectives of the ICCPR, have a legitimate aim, and must be demonstrably necessary and proportionate in a democratic society.<sup>68</sup>

The ICESCR guarantees everyone a right to education without discrimination.<sup>69</sup> This includes education at all levels, although State obligations vary.<sup>70</sup> The realization of the right to education contributes to developing critical inquiry, which is a central capability developed by and through research. The ICESCR also contains a set of rights in article 15 that guarantee everyone a right to participate in culture;<sup>71</sup> enjoy scientific progress and its applications;<sup>72</sup> and, where they author any scientific, literary or artistic production, to benefit from the protection of their moral and material interests.<sup>73</sup> Knowledge production is a central part of cultural life,<sup>74</sup> and research is integral to knowledge production. Moreover, scientific progress

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<sup>65</sup> ICCPR, art 19(2).

<sup>66</sup> Human Rights Committee, General Comment no 34: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 at para 9 (Sept. 12, 2011).

<sup>67</sup> Human Rights Committee, General Comment no 34: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 at paras 11-12 (Sept. 12, 2011).

<sup>68</sup> Human Rights Committee, General Comment no 34: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 at paras 21-36 (Sept. 12, 2011).

<sup>69</sup> ICESCR, arts 13, 14.

<sup>70</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 13: The Right to Education (Art. 13) UN Doc E/C.12/1999/10 at para 59 (8 Dec 1999).

<sup>71</sup> ICESCR, art 15(1)(a).

<sup>72</sup> ICESCR, art 15(1)(b).

<sup>73</sup> ICESCR, art 15(1)(c).

<sup>74</sup> Culture is a living concept, and includes but is not limited to: ‘ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.’ See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 13.

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

as part of the ‘right to science’<sup>75</sup> is impossible without scientific research<sup>76</sup> – both in terms of the practice of researching and access to research.<sup>77</sup> Benefiting from the authorship of scientific, literary or artistic works is part of recognizing the contribution of individuals, groups and communities to knowledge production,<sup>78</sup> of which research is a part. In addition to these rights, research undergirds the realisation of several other rights including the right to food<sup>79</sup> and the right to health.<sup>80</sup>

In this section, I set out the scope of application of the right to research, its content and its limitations. Then I discuss the nature and extent to which States parties bear obligations.

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<sup>75</sup> The right in art 15(1)(b) is commonly known as ‘the right to science’. Its content has recently been systematized in the Comm. on Econ., Soc. & Cult. Rts., *General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/25 (Apr. 30, 2020) (hereinafter *General Comment no. 25*). See, for an understanding that this right has been neglected by the international community, this recent systematic study of the literature on the right to science: Sebastian Porsdam Mann, Helle Porsdam, & Yvonne Donders, “*Sleeping Beauty*”: *The Right to Science as a Global Ethical Discourse*, 42 HUM. RTS. Q. 332–356 (2020). See also, Audrey Chapman, ‘Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications’, 8 J. OF H. RTS. 1 (2009); R Claude, ‘Scientists’ Rights and the Human Right to the Benefits of Science’, in CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (A Chapman and S Russell Eds., 2002).

<sup>76</sup> See, Klaus D Beiter “Reforming Copyright or Toward Another Science? A More Human Rights-Oriented Approach Under the REBSPA in Constructing a “Right to Research” for Scholarly Publishing.” (2022) PIJIP/TLS Research Paper Series no. 7. <https://digitalcommons.wcl.american.edu/research/79>

<sup>77</sup> Alternatively dubbed ‘the right to knowledge’. See, for this nomenclature, Lea Shaver, *The Right to Science and Culture*, 1 Wis. L. Rev. 156 (2010); Mikel Mancisidor, *The Dawning of a Right Science and the Universal Declaration of Human Rights (1941–1948)*, in THE RIGHT TO SCIENCE: THEN AND NOW 27-28 (Helle Porsdam & Sebastian Porsdam Mann eds., 2021). See also, H SUN, TECHNOLOGY AND THE PUBLIC INTEREST 12, 17-35 (CAM. UNI. PRESS, 2022). However, confining the right to research only to the right to science has the potential to reinforce the marginalization of indigenous communities and epistemes outside of scientific epistemes.

<sup>78</sup> Comm. Econ. Soc. Cult. Rts, 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) UN Doc E/C.12/GC/17 (12 January 2006).

<sup>79</sup> See, for the application of scientific and technological knowledge to the improvement of food production, distribution and conservation, ICESCR, art 11(2)(a). See, for a discussion of the right to food sovereignty and the role of research in realising this right, Comm. Econ. Soc. Cult. Rts., *Concluding Observations, Mali*, U.N. Doc. E/C12/MLI/CO/1 ¶ 39 (2019); Comm. Econ. Soc. Cult. Rts, *Burundi*, U.N. Doc. E/C12/BDI/CO/1 ¶ 50 (2015).

<sup>80</sup> See, for the central role of medical research in realising the right to health of all, particularly the most vulnerable groups in the prevention and control of diseases such as epidemics, ICESCR, art 12(2)(c); Comm. Econ. Soc. Cult. Rts., *Concluding Observations, Colombia*, U.N. Doc. E/C12/COL/CO/6 ¶ 62 (2017).

A. *Scope of application of the right to research*

The scope of application of the right to research includes an identification of the rights bearers and duty bearers. All the rights listed above ie., the rights to freedom of expression, education, culture, benefiting from authorship, and science denote that ‘everyone’ is a rights bearer.<sup>81</sup> What does ‘everyone’ mean?

The ICCPR and ICESCR both contain a cross-cutting right to equality and non-discrimination that applies across all rights.<sup>82</sup> In other words, the rights set out in these two covenants must be realized without any discrimination on the grounds of ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>83</sup> This imperative entails that in realising any of the rights in the Covenants, any ‘distinction, exclusion, restriction or preference’ based on the above grounds that aims to or has the effect of ‘nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms’ will fall foul of the cross-cutting right to equality and non-discrimination.<sup>84</sup> Any measures taken to give effect to the right to equality and non-discrimination for marginalized groups to realise their rights under both Covenants (such as affirmative action) are in and of themselves not violations of the right to equality.<sup>85</sup>

Rights bearers of the right to research thus encompass *everyone* without discriminating on the basis of protected grounds listed above: including an individual, as part of a group of individuals, or as a collective;<sup>86</sup> indigenous

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<sup>81</sup> See text of ICCPR, art 19; ICESCR, arts 13, 15. This also applies to the right to health and the right to food in ICESCR, arts 12, 11.

