



International  
Commission  
of Jurists

Africa Regional Office  
6 Sturdee Avenue  
Rosebank  
Johannesburg 2196  
South Africa

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**9 July 2021**

**For Attention: Portfolio Committee on Trade and Industry**

By email: [ahermans@parliament.gov.za](mailto:ahermans@parliament.gov.za);  
[tmadima@parliament.gov.za](mailto:tmadima@parliament.gov.za); [msheldon@parliament.gov.za](mailto:msheldon@parliament.gov.za);  
[ymanakaza@parliament.gov.za](mailto:ymanakaza@parliament.gov.za)

To Whom it May Concern,

**In Re: Submissions on Copyright Amendment Bill [B13B-2017]**

This submission is filed by the International Commission of Jurists (ICJ) and the Equal Education Law Centre (EELC), in response to the call for submissions issued by the Portfolio Committee on Trade and Industry dated 4 June 2021.

The ICJ and EELC remains available to attend and present its submissions at any public hearings on the Bill, including those contemplated by the call on 4-5 August 2021.

**Contact**

Kaajal Ramjathan-Keogh, Director of ICJ Africa  
c: +27845148039  
e: [kaajal.keogh\(a\)icj.org](mailto:kaajal.keogh(a)icj.org)

Tshego Phala, Executive Director of EELC  
e: [tshego@eelawcentre.org.za](mailto:tshego@eelawcentre.org.za)

## A. INTRODUCTION

- 1 Composed of 60 eminent judges and lawyers from all regions of the world, the ICJ promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.
- 2 The ICJ maintains offices in Johannesburg and, in partnership with human rights defenders and local civil society organizations, undertakes coordinated research and advocacy on the protection of economic, social and cultural rights in South Africa, in particular.<sup>1</sup>
- 3 The EELC is a public interest law centre using legal advocacy, research, and litigation to advance the struggle for equal and quality education in South Africa.<sup>2</sup>
- 4 The call for submissions issued by the Portfolio Committee on Trade and Industry on 4 June 2021, indicates, amongst other things that the Committee seeks submissions:

*"...with reference to the alignment of the Copyright Amendment Bill [B13B-2017] and the Performers' Protection Amendment Bill [B24B-2016] with the obligations set out in international treaties, **including** the World Intellectual Property Organisation (WIPO) Copyright Treaty, the WIPO Performance and Phonograms Treaty, and the Marrakesh Treaty to Facilitate Access to Published Works for Person Who Are Blind, Visually Impaired, or Otherwise Print Disabled."* (Emphasis Added).
- 5 The ICJ and EELC make the following submissions in response to this call, and in the context of the reservations expressed by the President of the Republic of South Africa in relation to "whether the Bill complies with" international treaties that South Africa is bound by or which "have been reviewed and are in the process of being acceded to by South Africa".<sup>3</sup>
- 6 In short, we submit the following:

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<sup>1</sup> In general, see: International Commission of Jurists "A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa" (August 2019): <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf>.

<sup>2</sup> For more information see: <https://eelawcentre.org.za/>.

<sup>3</sup> President of the Republic of South Africa, "Referral of the Copyright Amendment Bill [B13-B-2017 and the Performers' Protection Amendment Bill [B24-2016] to the National Assembly" (16 June 2020): [https://static.pmg.org.za/200818ramaphosa\\_on\\_copyright\\_amendment\\_bill.pdf](https://static.pmg.org.za/200818ramaphosa_on_copyright_amendment_bill.pdf).

