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# The Marrakesh Treaty as “Bottom Up” Lawmaking: Supporting Local Human Rights Action on IP Policies

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*Global intellectual property rules have had adverse consequences for the promotion and protection of a range of human rights, including the rights to food, health, water, culture, equality and non-discrimination, and freedom of expression. Nonetheless, these issues have been framed in human rights terms primarily at the international and regional levels. Domestic human rights advocates have largely not taken up the issue of how intellectual property law affects the enjoyment of human rights.*

*This Article argues that this incomplete translation is due to widespread reliance on a fairly narrow understanding of human rights. Human rights, when understood only as a set of legal rules and institutions, inevitably devolves into a debate about reconciling conflicting rights. This is an important conversation, but it is also a limiting one. The emancipatory potential of human rights often lies not in its power as a set of legal rules but in the way in which those rules can be employed by affected individuals to make claims and demand political change. Using the case study of law and politics around intellectual property mobilization, the Article argues that framing intellectual property in more robust human rights terms is important for challenging the fundamental power structures that undergird the intellectual property regime.*

*The Article then argues that the Marrakesh Treaty—a new treaty that requires states to create mandatory exceptions to copyright to protect the rights of individuals with disabilities—charts a new path for human rights advocacy on intellectual property. This treaty has the potential to lay a foundation for better translation of intellectual property issues into human rights advocacy by identifying a clear violation and by activating domestic human rights advocates. Creating a foundation for affected individuals and human rights advocates to participate in*

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*intellectual property lawmaking is essential to realizing the potential of human rights for revising the essential bargains of the international intellectual property system.*

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## INTRODUCTION

The relationship between intellectual property and human rights is contested and complex, both deeply frustrating in its internal contradictions and also fascinating for its potential to affect lives. It is also largely irrelevant for most of the human rights world. Global intellectual property rules have had adverse consequences for the promotion and protection of a range of human rights, including the rights to food, health, water, culture, equality and non-discrimination, and freedom of expression. The relationship between human rights and intellectual property has also been thoroughly explored by scholars and has been the subject of many United Nations initiatives. Nonetheless, these efforts have largely not translated into domestic advocacy. Other than in a few specific areas such as access to essential medicines, intellectual property issues have not been taken up by local or international human rights advocates as explicit concerns.

This Article explores the causes and consequences of this incomplete translation of intellectual property issues into human rights advocacy. The causes vary but are related largely to the way in which both intellectual property rights-holders and transnational advocates working on issues of intellectual property and social justice have relied on the language and metrics of intellectual property to define and measure progress. The concerns of transnational intellectual property activists, which are often framed in the language of incentives, innovation, and

cost/benefit analysis, have not been accessible by or viewed as highly relevant to the work of most human rights practitioners.

The consequence of this incomplete translation has been to deprive the human rights frame of its emancipatory potential to challenge the fundamental power structures that undergird the intellectual property regime. For human rights to be effective in challenging established power relationships, it must engage both law and politics—it must be understood not only as a set of legal rules but also as a body of “bottom up” discursive practices of rights claiming.

Relying on the model embodied in a new treaty on copyright exceptions for individuals with disabilities, the Article charts a new path for human rights advocacy on intellectual property. This new treaty, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (“Marrakesh Treaty” or “Treaty”) requires state parties to create exceptions and limitations to copyright for individuals with print disabilities. The Marrakesh Treaty, which came into force on September 30, 2016, lays a foundation for better translation of intellectual property issues into human rights advocacy on the domestic level. It does this in two ways: first, by identifying a clear violation (for example, a “book famine” for individuals with disabilities) that can be attributed to the effects of intellectual property rules (needing a license from the copyright owner in each country in order to create an accessible version of a book),<sup>1</sup> and second, by activating domestic human rights advocates, naming them as explicit partners in intellectual property policy making and implementation on the domestic level.

This Article makes two contributions to the literature. First, it contributes to human rights literature by providing a case study of the relationship between law and politics in social mobilization on intellectual property issues. Human rights operate simultaneously as a language of law and as a discourse of political action. Recent critiques of human rights by scholars such as Samuel Moyn<sup>2</sup> and Stephen Hopgood<sup>3</sup> focus on an overly narrow and legalistic vision of human rights that often prevents recognition of the more transformative potential of human rights as a frame for political action.