<sup>82</sup> ICCPR, art 2(1), 2(2), 26; ICESCR, art 2(2).

<sup>83</sup> *ibid.*

<sup>84</sup> Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) at para 7.

<sup>85</sup> Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) at paras 5, 13.

<sup>86</sup> Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 at para 9 (May 26, 2004); Comm. Econ. Soc. Cult. Rts, 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) UN Doc E/C.12/GC/17 (12 January 2006) at para 7; Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 9.

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

peoples,<sup>87</sup> people with disabilities,<sup>88</sup> people living in poverty, without discrimination on the basis of nationality,<sup>89</sup> among other marginalized groups.<sup>90</sup> Crucially, although groups of individuals are included in this protection, the work of the UN human rights treaty bodies makes clear that corporations are excluded from being rights bearers under international human rights law.<sup>91</sup>

Duty bearers of the right to research include the State<sup>92</sup> as well as private entities that are engaged in the realization of the right in some capacity,<sup>93</sup> whether as funding bodies,<sup>94</sup> private educational institutions,<sup>95</sup> or

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<sup>87</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 7.

<sup>88</sup> Comm. Econ. Soc. Cult. Rts, General Comment No. 5: Persons with Disabilities UN Doc E/1995/22 (9 December 1994).

<sup>89</sup> Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 at para 10 (May. 26, 2004).

<sup>90</sup> Comm. Econ. Soc. Cult. Rts, General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/25 (30 April 2020) at paras 25, 26.

<sup>91</sup> Comm. Econ. Soc. Cult. Rts, 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) UN Doc E/C.12/GC/17 (12 January 2006) at para 7. While regional systems such as the European Court of Human Rights have held on a case by case basis that corporations were entitled to seek redress for rights violations under the European Convention on Human Rights (such as in *Comingersoll SA v Portugal* App no 35382/97 (ECtHR, 6 April 2000); *Société Colas Est et al. v France* ECtHR 2002-III 131; *Autronic AG v Switzerland* App no 12726/87 (ECtHR 22 May 1990)), this is not the approach that has been taken by the UN human rights treaty bodies. See, for a normative critique of corporate human rights, A. Grear, *Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights*, 7 HUMAN RIGHTS LAW REVIEW 511 (2007); UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 234 (2008).

<sup>92</sup> ICCPR, art 2(1), 2(2); ICESCR, art 2(1).

<sup>93</sup> Human Rights Committee, General Comment no 34: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 at para 7 (Sept. 12, 2011); Comm. Econ. Soc. Cult. Rts, 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) UN Doc E/C.12/GC/17 (12 January 2006) at paras 55-57.

<sup>94</sup> Comm. Econ. Soc. Cult. Rts, General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/25 (30 April 2020) at paras 58-62.

<sup>95</sup> UN Human Rights Council, Report of the Special Rapporteur on the right to education, Kishore Singh, Protecting the right to education against commercialization UN Doc A/HRC/29/30 (10 June 2015). See also, more recently, UN Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural



pharmaceutical companies<sup>96</sup> amongst others.<sup>97</sup>

### B. Normative content of the right to research

The content of the right to research includes both civil, political, economic, social, and cultural aspects. Drawing on the framework developed by UN human rights treaty bodies on the right to food,<sup>98</sup> health,<sup>99</sup> sexual and reproductive health,<sup>100</sup> housing,<sup>101</sup> education,<sup>102</sup> cultural life,<sup>103</sup> water,<sup>104</sup> and science,<sup>105</sup> I identify four interrelated dimensions of the right to research – availability, accessibility, adaptability and quality (‘3AQ’). As discussed, the right to equality and non-discrimination cuts across all four dimensions of the right to research.

#### 1. Availability

The availability dimension requires that research, as a body of knowledge, is meaningfully made available to everyone without discrimination. Centrally, this includes ‘the expression and receipt of communications of every form of idea and opinion capable of transmission to others’.<sup>106</sup> The availability dimension requires conservation, development and diffusion of research, as well as allocation of sufficient State resources in

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rights, including the right to development: The right to education, A/HRC/53/L.10 (6 July 2023) recognising and affirming the Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education (13 February 2019) <<https://www.abidjanprinciples.org>>.

<sup>96</sup> UN Special Rapporteur on the right to the highest attainable standard of health, Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines, published in the report to the General Assembly (UN document: A/63/263, dated 11 August 2008).

<sup>97</sup> See, including all business entities, whether private or in a public private partnership with the State, whether operating domestically or internationally, Comm. Econ. Soc. Cult. Rts, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24 at paras 3, 4.

<sup>98</sup> Comm. Econ. Soc. Cult. Rts, *General Comment No 12 (1999) on The Right to Adequate Food (art 11)*, U.N. Doc. E/C12/1999/5 ¶ 11-13.

<sup>99</sup> Comm. Econ. Soc. Cult. Rts, *General Comment No. 14 (2000) on The Right to the Highest Attainable Standard of Health (art 12)*, U.N. Doc. E/C12/2000/4 ¶ 12 (hereinafter *General Comment No. 14*).

<sup>100</sup> Comm. Econ. Soc. Cult. Rts, *General Comment No 22: The right to sexual and reproductive health (art 12)* E/C.12/GC/22 ¶¶ 11-21.

<sup>101</sup> Comm. Econ. Soc. Cult. Rts, *General Comment No. 4 (1992) The Right to Adequate Housing (art 11(1))*, U.N. Doc. E/1992/23 ¶ 8.

<sup>102</sup> Comm. Econ. Soc. Cult. Rt, *General Comment No. 13 (1999) on The Right to Education (art 13)*, U.N. Doc. E/C12/1999/10 ¶ 6 (hereinafter *General Comment no. 13*).

<sup>103</sup> *General Comment 21*, *supra* note 80, ¶ 16.

<sup>104</sup> Comm. Econ. Soc. Cult. Rt, *General Comment No. 15 (2002) The Right to Water (arts 11 and 12)* U.N. Doc. E/C12/2002/11 ¶12.

<sup>105</sup> *General Comment 25*, *supra* note 23 ¶ 15.

<sup>106</sup> Human Rights Committee, *General Comment no 34: Freedoms of opinion and expression*, U.N. Doc. CCPR/C/GC/34 at para 11 (Sept. 12, 2011).