- 6.1 The Vienna Convention on the Law of Treaties (VCLT), Article 31(3)(c), sets the standard for the interpretation of international treaties, and requires that international law is interpreted as a single coherent system.<sup>4</sup> International human rights law obligations in terms of, for instance, the Convention on the Rights for Persons with Disabilities (CRPD) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), therefore must be taken into account in the interpretation of international copyright law. Thus, the legislature should consider the President's reservations about whether the Bill, as it stands, aligns with international treaties, taking into account a full range of South Africa's international law obligations in terms of various treaties emanating in particular from international copyright law, international trade law and international human rights law.
- 6.2 South Africa's obligations in terms of the CRPD and ICESCR require it to take all appropriate steps to ensure the full and equal availability of all cultural and educational materials, on equal basis, to persons with disabilities. The rights to inclusive education, participation in cultural life, and accessibility, in particular, require that the South African government take proactive measures to revise its copyright laws, ensuring that these laws do not hinder equal access. We submit that an interpretation of international copyright law and international trade law as a coherent system is capable of an interpretation consistent with these obligations.
- 6.3 Although South Africa has not signed or acceded to the Marrakesh Treaty (a situation which we submit must itself be addressed), the provisions of the treaty should be considered: 1) in the interpretation of international treaties to which South Africa is a party; 2) the interpretation of domestic constitutional provisions; and 3) the interpretation of the Copyright Amendment Bill and its constitutionality.
- 7 The aforesaid considerations are of direct relevance in addressing the President's concerns in relation to the consistency of the Bill with its "obligations set out international treaties ... **including** ... the Marrakesh Treaty to Facilitate Access to Published Works for Person Who Are Blind,

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<sup>4</sup> VCLT, Article 31(3) Reads:

"3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) *any relevant rules of international law applicable in the relations between the parties.*"

(Emphasis Added).

Visually Impaired, or Otherwise Print Disabled”,<sup>5</sup> and therefore respond directly to this call for comment.

- 8 This submission primarily highlights the extent to which, insofar as Clause 20 (Section 19D of the Bill) headed “General exceptions regarding protection of copyright work for persons with disability” is concerned, the Bill is consistent with South Africa’s international law obligations.<sup>6</sup> This falls directly within the scope of the President’s concerns given his broad request for inputs on the compliance with Bill with international treaties “including” the Marrakesh Treaty.<sup>7</sup>
- 9 The ICJ, represented by the EELC, has filed an application to intervene as *amicus curiae* in a legal challenge to the validity of the Copyright Act as it stands. In the aforementioned application, ICJ’s submissions focus specifically on the correct approach of Court’s seized with such a matter to understanding South Africa’s international law obligations. The ICJ’s application to intervene as *amicus curiae* in a legal challenge to the validity of the Copyright Act can be found here.<sup>8</sup>
- 10 Echoing our submissions to the Court, we submit here to Parliament that the enactment of a provision such a section 19D of the Bill is not only permissible, but required, in terms of South Africa’s international human rights law obligations. The enactment of such a provision by Parliament

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<sup>5</sup> President of the Republic of South Africa, “Referral of the Copyright Amendment Bill [B13-B-2017 and the Performers’ Protection Amendment Bill [B24-2016] to the National Assembly” (16 June 2020): [https://static.pmg.org.za/200818ramaphosa\\_on\\_copyright\\_amendment\\_bill.pdf](https://static.pmg.org.za/200818ramaphosa_on_copyright_amendment_bill.pdf).

<sup>6</sup> Clause 20, Section 19D, reads as follows:

“19D. (1) Any person as may be prescribed and that serves persons with disabilities may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

(a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;

(b) the copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and

(c) the activity under this subsection must be undertaken on a non-profit basis.

(2) (a) A person with a disability, or a person that serves persons with disabilities, to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorization of the owner of the copyright work, reproduce the work for personal use.

(b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.

(3) A person with a disability or a person that serves persons with disabilities may, without the authorization of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person.

(4) The exception created by this section is subject to the obligation of indicating the source and the name of the author on any accessible format copy in so far as it is practicable.”

<sup>7</sup> The international instruments mentioned by the President explicitly are not intended to be a closed list nor could they be in light of the requirements of Article 31(3)(c) of the VCLT as detailed in this submission.

<sup>8</sup> [https://eelawcentre.org.za/wp-content/uploads/24.06.2021\\_icjbsa.pdf](https://eelawcentre.org.za/wp-content/uploads/24.06.2021_icjbsa.pdf)

is therefore also consistent with the provisions South African Constitution.<sup>9</sup>