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

this regard.<sup>107</sup> For instance, a right of the public to access State funded research findings and data falls within this dimension,<sup>108</sup> does a right to citizen science and open science.<sup>109</sup>

With regard to the practice of research, availability requires that preconditions for participation, facilitation and promotion of research, are made available.<sup>110</sup> This includes the existence and maintenance of libraries, museums, archives, galleries;<sup>111</sup> the existence of research institutions and autonomous educational institutions;<sup>112</sup> “strong” infrastructure with adequate resources and financial support; access to essential infrastructure like the internet.<sup>113</sup> Participation in research includes ‘pursu[ing], develop[ing] and transmit[ing] knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing’,<sup>114</sup> researching in the medium and language of one’s choice, choosing to identify with a community (or not), engaging in research practices as part of the community or individually, and sharing knowledge and expressions with others.<sup>115</sup> This includes the right to contribute creatively to society by creating the ‘spiritual, material, intellectual and emotional expressions of the community’.<sup>116</sup> Moreover, conditions for the freedom of thought and academic or scientific freedom must be made available without fear of repression,<sup>117</sup> where research

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<sup>107</sup> Comm. Econ. Soc. Cult. Rts., *Concluding Observations, Mexico*, U.N. Doc. E/C12/MEX/CO/5-6 ¶ 70 (2018).

<sup>108</sup> *General Comment 25, supra* note 23 ¶ 16.

<sup>109</sup> *General Comment 25, supra* note 23 ¶ 10.

<sup>110</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 6.

<sup>111</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 16.

<sup>112</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 13: The Right to Education (Art. 13) UN Doc E/C.12/1999/10 at para 40 (8 Dec 1999)

<sup>113</sup> Comm. Econ. Soc. Cult. Rts., *Concluding Observations, Mauritius*, U.N. Doc. E/C12/MUS/CO/5 ¶¶ 61-62 (2019); *see also*, Comm. Econ. Soc. Cult. Rts., *Estonia*, U.N. Doc. E/C13/EST/CO/3 ¶ 53 (2019), Comm. Econ. Soc. Cult. Rts., *Greece*, U.N. Doc. E/C12/GRC/CO/2 ¶ 44 (2015).

<sup>114</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 13: The Right to Education (Art. 13) UN Doc E/C.12/1999/10 at para 39 (8 Dec 1999).

<sup>115</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 15 (a).

<sup>116</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 15 (c).

<sup>117</sup> *General Comment 25, supra* note 23 ¶ 13.

is considered in an academic or scientific context.<sup>118</sup>

## 2. Accessibility

The accessibility dimension of the right to research is a manifestation of the principle of equality and non-discrimination in accessing and participating in research. Research, as a body of knowledge and as a cultural practice, must be made accessible to everyone – including people with disabilities, people living in poverty, racial, ethnic, linguistic, religious and other minorities.<sup>119</sup> Barriers to accessibility include economic barriers, where for instance essential research to realise other economic, social, and cultural rights is unaffordable;<sup>120</sup> physical barriers, where for instance, physical spaces such as research institutions are inaccessible to people with disabilities;<sup>121</sup> communication barriers, where for instance, materials are published in inaccessible formats for people with disabilities across the spectrum,<sup>122</sup> or for instance where scientific knowledge is not communicated in accessible language;<sup>123</sup> legal and bureaucratic barriers, where for instance access to essential information is difficult to obtain from the State due to unclear laws and policies;<sup>124</sup> epistemic barriers, where for instance historically marginalized groups do not have ‘effective and concrete opportunities’ to conserve their research and culture.<sup>125</sup>

## 3. Acceptability

Research, whether scientific or otherwise must not be used as a ‘cultural imposition’.<sup>126</sup> The acceptability dimension of the right to research as a right of access to knowledge as well as a right to conduct research thus requires that all rights bearers have the freedom to pursue research that is

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<sup>118</sup> See, in the context of academic freedom, Comm. Econ. Soc. Cult. Rts, General Comment no 13: The Right to Education (Art. 13) UN Doc E/C.12/1999/10 at para 38 (8 Dec 1999); in the context of scientific freedom, UNESCO, *Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications* Part III ¶ 12(a) (Jul., 2009) at para 13, 14.

<sup>119</sup> Comm. Econ. Soc. Cult. Rts., *Concluding Observations, Spain*, U.N. Doc. E/C12/ESP/CO/6 ¶ 50 (2018).

<sup>120</sup> See, for instance, the unaffordability of the covid-19 vaccines, Comm. Econ. Soc. Cult. Rts., *Statement on universal and equitable access to vaccines for COVID-19* UN Doc E/C.12/2020/2 (27 November 2020) at paras 4, 6.

<sup>121</sup> Comm. Econ. Soc. Cult. Rts, General Comment No. 5: Persons with Disabilities UN Doc E/1995/22 (9 December 1994) at para 22.

<sup>122</sup> Comm. Econ. Soc. Cult. Rts, General Comment No. 5: Persons with Disabilities UN Doc E/1995/22 (9 December 1994) at para 36.

<sup>123</sup> *General Comment 25*, *supra* note 23 ¶ 47.

<sup>124</sup> Human Rights Committee, General Comment no 34: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 at paras 18, 19 (Sept. 12, 2011).

<sup>125</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 16 (b).

<sup>126</sup> *General Comment 25*, *supra* note 23 ¶¶ 19, 40.

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

culturally appropriate.<sup>127</sup> Additionally, with regard to academic and scientific research, the practice and output must meet the ethical standards established by the research community.<sup>128</sup> These standards must be in line with human dignity, bearing in mind the marginalization of vulnerable groups.<sup>129</sup> The legal and policy framework facilitating the right to research must be created in a participatory manner to ensure its acceptability.<sup>130</sup> Moreover, research that is acceptable, particularly scientific research, must be in furtherance of peace and the realisation of human rights rather than its destruction.<sup>131</sup> An important aspect of acceptability is the adaptability of bodies of research and research practices to changing circumstances,<sup>132</sup> such as the advent of new technology.<sup>133</sup>

#### 4. *Quality*

The quality dimension of the right to research requires that rights bearers have access to the most updated research on a particular issue. It also requires that in producing such research, ethical and legal standards are adhered to.<sup>134</sup> This includes recent standards on the spread of misinformation and disinformation.<sup>135</sup> Where training and research takes place as part of an educational institution, it must meet the minimum

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<sup>127</sup> See, in the context of traditional knowledge and cultural heritage of indigenous people, Comm. Econ. Soc. Cult. Rts., *Concluding Observations, Argentina*, U.N. Doc. E/C12/ARG/CO/3 (2011); Comm. Econ. Soc. Cult. Rts., *Plurinational State of Bolivia*, U.N. Doc. E/C12/BOL/CO/2 (2008); in the context of traditional languages, Comm. Econ. Soc. Cult. Rts., *Concluding Observations, Australia*, U.N. Doc. E/C12/AUS/CO/4 (2009).

<sup>128</sup> See, in the context of medical applications of research, Comm. Econ. Soc. Cult. Rts, *General Comment No. 14 (2000) on The Right to the Highest Attainable Standard of Health (art 12)*, U.N. Doc. E/C12/2000/4 at para 12(c).

<sup>129</sup> *General Comment 25, supra* note 23 ¶¶ 19.

<sup>130</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 16 (c).

<sup>131</sup> See, Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 6. See also, UNESCO, *Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications* Part III (Jul., 2009) at paras 13(a)-(c). See also, ICCPR, art 20(1).

<sup>132</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 13: The Right to Education (Art. 13) UN Doc E/C.12/1999/10 at para 6(d) (8 Dec 1999).

<sup>133</sup> *General Comment 25, supra* note 23 ¶¶ 18.

<sup>133</sup> *General Comment 25, supra* note 23 ¶¶ 77.

<sup>134</sup> *General Comment 25, supra* note 23 ¶¶ 18.

<sup>135</sup> Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, Disinformation and freedom of opinion and expression, UN Doc A/HRC/47/25 (9 July 2021).

standards set by the State.<sup>136</sup> In order to ensure that research is relevant and of good quality across cultural mores, this dimension of the right requires international cooperation for the exchange of ideas.<sup>137</sup> International cooperation has been highlighted as a key aspect of producing quality scientific and academic research, particularly in light of new technological advances and the recent covid-19 pandemic.<sup>138</sup>

### C. *Limitations to the right to research*

Like all other human rights in the covenants, the right to research that I have located and described above is not absolute. Its limitations arise from the different rights that it is derived from. I will discuss them in turn.

The freedom of expression and free flow of information aspects of the right to research can only be limited if the limitation fulfils the test set out in the ICCPR.<sup>139</sup> The limitation must be provided by law, be reasonably foreseeable and clear,<sup>140</sup> in furtherance of one of the specified grounds (protection of rights or reputations of others; public order; public morality), and be necessary and proportionate in a democratic society.<sup>141</sup> Moreover, they must not violate the principle of equality and non-discrimination.<sup>142</sup> Restrictions on grounds that are not specified in art 19(3) of the covenant are not permitted.<sup>143</sup>

The aspects of the right to research that derive from education, culture, benefiting from authorship, and science, apart from inherent limitations internal to specific rights that I will discuss below, can only be limited through law, insofar as these limitations are compatible with the nature of the right in question and directed towards promoting general societal welfare.<sup>144</sup> This has been interpreted to include a proportionality test where the least restrictive must be selected and the burden of the limitation must not outweigh the realisation of the right.<sup>145</sup> Moreover, for the aspects of the right that are progressively realisable, States parties may limit the realisation of the

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<sup>136</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 13: The Right to Education (Art. 13) UN Doc E/C.12/1999/10 at para 6(c) (8 Dec 1999).

<sup>137</sup> *General Comment 25, supra* note 23 ¶¶ 18.

<sup>138</sup> *General Comment 25, supra* note 23 ¶¶ 74, 77-84.

<sup>139</sup> ICCPR, art 19(3).

<sup>140</sup> See communication No. 578/1994, de Groot v. The Netherlands, Views adopted on 14 July 1999

<sup>141</sup> Human Rights Committee, General Comment no 34: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 at para 22 (Sept. 12, 2011).

<sup>142</sup> Human Rights Committee, General Comment no 34: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 at para 26 (Sept. 12, 2011).

<sup>143</sup> Human Rights Committee, General Comment no 34: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 at para 22 (Sept. 12, 2011); See communication No. 1022/2001, Velichkin v. Belarus, Views adopted on 20 October 2005.

<sup>144</sup> ICCPR, art 4.

<sup>145</sup> *General Comment 25, supra* note 23 ¶¶ 21.

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

right to the maximum available resources.<sup>146</sup> I discuss this more fully in the duties section. In general, the principle behind limiting rights in the ICESCR is not to foster a practice of permissive limitations, but to protect rights bearers. The burden of justifying a limitation is thus on the State.<sup>147</sup>

With regard to the aspects of the right to research derived from the right to culture, in addition to the above limitations test, these aspects must be realized alongside the other rights in the Covenant as they are interlinked with them.<sup>148</sup> Cultural diversity cannot be grounds to limit the realisation of human rights.<sup>149</sup> With regard to the aspects of the right to research derived from the right to science, in addition to the above limitations test, limits may be imposed on scientific research where it poses a risk to human participants in order to protect their dignity and privacy.<sup>150</sup> With regard to the aspects of the right to research derived from the right to claim authorship and its benefits, this right must be balanced with the realisation of the other rights in the Covenant.<sup>151</sup>

### III. STATE OBLIGATIONS TO REALIZE THE RIGHT TO RESEARCH

The ICCPR and ICESCR are two of the most widely ratified treaties in the world. States parties are bound to fulfil their obligations under these treaties in good faith.<sup>152</sup> Accordingly, in this section, I ask what domestic measures do States have to take to give effect to the right to research as derived from the two Covenants? First, I discuss the priority of obligations, and then I turn to the ways in which States can discharge them.

#### *A. Nature and priority of obligations*

For the aspects of the right to research that are derived from the right to freedom of expression in the ICCPR, States are required to adopt administrative, judicial, legislative and public education measures to

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<sup>146</sup> ICCPR, art 2.

<sup>147</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 13: The Right to Education (Art. 13) UN Doc E/C.12/1999/10 at para 42 (8 Dec 1999).

<sup>148</sup> See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 17.

<sup>149</sup> See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 18.

<sup>150</sup> *General Comment 25, supra* note 23 ¶¶ 22.

<sup>151</sup> Comm. Econ. Soc. Cult. Rts, 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) UN Doc E/C.12/GC/17 (12 January 2006) at para 22.