## **B. HARMONIUS INTERPRETATION OF INTERNATIONAL LAW**

- 11 The VCLT generally reflects law of treaties under international customary law. The South African Constitutional Court, the executive, and the legislature have acknowledged that the "main provisions" of VCLT form part of international customary law.<sup>10</sup> It is widely accepted among States and international law experts that Article 31 of the VCLT forms part of international customary law.<sup>11</sup>
- 12 Article 31(3)(c) of the VCLT provides that the interpretation of treaties should take into account "any relevant rules of international law applicable in relation between the parties".
- 13 A further principle of international treaty interpretation is that conflicting treaty provisions should be harmonized, to the extent possible, in light of their shared systemic objectives. This principle by which the construal of different international instruments is harmonized, is sometimes referred to as "systemic integration".<sup>12</sup> It is not uncommon for treaty provisions adopted in divergent contexts to be in apparent conflict, as international law covers a broad range of fields and subject matter and treaties are often negotiated and agreed in a wide range of institutional settings or groupings of States.
- 14 For purposes of this submission, the import of the application of this principle in line with the VCLT, Article 31(3)(c), is that the relevant provisions from international trade law and international copyright law treaties, should be read, wherever possible, as part of a single overarching regime of international law.<sup>13</sup> There is however "substantial overlap",<sup>14</sup> for instance, between ICESCR, the CRPD, and treaties such

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<sup>9</sup> Constitution s 7(2) requires the State, which includes Parliament to "respect, protect, promote and fulfil the rights in the Bill of Rights". All measures taken to give effect to this responsibility must be "reasonable and effective". See *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011), para 189. See also, Constitution, s 233 which requires "any reasonable interpretation of the legislation that is consistent with international law" to be preferred "over any alternative interpretation that is inconsistent with international law".

<sup>10</sup> *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018), para 33-39.

<sup>11</sup> International Law Commission "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (13 April 2006) A/CN.4/L.682: [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf), para 168.

<sup>12</sup> *Id*, para 410.

<sup>13</sup> P Sands, "Treaty, Custom and the Cross-Fertilisation of International Law" (1998) 1 *Yale Human Rights and Development Law Journal* 85, 95.

<sup>14</sup> S Samtani "The Right Of Access To Educational Materials And Copyright: International And Domestic Law" (Unpublished DPhil Thesis, University of Oxford, Hilary Term 2021), p 19.

as the Berne Convention<sup>15</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>16</sup>

- 15 As detailed above, the President has expressed concern about the compliance of the provisions of the Bill with South Africa's international law obligations generally, making specific mention of: World Intellectual Property Organization (WIPO) Copyright Treaty; the WIPO Performance and Phonograms Treaty, and the Marrakesh Treaty to Facilitate Access to Published Works for Person Who Are Blind, Visually Impaired, or Otherwise Print Disabled.
- 16 All of these treaties, and South Africa's obligations in respect thereof, must, as a matter of international law, be understood consistently with all of South Africa's international law obligations, including, and in particular, those in terms of the CRPD and the ICESCR.
- 17 Compliance with the Marrakesh Treaty, which the President specifically raises, requires as much. According to Article 10 of the Marrakesh Treaty:

"Contracting Parties may fulfil their rights and obligations under this Treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof, within their national legal system and practice. These may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses to *meet their needs consistent with the Contracting Parties' rights and obligations under the Berne Convention, **other international treaties**, and Article 11.*"  
(Emphasis Added)

- 18 The legislature's overall approach to applicable international law should therefore be to ensure that international human rights law is not construed in a manner so as to be subordinate to international copyright law and international trade law. In light of the primacy given to human rights in South Africa's Constitution, and the similar interpretative regime it entrenches,<sup>17</sup> the effective application of VCLT Article 31(3)(c), is that courts, and other State entities applying these legal provisions, ensure that international copyright law and international trade law are constituted consistently with applicable international human rights law, as detailed below.

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<sup>15</sup> Berne Convention for the Protection of Literary and Artistic Works <https://www.wipo.int/treaties/en/ip/berne/>, of which South Africa is a party.

<sup>16</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights, [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm), of which South Africa is automatically a party as a Member State of the WTO.

<sup>17</sup> Constitution, ss 39, 233.