<sup>152</sup> See, codifying the principle of *pacta sunt servanda* in customary international law, VCLT, art 26.

immediately realise the right to research where such measures do not already exist.<sup>153</sup> States are also bound to provide for adequate and effective remedies for violations of the right.<sup>154</sup> Crucially, the obligation incumbent upon States for this aspect of the right is immediately realisable and includes both positive and negative dimensions.<sup>155</sup> This means that the State party in question must take measures towards the fulfilment of the right both directly and to ensure that private entities and persons do not violate the right, and States must refrain from violating the right themselves. These measures must be immediate and are not subject to political, economic, social or cultural constraints.<sup>156</sup> The State's failure to take such measures, including for instance the failure to hold private entities accountable for violating the free flow of information aspects of the right to research, is itself a violation of the right.<sup>157</sup>

For the aspects of the right to research that are derived from the rights to education, culture, benefit from authorship, and science in the ICESCR, States parties are bound to immediately take steps towards their realisation and, crucially, are bound to ensure that these steps do not directly or indirectly discriminate against people on the basis of the protected characteristics discussed above.<sup>158</sup> The steps that States are bound to take include promulgating appropriate legislation and, where justiciable in the specific domestic jurisdiction, judicial remedies.<sup>159</sup> Should the State fail to take any steps at all, this would be considered a violation of the right.<sup>160</sup>

In addition to these immediately realisable obligations of conduct, the Covenant imposes substantive 'minimum core' obligations of result for each aspect of the right set out above that are also immediately realisable.<sup>161</sup> These

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<sup>153</sup> ICCPR art 2(2).

<sup>154</sup> ICCPR art 2(3).

<sup>155</sup> Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 at paras 7, 8 (May. 26, 2004).

<sup>156</sup> Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 at para 14 (May. 26, 2004).

<sup>157</sup> Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 at para 8 (May. 26, 2004).

<sup>158</sup> ICESCR, art 2.

<sup>159</sup> Steps must be the most appropriate in the circumstances. See, Comm. Econ. Soc. Cult. Rts, General Comment no 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) UN Doc E/1991/23 (14 December 1990) at paras 4, 5.

<sup>160</sup> *General Comment No. 3*, *supra* note 152, ¶¶ 2, 3; *see also*, UN Commission on Human Rights, Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ('Limburg Principles'), 8 January 1987, E/CN4/1987/17 paras 17-18.

<sup>161</sup> Minimum core obligations are defined as the duty to immediately realise 'minimum essential levels of each of the rights [in the ICESCR]' *General Comment No. 3*, *supra* note 152, ¶ 10. See also, for the robust debate on the minimum core's virtues and vices, JOHN TASIOLAS, *MINIMUM CORE OBLIGATIONS: HUMAN RIGHTS IN THE HERE AND NOW* (2017);

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

minimum core obligations require that States realise the ‘minimum essential levels’ of each right, and guard against State inaction.<sup>162</sup> Should a State party fail to fulfil these obligations, they are subject to intense scrutiny. With regard to the education aspects of research, the minimum core obligations include access to public educational institutions and ensuring that education is free from interference from the State or third parties.<sup>163</sup> Further, with regard to the cultural aspects of research, States are obliged to ensure that they eliminate all barriers to access to cultural life; to ensure that indigenous groups and other marginalized communities are active participants in the design and implementation of laws that affect them; to respect everyone’s right to their cultural practices while also respecting other human rights including freedom of expression.<sup>164</sup> Turning to the aspects of research that relate to authorship, the minimum core obligations borne by the State include taking legislative and other measures to protect the attribution of authors and creators to their creations and the integrity of their works as well as to ensure that creators have an adequate standard of living; and to ensure that a balance is struck between the realisation of the right to the protection of authors’ moral and material interests and State obligations to realise the rights to food, health, education, culture, and science.<sup>165</sup> The minimum core obligations incumbent on States relating to science and its applications include eliminating laws, policies and practices that limit access to science and technology and its applications, where these limitations are unjustifiable; similarly, eliminating existing limitations on freedom of research that are contrary to art 4 of the ICESCR; ensuring access to those applications that are essential to realising rights in the ICESCR; prioritising research on the realisation of economic, social and cultural rights focusing on well-being and meeting basic needs of everyone including vulnerable groups; promoting and disseminating accurate scientific information and combating misinformation; and fostering international cooperation in scientific research.<sup>166</sup>

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Katharine Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 *YALE JOURNAL OF INTERNATIONAL LAW* 113 (2008); Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 *HUMAN RIGHTS QUARTERLY* 156 (1987).

<sup>162</sup> *General Comment No. 3*, *supra* note 152, ¶ 10.

<sup>163</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 13: The Right to Education (Art. 13) UN Doc E/C.12/1999/10 at para 57 (8 Dec 1999).

<sup>164</sup> See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 55.

<sup>165</sup> Comm. Econ. Soc. Cult. Rts, 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) UN Doc E/C.12/GC/17 (12 January 2006) at para 39.

<sup>166</sup> *General Comment 25*, *supra* note 23 ¶¶ 52.



The rest of the obligations that flow from these rights are programmatic (progressively realisable over time) and subject to States' maximum available resources.<sup>167</sup> With regard to programmatic obligations, once the State takes steps to further the realisation of the right to research, any retrogression is subject to intense scrutiny for it to be permissible.<sup>168</sup>

### B. *Typology: Respect, protect and fulfil*

The work of the UN human rights treaty bodies develops a tripartite typology to analyse the ways in which States parties may crystallise the duties they bear.<sup>169</sup> The tripartite typology takes us forward from the antiquated debate of *whether* positive duties are engaged. Rather, it assists with the identification of the steps required to be taken by the State focusing on the realisation of the right.<sup>170</sup> As will be observed in the discussion below, the respect, protect and fulfil typology are not watertight categories. They offer a heuristic that assists with asking helpful questions to understand what the State is bound to do to perform their treaty obligations under the Covenants.<sup>171</sup>

#### 1. *Respect*

What possible steps may be taken to respect the right to research, avoid a state of deprivation, and treat other rights-bearers like equal moral agents? The freedom of expression aspect of the right proscribes State interference in the free flow of information and opinions where such free flow exists.<sup>172</sup> This includes access to information in all languages and of all kinds across all

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<sup>167</sup> *General Comment No. 3, supra* note 152, ¶ 9; Limburg Principles, ¶ 21-23.

<sup>168</sup> If States retrogress they must demonstrate that 'careful consideration of all alternatives' has been undertaken and that the measure is 'fully justified by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the state party's maximum available resources'. See, *General Comment No. 3, supra* note 152, ¶ 9. I have written more fully on non-retrogression at Sanya Samtani, *International Law, Access to Courts and Non-Retrogression: Law Society v President of the Republic of South Africa*, 10 CONST. COURT REV. 197, 217-221 (2020). See also, on non-retrogression, A Nolan, NJ Lusiani, & C Curtis, *Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights*, in ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS 121 (A Nolan ed., 2014).

<sup>169</sup> Asbjorn Eide, Report of the Special Rapporteur on The Right to Adequate Food as a Human Right, 7 July 1987, C/CN.4/Sub.2/1987/23 [66-70]. This typology was developed in response to the characterisation of rights as positive and negative as well as the dichotomy between economic, social and cultural rights and civil and political rights. See Asbjorn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUMAN RIGHTS LAW JOURNAL 35 (1989).

<sup>170</sup> SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 69-71 (2008).

<sup>171</sup> DJ Karp, *What Is the Responsibility to Respect Human Rights? Reconsidering the 'Respect, Protect, and Fulfill' Framework*, 12 INT. THEORY 83 (2020). See also, HENRY SHUE, BASIC RIGHTS 51-53 (Princeton Uni. Press, 1980).

<sup>172</sup> Human Rights Committee, General Comment no 34: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 at para 7 (Sept. 12, 2011).

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

frontiers.<sup>173</sup> The limited justifications for State interference are set out in the limitations section above.<sup>174</sup> With regard to the cultural aspect of the right to research, States parties must create an environment that respects cultural specificity and diversity, and values mutual understanding.<sup>175</sup> In particular, the work of the UN human rights treaty bodies affirms the right of indigenous people to act collectively to develop, control, protect, and maintain traditional knowledge including ‘manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts’.<sup>176</sup> States must take steps not to interfere with this. Moreover, the State is enjoined to respect the freedom of scientific, cultural, academic and creative inquiry,<sup>177</sup> which includes the freedom to create individually or collectively.<sup>178</sup> The authorship aspect of this right requires States to abstain from preventing authors from claiming authorship and integrity of their work, including objecting to distortion,<sup>179</sup> and benefiting from such authorship to the extent that it enables the realisation of the right to an adequate standard of living.<sup>180</sup> The aspects of this right derived from the right to science require States to respect access to scientific education by eliminating any barriers to

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<sup>173</sup> See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 49.

<sup>174</sup> ICCPR, art 19(3).

<sup>175</sup> See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 2, 27.

<sup>176</sup> See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 37.

<sup>177</sup> See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 47.

<sup>178</sup> See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 49.

<sup>179</sup> Comm. Econ. Soc. Cult. Rts, 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) UN Doc E/C.12/GC/17 (12 January 2006) at para 30.

<sup>180</sup> Comm. Econ. Soc. Cult. Rts, 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) UN Doc E/C.12/GC/17 (12 January 2006) at para 30.

access, including censorship and internet shutdowns. Such barriers undermine access to knowledge.<sup>181</sup> Further, where business entities are engaging in research, States parties must not prioritise their interests where their activities have a negative effect on the realisation of the right to research.<sup>182</sup> Before entering into further trade and investment treaties, States parties to the Covenants must conduct a human rights impact assessment that includes the impact of these treaties on the right to research.<sup>183</sup>

## 2. *Protect*

What possible steps may be taken to protect rights-bearers from third party violations of the right, prevent third parties from depriving rights-bearers, and create an environment where everyone can flourish equally without degrading others? With regard to the free expression aspects of the right to research, States are enjoined to ensure that any acts of private persons or entities do not limit the realisation of the right.<sup>184</sup> Drawing on the scientific aspects of the right, the duty to protect extends to ensuring that misinformation about scientific research is not spread by third parties. Moreover, the duty extends to ensuring that private entities' investment in does not unduly influence the direction of scientific research.<sup>185</sup> The cultural aspects of the right to research require the State to develop specific protections for women, children, people with disabilities, older persons, indigenous people, migrants, and other vulnerable groups to ensure that private individuals do not limit their right to participate in cultural life and access cultural outputs on the basis of pre-existing inequality and vulnerability.<sup>186</sup> The authorship aspects of the right require the State to ensure that third parties do not unreasonably prejudice the author without adequate compensation for use of their output, and to enact a legislative framework to ensure that authors' moral and material interests be protected from exploitation.<sup>187</sup> With regard to private entities that carry out business

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<sup>181</sup> *General Comment 25, supra* note 23 ¶ 42.

<sup>182</sup> Comm. Econ. Soc. Cult. Rts. General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24 (10 August 2017) at para 12.

<sup>183</sup> Comm. Econ. Soc. Cult. Rts. General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24 (10 August 2017) at para 13.

<sup>184</sup> Human Rights Committee, General Comment no 34: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 at para 7 (Sept. 12, 2011). See communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 7 April 1999. The only limits that can be placed are those by the State under ICCPR, s 19(3).

<sup>185</sup> *General Comment 25, supra* note 23 ¶ 43.

<sup>186</sup> See Comm. Econ. Soc. Cult. Rts. General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at paras 25-39.

<sup>187</sup> Comm. Econ. Soc. Cult. Rts. 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

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

activities relating to the right to research, whether in its conduct or its output, States are enjoined to ensure that such activities do not negatively impact the realisation of the right. This includes ‘the obligation to regulate private actors to ensure that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are adapted to those needs’,<sup>188</sup> for instance, by regulating the private pharmaceutical market to ensure that access to vaccines, as an aspect of the right of access to the benefits of science, is available to all without discrimination and not just those who can pay for it.<sup>189</sup>

### 3. *Fulfil*

What possible steps may be taken to fulfil, provide, promote, the right and construct necessary frameworks for the realization of the right with a view to its full realization including international cooperation where necessary? With regard to the exercise of the freedom of expression aspects of the right to research, States are enjoined to create the infrastructure for the free flow of information and to counter misinformation.<sup>190</sup> As regards the educational aspects, States must take steps to facilitate research training in education that is contemporary and acceptable across cultures.<sup>191</sup> To fulfil the cultural aspects of the right, States must take steps to conserve cultural heritage including building and maintaining libraries, archives, museums and galleries and providing access to all without discrimination.<sup>192</sup> This includes cultural education in schools as well as more broadly in communities, with the participation and consultation of cultural communities.<sup>193</sup> With regard to authorship aspects of the right, States are required to ensure that adequate administrative and judicial measures exist for the realisation of the right, as well as engaging the participation of authors in matters concerning them.<sup>194</sup>

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the Covenant) UN Doc E/C.12/GC/17 (12 January 2006) at para 45.

<sup>188</sup> Comm. Econ. Soc. Cult. Rts. General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24 (10 August 2017) at para 22.

<sup>189</sup> See as a whole, Comm. Econ. Soc. Cult. Rts., Statement on universal and equitable access to vaccines for COVID-19 UN Doc E/C.12/2020/2 (27 November 2020).

<sup>190</sup> Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, Disinformation and freedom of opinion and expression, UN Doc A/HRC/47/25 (9 July 2021) para 88, 93.