## C. APPLICATION TO SPECIFIC OBJECTIONS RAISED

- 19 While the preceding conclusion in relation to the harmonized interpretation of international human rights law, international copyright law, and international trade law is of general importance to the overall exercise requested by the President, it is important for present purposes to ensure that the provisions of the Bill are compliant with international law. In examining whether it in fact achieves this, we proceed to look at those reservations which are directly relevant to clause 20, section 19D of the Bill, relating to the “general exceptions regarding protection of copyright work for persons with disability”.
- 20 Some experts have raised objections with regards to the ambit of protection provided by the Bill in regard to “accessible format copy”,<sup>18</sup> which the Bill explicitly defines as “a copy of a work in an alternative manner or form, *which gives a person with a disability* access to the work and which permits such person to have access as feasibly and comfortably as a person without a disability”.<sup>19</sup> The reason for this appears to be that by doing so the Bill provides protection to a wider range and category of person (“person with disability”)<sup>20</sup> than the Marrakesh Treaty, which is specifically aimed at providing protection to persons who are blind, visually impaired, or otherwise print disabled.<sup>21</sup> This has led some to observe that the Bill “far exceed the provisions of the Marrakesh Treaty”, creating “Marrakesh-plus provisions”. The

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<sup>18</sup> See for example the submissions of Advocate JJ Baloyi: B Baloyi “Advisory Comments on the Copyright Amendment Bill” (4 July 2018):

<https://legalbrief.co.za/media/filestore/2018/10/Baloyi.pdf>.

<sup>19</sup> Clause 1(a) of the Bill itself also further defines person with disability as:

“a person who has a physical, intellectual, neurological, or sensory impairment and who requires the work to be in a format that enables that person to access and use the work in the same manner as a person without a disability”.

<sup>20</sup> B Baloyi “Advisory Comments on the Copyright Amendment Bill” (4 July 2018):

<https://legalbrief.co.za/media/filestore/2018/10/Baloyi.pdf>.

<sup>21</sup> Article 2(a) of the Marrakesh Treaty in turn defines “accessible format copy” as referring to a:

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

Article 3 of the Marrakesh Treaty defines “beneficiary person” as:

“a person who:

(a) is blind;

(b) has a visual impairment or a perceptual *or reading disability* which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading; *regardless of any other disabilities*.” (Emphasis Added).



President appears to refer to these concerns in passing in his referral letter.<sup>22</sup>

- 21 On a proper interpretation of South Africa's international law obligations consistent with VCLT Article 31(3)(c), these objections stand to be rejected.<sup>23</sup> In our view, the Bill as it stands is not only consistent with the Marrakesh Treaty, but South Africa's broader obligations in terms international human rights law.
- 22 Importantly, international trade and copyright law requires that when interpreting the provisions of these treaties, it is consistent with international human rights law as well as the broader principles of international law. This does however not mean that preference is given to international human rights law or indeed any other regime, but to the extent that this requires "Marrakesh-plus provisions" this should be embraced rather than denigrated.
- 23 As the ICJ's aforementioned court papers sets out, South Africa is bound to international obligations to ensure the provision of access to reading materials to *all* persons with disabilities in terms of at least the following provisions of the CRPD and the ICESCR:
  - 23.1 **The Right to Education:** In terms of Article 24 of the CRPD and Article 13 of ICESCR, as interpreted by the authoritative General Comments of the Committee on the Rights of Persons with Disabilities and the Committee on Economic, Social and Cultural Rights.<sup>24</sup> Specifically, it is a core obligation in terms of the right to education to prevent discrimination in access to education, including in relation to reading materials. The CRPD Committee has therefore decried the "widespread lack of textbooks and learning materials in accessible formats and languages" and stressed that States have an obligation to "invest in the timely development of resources".<sup>25</sup> The Copyright Act, as it stands, clearly results in violations of the right to education.
  - 23.2 **The Right to Participate in Cultural Life:** In terms of Article 30 of the CRPD and Article 15 of ICESCR, as interpreted by the authoritative General Comments of the Committee on the Rights of Persons with Disabilities and the Committee on Economic, Social

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<sup>22</sup> President of the Republic of South Africa, "Referral of the Copyright Amendment Bill [B13-B-2017 and the Performers' Protection Amendment Bill [B24-2016] to the National Assembly" (16 June 2020): [https://static.pmg.org.za/200818ramaphosa\\_on\\_copyright\\_amendment\\_bill.pdf](https://static.pmg.org.za/200818ramaphosa_on_copyright_amendment_bill.pdf), p 9-10, paras 20-21.