<sup>191</sup> Comm. Econ. Soc. Cult. Rt, *General Comment No. 13* (1999) on *The Right to Education* (art 13), U.N. Doc. E/C12/1999/10 ¶ 50.

<sup>192</sup> See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at para 54.

<sup>193</sup> See Comm. Econ. Soc. Cult. Rts, General Comment no 21: General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 (21 December 2009) at paras 53-54.

<sup>194</sup> Comm. Econ. Soc. Cult. Rts, General Comment no 17: The right of everyone to

Regarding scientific research, States must enact legislative and other measures ensuring participation of all, and actively promote investment in science and technology. This requires the State to prioritise science and technology in its budget.<sup>195</sup> Moreover, as part of the cross-cutting equality and non-discrimination obligation, States are required to actively invest in facilitating the participation of marginalized and historically excluded groups in scientific research.<sup>196</sup> Centrally, States are required to disseminate scientific research and ensure that the infrastructure critical to this has been set up. This includes ‘equitable and open access to scientific literature, data and content, including by removing barriers to publishing, sharing and archiving scientific outputs’.<sup>197</sup> As the General Comment recognises, this is an endeavour that requires several stakeholders – including private individuals, research and development units in universities, business entities, funding bodies – to contribute, as they play a ‘decisive role’ in access to knowledge especially research outputs from public funds.<sup>198</sup> Considering the significant role of private entities engaged in business activities that impact on research, or that conduct research, States must ensure that their activities do not lead to a denial of rights under the Covenants. Moreover, although these entities are not directly bound to fulfil human rights obligations, they must not violate human rights.<sup>199</sup>

### C. *International cooperation*

States parties to the above Covenants primarily undertake human rights obligations within their jurisdiction.<sup>200</sup> Whether and to what extent does the right to research include an obligation to cooperate internationally?

The text of the ICESCR indicates that States parties that are ‘in a position to assist others’, bear obligations to take steps towards international cooperation.<sup>201</sup> Moreover, the concept of ‘maximum available resources’ has been interpreted as including requests made of the international community for assistance. Such assistance is contemplated to be economic or technical

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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) UN Doc E/C.12/GC/17 (12 January 2006) at para 46.

<sup>195</sup> *General Comment 25, supra* note 23 ¶ 46.

<sup>196</sup> *General Comment 25, supra* note 23 ¶ 47.

<sup>197</sup> *General Comment 25, supra* note 23 ¶ 49.

<sup>198</sup> *General Comment 25, supra* note 23 ¶ 49.

<sup>199</sup> UN Guiding Principles on Business and Human Rights (2011).

<sup>200</sup> This is not limited to territorial jurisdiction. See, Comm. Econ. Soc. Cult. Rts, General Comment no 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) UN Doc E/1991/23 (14 December 1990); Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May. 26, 2004).

<sup>201</sup> *General Comment No. 3, supra* note 152, ¶ 14. See also, Comm. Econ. Soc. Cult. Rts, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24 at para 36.

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

in nature.<sup>202</sup> The ICCPR does not contain such text. Thus, this section focuses on the economic, social and cultural aspects of the right to research.

With regard to the scientific research aspects of the right to research, the text of art 15(4) of the ICESCR highlights the importance of international cooperation in science and culture.<sup>203</sup> Drawing on the cultural aspects of the right to research, States parties must ensure that in their international treaty making and standard setting activities that the right to participate in cultural life is not negatively impacted.<sup>204</sup> Moreover, the scientific research aspects of the right, require that in treaty making and other international activities such as voting in committee, 'traditional knowledge is protected, contributions to scientific knowledge are appropriately credited and that intellectual property regimes foster the enjoyment of this right'.<sup>205</sup> With regard to cooperation, States are permitted to restrict the movement of people, services, goods and knowledge across borders only if the restrictions are compatible with art 4 of the ICESCR.<sup>206</sup>

Further, States have an obligation to regulate and monitor business activities of corporations within their jurisdiction, even if the activities of the corporations are abroad and have an impact on the human rights extra territorially.<sup>207</sup> States must ensure that effective remedies for victims of such violations is in place.<sup>208</sup> Conversely, States must not prevent other States from realising the right to research.<sup>209</sup>

### CONCLUSION

In this paper I have set out the beginnings of a human right to research and the obligations that consequently bind States both internationally and domestically. In Part I, I discuss a working definition of research as an inquiry into what is not yet known. I also explain the nature of the right to research

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<sup>202</sup> ICESCR, art 2.

<sup>203</sup> ICESCR, art 15(4).

<sup>204</sup> *General Comment 21, supra note XX paras 58, 59.*

<sup>205</sup> *General Comment 25, supra note 23 ¶ 83.* See also, with regard to the educational aspects of the right to research having extra territorial obligations concerning treaty making, KD Beiter, *Extraterritorial Human Rights Obligations to "Civilize" Intellectual Property Law: Access to Textbooks in Africa, Copyright, and the Right to Education*, 23 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 232 (2020).

<sup>206</sup> *General Comment 25, supra note 23 ¶ 53.*

<sup>207</sup> *General Comment 25, supra note 23 ¶ 84.* See also, Comm. Econ. Soc. Cult. Rts, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24 at para 27.

<sup>208</sup> Comm. Econ. Soc. Cult. Rts, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24 at paras 31.

<sup>209</sup> See Comm. Econ. Soc. Cult. Rts, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24 at para 29.

as an unenumerated or an implied right that draws on existing rights in the core human rights covenants. In short, this approach more closely accords with the interpretation of human rights treaties, and prevents the further fragmentation of international law.

The derivative right to research has civil and political aspects as well as economic, social and cultural aspects. Accordingly, I construct the right, drawing on the right to freedom of expression and free flow of information from the ICCPR, and the rights to education, culture, authorship, and science from the ICESCR. In Part II, I discuss the scope of application of the right: rights bearers of this right include everyone without discrimination. Duty bearers are primarily the State but also private entities in certain circumstances. I provide normative content to the right to research by drawing on the work of the UN human rights treaty bodies in respect of the rights listed above. Using the 3AQ framework, I discuss what it means to make the right to research available, accessible, acceptable and of good quality. I also explain in what circumstances the right to research can be limited by the State. Any restrictions on particular aspects of the right must fulfil the respective test set out in the limitations section.