<sup>23</sup> S Samtani "The Right Of Access To Educational Materials And Copyright: International And Domestic Law" (Unpublished DPhil Thesis, University of Oxford, Hilary Term 2021), p 181.

<sup>24</sup> UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 4 (2016), Article 24: Right to inclusive education*, 2 September 2016, CRPD/C/GC/4, available at: <https://www.refworld.org/docid/57c977e34.html>; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, available at: <https://www.refworld.org/docid/4538838c22.html>.

<sup>25</sup> CRPD General Comment 4, para 22.



and Cultural Rights.<sup>26</sup> Persons with disabilities have a right to “access cultural life and to develop and utilize their creative, artistic and intellectual potential”, which requires States to take measures to ensure they can “enjoy access to cultural materials in accessible formats”.<sup>27</sup> The Copyright Act, as it stands, clearly serves to impede the exercise of the right to cultural life.

- 23.3 **The Right to Accessibility:** In terms of Article 9 of the CRPD, as interpreted by the authoritative General Comment 2 of the Committee on the Rights of Persons with Disabilities.<sup>28</sup> This self-standing right includes protection of a right to access to “information and communications” and that all “facilities and services open or provided to the public” should be accessible to persons with disabilities. In this regard, States are required to ensure the “elimination of obstacles and barriers to accessibility”, including by ensuring that “private entities that offer facilities and services which are open to or provided to the public take into account all aspects of accessibility for persons with disabilities”.<sup>29</sup> The Copyright Act, as it stands, clearly serves to impede the exercise of right to accessibility.
- 24 South Africa’s obligations in terms of these rights require that proactive measures be taken to put in place, laws, policies and other regulations which create exceptions to copyrights, and enables all people, including all persons with disabilities, to have access to educational and cultural materials, which includes, reading materials, on an equal basis.
- 25 These rights, which are protected and guaranteed under international human rights treaties, such as the CRPD and ICESCR, are held by *all* persons, including all persons with disabilities. The Marrakesh Treaty, which South Africa has yet to become a party to, merely serves to *reinforce* the corresponding obligations that gives effect to these rights. This means that whether or not it is correct to interpret the treaty narrowly to apply to only “blind”, “visually impaired” and with specific “print disabilities (narrowly construed), South Africa remains obliged to enact legal provisions securing the protection of the rights of all persons with disabilities.
- 26 Consequently, the Copyright Act as it stands, when assessed for compatibility with international law and standards, including South Africa’s human rights treaty obligations, places an impermissible barrier

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<sup>26</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, E/C.12/GC/21, available at: <https://www.refworld.org/docid/4ed35bae2.html>.

<sup>27</sup> CRPD, Article 30(1)(a).

<sup>28</sup> UN Committee on the Rights of Persons with Disabilities (CRPD), General comment no. 2 (2014), Article 9, Accessibility (22 May 2014) CRPD/C/GC/2, available at: <https://digitallibrary.un.org/record/812025?ln=en>.

<sup>29</sup> CRPD, Article 9 and Article 9(2)(b) in particular. CRPD General Comment 2, para 18.

to non-discriminatory access to educational and cultural facilities for all persons with disabilities who may have difficulty in accessing reading materials for reasons relating to their disabilities. The proposed amendment included in Clause 20, Section 19 of the Bill is therefore sensibly broad. While it may provide more protection than some interpretations of the Marrakesh Treaty require, this is irrelevant to its overall consistency either with the Marrakesh Treaty or with international law read as a coherent, single system.

#### **D. THE MARRAKESH TREATY ITSELF**

- 27 One of the complexities and confusions introduced in the entire process of the Bill, and in particular in relation to Clause 20, Section 19D, is the incoherent approach South Africa appears to have taken towards the Marrakesh Treaty.
- 28 South Africa was integrally involved in the deliberations that resulted in the conclusion of this treaty in 2013. It has expressed a clear commitment to, and agreement with, the content of the agreement, which is reflected in the *travaux préparatoires* of the treaty.<sup>30</sup>
- 29 South Africa is so much in agreement with the Marrakesh Treaty that through the present proposed amendments to the Copyright Act the State has expressly sought to comply with the provisions of the treaty despite South Africa having neither signed nor ratified the treaty. The President's own referral letter refers to the treaty as one that South Africa has "reviewed and are in the process of being acceded to".<sup>31</sup>
- 30 Despite this, South Africa has not signed, ratified or acceded to the treaty, and appears to suggest that it will become a party to the treaty only once this amendment to the Copyright Act contemplated in the Bill, is concluded. As a general matter, States often enter into treaty commitments which will require them to adapt their domestic law provision to comply with new international legal obligations, even prior