The right to research is enforceable in international law, for the States parties to the ICCPR and ICESCR. It also has domestic implications in creating obligations for the State to discharge domestically. In Part III, I set out the nature and priority of these obligations. I identify which obligations are immediately realisable; which obligations form part of the minimum core; and which obligations are programmatic. Fundamentally, the obligation of non-discrimination and the obligation for the State to take steps must be performed immediately. Resource constraints are not a justification in this regard. I then discuss the ways in which the State may fulfil the duty to respect, protect and fulfil the right to research. I also discuss the role of private entities that carry out business activities in relation to research. Finally, I explain that although the obligations that arise are primarily domestic, there is an obligation on States parties to the ICESCR to request and render international assistance and cooperation to give full effect to the right to research.

The implications of recognising a right to research for intellectual property laws like copyright are as follows. For instance, on the international plane, should a provision in a copyright treaty appear to limit any aspect of the right to research, for instance, the free flow of information, both provisions must be interpreted harmoniously in a manner that gives full effect to each provision without limiting the other.<sup>210</sup> Should that not be possible, any limitation to the right to research must be justified under the ICESCR and ICCPR, depending on which aspect of the right is being limited.<sup>211</sup>

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<sup>210</sup> VCLT, art 31(3)(c).

<sup>211</sup> There are also significant fragmentation of international law issues that arise, that require the application of the International Law Commission's fragmentation toolbox. See,

## DEVELOPING A HUMAN RIGHT TO RESEARCH IN INTERNATIONAL LAW

Many of these thorny interpretive issues must be resolved on the domestic plane. This engages the constitution of the State in question in conjunction with their international obligations. For instance, if one considers that the freedom of expression aspect of the right to research is limited by a State's domestic copyright law, the limiting provision must fulfil the test for restrictions set out in the section on limitations to the right. These arise from art 19(3) of the ICCPR. Taking this aspect of the right as an example, the restriction must only be enacted for the respect of the rights and reputations of others, be prescribed by law, and necessary and proportionate in a democratic society. The burden is on the State to demonstrate this. The stated aim of copyright law is to give effect to authors' rights – prima facie fulfilling the legitimate aim part of art 19(3). Should the consideration of authors rights overlap with the aspects of the right to research that relate to authorship (including art 15(1)(c) of the ICESCR) law, this would potentially take us into the realm of considering the question: to what extent does this right overlap with copyright, if at all? To what extent does the copyright law in question actually meet that aim? Whose interests does it protect? If businesses' interests are protected, can they be protected above everyone's right to research that includes access to information? The work of the UN human rights treaty bodies that I have set out in the body of this paper explains that businesses must not negatively impact the realisation of human rights. In short, recognising these aspects of the right to research open up entirely new modes of analyses and hitherto unasked legal questions regarding intellectual property law's socio-economic impact.

Second, it is contested in the literature whether and to what extent human rights obligations take primacy over other treaty obligations for common States parties.<sup>212</sup> The work of the UN human rights treaty bodies that I have discussed in this paper explains the pressing need to conduct a harmonious interpretation of States concurrent obligations.<sup>213</sup> One argument, that I have made elsewhere,<sup>214</sup> is that *obligations erga omnes* could potentially be developed in a manner that supports the primacy of particular human rights

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in the context of intellectual property law HENNING GROSSE RUSE-KHAN, *THE PROTECTION OF INTELLECTUAL PROPERTY IN INTERNATIONAL LAW* (1 ed. 2017). I write about the application of the fragmentation toolbox at the intersection of intellectual property and human rights law in SANYA SAMTANI, *UNIVERSALISING ACCESS TO EDUCATIONAL MATERIALS* (FORTHCOMING, 2024).

<sup>212</sup> See the debates laid out in Erika De Wet, *The International Constitutional Order*, 55 INT'L & COMP. L. Q. 51–76 (2006); Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156–229 (1987); HJ STEINER, P ALSTON, & R GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS* (3rd ed., 2008).

<sup>213</sup> VCLT art 31(3)(c).

<sup>214</sup> Sanya Samtani, *The Right of Access to Educational Materials and Copyright: International and Domestic Law* (DPhil/PhD Thesis, University of Oxford, 2021).



on a case by case basis.<sup>215</sup> In terms of negotiating new trade, investment, and intellectual property treaties, the work of the UN human rights treaty bodies indicates that it is crucial for States to make explicit their commitments to their pre-existing human rights obligations and to act in a way that enables them to fully realise these obligations.

Thus, the recognition of a right to research in existing international human rights instruments has symbolic, normative, strategic and enforcement implications. The symbolic implications entail that a right to research can be 'claimed' from the State, rather than understood as the 'benevolence' of the State.<sup>216</sup> Normative implications entail that where there is a gap in domestic law on the issue, or where domestic law is unclear on the precise contours of the content of a right to research, or indeed the extent of State obligations or types of steps that the State is obliged to take, the international human rights framework offers helpful guidance.<sup>217</sup> Strategic implications entail that social movements and communities may articulate research as a right, in the struggle for social justice, contributing to the mutually constitutive relationship between human rights law and social movements.<sup>218</sup> Enforcement implications relate to the recognition of enforceability of the claim articulated in the form of human rights, whether internationally or domestically.<sup>219</sup>

Centrally, the articulation of research as a right has implications for States parties to two of the most widely ratified treaties in the world. States parties bear obligations to take measures towards realising the right to research for all, without discrimination.

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<sup>215</sup> See also, JOOST PAUWELYN, HUMAN RIGHTS AND INTERNATIONAL TRADE (2005); Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EURO. J. OF INT'L L. 907–951 (2003); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW : HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003).

<sup>216</sup> Benjamin Mason Meier, Georgia Lyn Kayser, Urooj Quezon Amjad & Jamie Bartram, *Implementing an Evolving Human Right Through Water and Sanitation Policy*, 15 WATER POL'Y 117 (2013).

<sup>217</sup> This is of course predicated on the domestic constitutional framework of the particular jurisdiction in question and the extent to which it enables the domestic application of international law. See in the South African context, for instance, Constitution, ss 231-233 and s 39(1).

<sup>218</sup> See, for instance in the context of the recognition of disability rights, Theresia Degener & Andrew Begg, *From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (Rachele Cera, Valentina Della Fina, & Giuseppe Palmisano eds., 1 ed. 2017).

<sup>219</sup> Yonatan Lupu, Pierre-Hugues Verdier & Mila Versteeg, *The Strength of Weak Review: National Courts, Interpretive Canons, and Human Rights Treaties*, 63 INT'L STUD. Q. : J. OF THE INT'L STUD. ASS'N. 507, 511 (2019) as cited in Brandon L Garrett, Laurence R Helfer, and Jayne C Huckerby, *supra* note 41 at 330.