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<sup>30</sup> Government of South Africa "Draft South African Closing Statement Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons and Persons with Print Disabilities" (27 June 2013): [https://libguides.wits.ac.za/ld.php?content\\_id=5267475](https://libguides.wits.ac.za/ld.php?content_id=5267475), which inter alia, reads:

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

<sup>31</sup> President of the Republic of South Africa, "Referral of the Copyright Amendment Bill [B13-B-2017 and the Performers' Protection Amendment Bill [B24-2016] to the National Assembly" (16 June 2020): [https://static.pmg.org.za/200818ramaphosa\\_on\\_copyright\\_amendment\\_bill.pdf](https://static.pmg.org.za/200818ramaphosa_on_copyright_amendment_bill.pdf).

to their compliance with the requirements of such treaties. It is once the obligations come into force that their implementation is required. In the case of the Marrakesh Treaty, under article 19(b), the State does not become bound by its provisions until three months after it has deposited its instrument of ratification or accession. Indeed, one of the purposes of signing and ratifying or acceding to treaties is to express a commitment, undertaking to improve on the protection of human rights covered by a particular treaty.

- 31 It is for this reason that, in its Concluding Observations to South Africa in 2018, the Committee on the Rights of Persons with Disabilities, which expressed concern “about the delay in revising the Copyright Act (1978) and ratifying the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled”, recommended “expedite[d] action” to secure *both*.
- 32 There is no reason in logic or law, why South Africa cannot or should not become party to the Marrakesh Treaty before the process relating to the Bill is complete. Indeed, accession to the Marrakesh Treaty may provide some much needed impetus to the process of the amendment of the Bill and communicate a real commitment to persons with disabilities in South Africa that government is serious about ensuring the protection of their rights.
- 33 As ICJ’s affidavit shows, even prior to South Africa acceding to the Marrakesh Treaty, as a matter of both domestic and international human rights law, the treaty may be considered by Parliament in:
  - 33.1 The interpretation of applicable international treaties to which South Africa is a party, including the CRPD and ICESCR;
  - 33.2 The interpretation of applicable domestic constitutional provisions and the State’s corresponding obligations; and
  - 33.3 The interpretation of the Copyright Act and its constitutionality.
- 34 In conclusion, the arguments made in this submission show that the Marrakesh Treaty simply fortifies South Africa’s existing obligations in terms of ICESCR and the CRPD to take proactive measures to create exactly the exemptions to copyright law that the Clause 20, Section 19D of the Bill contemplate.

## **E. CONCLUSION**

- 35 In summary, the ICJ and EELC recommend the following:
  - 35.1 That when assessing the compliance of the Bill in terms of international law, Parliament consider South Africa’s obligations in terms of international law as a coherent whole taking into account

the obligations placed on the State in terms of international human rights law. This requires in particular the consideration of South Africa's obligations in terms of the ICESCR and the CRPD.

- 35.2 That Parliament assuage the President's concerns, to the extent that they may exist, about the compliance of Clause 20, Section 19D of the Bill, with South Africa's international law obligations.
- 35.3 That, in accordance with the recommendations of the Committee on the Rights of Persons with Disabilities, Parliament and the National Executive take all appropriate and necessary measures to ensure that South Africa accedes to the Marrakesh Treaty, irrespective of the status of the Copyright Amendment Bill.
- 36 The ICJ and the EELC thank the Portfolio Committee on Trade and Industry for the opportunity to make submissions on the compliance of the Bill with South Africa's international law obligations. We remain available to respond to further queries and to present our submissions at any public hearings on the Bill, including those contemplated by the call on 4-5 August 2021.



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**Kaajal Ramjathan-Keogh**  
**Director of ICJ Africa**



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**Tshego Phala**  
**Executive Director of Equal Education Law Centre**