Second, the Article contributes to the literature on human rights and intellectual property by identifying the barriers that have hampered efforts to use human rights frames to address the impacts of intellectual property and offering suggestions for the way forward. In so doing, it seeks to begin a discussion about what a human rights agenda for innovation would look like—an agenda that would put human rights front and center instead of deferring to the essential bargains and assumptions that underlie intellectual property law.

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1. See PAUL HARPUR, *DISCRIMINATION, COPYRIGHT, AND EQUALITY: OPENING THE E-BOOK FOR THE PRINT-DISABLED* 80 (2017).

2. SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018) [hereinafter MOYN, *NOT ENOUGH*]; SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

3. STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013).

This Article proceeds in two parts. First, it charts the way in which intellectual property as a human rights issue was initially raised in South Africa and Brazil before being taken up by institutions within the United Nations. This part also discusses why intellectual property, once it was articulated as a human rights concern in these forums, did not further translate into domestic action. It identifies the barriers to this uptake as largely stemming from the decision by transnational intellectual property advocates to engage with IP rights-holders on rights-holders' terms, using social justice rationales to advocate for exceptions and limitations to intellectual property rather than challenging the inequitable power relationships that undergird international intellectual property protection. Meeting intellectual property rights-holders on their own terms may well have been a necessary strategic move in order to present arguments in terms that would resonate. Nonetheless, an unintended side effect of this move has been to limit opportunities to build alliances with human rights advocates.

The second part of this Article discusses the core provisions of the Marrakesh Treaty as well as the way in which the unique features of the Treaty represent a new approach to intellectual property lawmaking. Normatively, the Treaty focuses on an issue that resonates well within the human rights framework, identifying a clear violator, violation, and remedy, and it is also associated with a clear constituency—in this case, individuals with print disabilities and their representative organizations. These characteristics make it more likely for the intellectual property issues at the heart of the Treaty to be framed as human rights concerns. Institutionally, the Marrakesh Treaty also represents an advance over prior efforts to catalyze domestic human rights advocacy on intellectual property issues by ensuring that beneficiaries and their representative organizations will be able to participate in exercising the rights created by the Treaty as well as in lawmaking on the Treaty's implementation.

## I. FRAMING HUMAN RIGHTS

This section examines the “geography” of human rights framing of intellectual property, from initial deployment in South Africa and Brazil to elaboration and entrenchment at the United Nations. The section then considers why the trajectory of human rights and intellectual property “stalled” at the international level and was not translated into further domestic human rights advocacy. In large part, this lack of uptake was due to the fact that there was no clear constituency within the human rights community to take up these issues. In addition, the transnational and national activists who did engage with the social justice impacts of intellectual property tended to use the language and metrics of intellectual property to frame their work, which made the impacts of intellectual property less accessible by, and perceived as less relevant to, most human rights practitioners.

A. *From South Africa to the United Nations*

Prior to the mid-1990s, there was little interaction between the intellectual property and human rights regimes.<sup>4</sup> In the late 1980s and early 1990s, however, IP rights-holders began pressuring their constituent states to advocate for stronger global intellectual property rights.<sup>5</sup> These efforts were successful, and in 1994, the negotiation of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement)<sup>6</sup> made compliance with minimum intellectual property standards a requirement of membership in the World Trade Organization (WTO).<sup>7</sup>

The TRIPS Agreement and the later bilateral trade and investment treaties that sought to expand upon and strengthen its requirements, were combined with continued bilateral pressure to strengthen domestic intellectual property rules and enforce them more effectively. These forces created a culture of compliance that led many states to forego even the minimal flexibility that TRIPS allows ratifying states in implementing their obligations under the treaty.<sup>8</sup> Many countries, including some of the least-developed countries, implemented their TRIPS obligations far in advance of when they were actually required to do so.<sup>9</sup> Others adopted stronger rules than required by the treaty or declined to incorporate flexibilities allowed by TRIPS.<sup>10</sup> Bilateral agreements further required states to provide “TRIPS-plus” protection beyond what was required by TRIPS.<sup>11</sup>

The impacts of these stronger intellectual property rights began to engender significant resistance among several communities. Advocates argued that patents on essential medicines allowed pharmaceutical companies to charge prices that most

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4. Prior to the mid-1990s, the intellectual property and human rights regimes largely developed in isolation. See Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 47 (2003); see also Laurence R. Helfer, *Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship*, in THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 117, 118 (Rochelle C. Dreyfuss & Justine Pila eds., 2018) [hereinafter Helfer, OXFORD HANDBOOK].

5. LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 35 (2011).

6. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. The agreement was negotiated as part of a set of agreements concluded in 1994 that established the WTO, vested it with certain regulatory power, and strengthened the mechanism for resolving trade disputes. Annexed to the principal agreement establishing the WTO were topic-specific agreements regulating issues ranging from trade in goods and services to textiles and clothing, agriculture, and anti-dumping (collectively called the “covered agreements”). The TRIPS Agreement is one of these covered agreements and establishes minimum standards for intellectual property protection in the domestic law of WTO member states.

7. Helfer, OXFORD HANDBOOK, *supra* note 4, at 121.

8. Molly Land, *Rebalancing TRIPS*, 33 MICH. J. INT'L L. 433, 442 (2012).

9. CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 72–74 (2008).

10. See, e.g., *id.* at 73, 81, 91–94, 98 (describing instances where countries implemented the TRIPS Agreement in excess of required standards). According to Deere, “some of the countries with the highest IP protection were among the world’s poorest.” *Id.* at 102.

11. *Id.* at 151–55.

individuals suffering from disease in developing countries could not afford.<sup>12</sup> Others argued that intellectual property rights diverted research toward the needs of developed countries' health care markets.<sup>13</sup> Constituencies concerned with the effects of stronger intellectual property rights on health were joined by those who were worried about their consequences for farmers and databases, among others. As Amy Kapczynski recounts in her analysis of the origins of the access to knowledge mobilization, resistance to the expansion of intellectual property law and concern about its effects on the public interest began in the early 1990s with protests by farmers over the TRIPS Agreement in India and mobilization around databases in the European Union.<sup>14</sup> These and other concerns sparked protests around the social justice impacts of trade negotiations in Seattle in 1999.<sup>15</sup>

Although advocacy around intellectual property and access to medicines dates back to the early 1990s,<sup>16</sup> it was not framed as a human rights issue until later in that decade through the access to medicines movements in South Africa and Brazil. "Framing" is a particular way in which activists seek to legitimize their demands and identify desired outcomes.<sup>17</sup> Schön and Rein describe "naming and framing" as processes in which "[t]hings are selected for attention and named in such a way as to fit the frame constructed for the situation."<sup>18</sup> These processes of naming and framing select for attention a few salient features and relations from what would

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12. See Amy Kapczynski et al., *Addressing Global Health Inequities: An Open Licensing Approach for University Innovations*, 20 BERKELEY TECH. L.J. 1031, 1047 (2005).

13. See, e.g., Audrey R. Chapman, *The Human Rights Implications of Intellectual Property Protection*, 5 J. INT'L ECON. L. 861, 877–78 (2002); Susan K. Sell, *What Role for Humanitarian Intellectual Property? The Globalization of Intellectual Property Rights*, 6 MINN. J.L. SCI. & TECH. 191, 192–93, 200 (2004).

14. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 826–27 (2008).

15. Sean D. Murphy, *Collapse of Efforts to Launch "Millennium" Round of Multilateral Trade Negotiations*, 94 AM. J. INT'L L. 375, 375 (2000).

16. Focusing on the origins of the access to medicines movement, de Mello e Souza explains that the transnational network that eventually emerged around access to HIV/AIDS drugs was originally a U.S.-based movement led by Ralph Nader and James Love of the Consumer Project on Technology (CPTech, now Knowledge Ecology International, KEI). The activists began with a focus on drug prices in the United States in the early 1990s, but turned their attention to concerns about international equity after the conclusion of the TRIPS Agreement. See André de Mello e Souza, *The Power of the Weak: Advocacy Networks, Ideational Change and the Global Politics of Pharmaceutical Patent Rights* 136–37 (Feb. 2005) (unpublished Ph.D. dissertation, Stanford University) (on file with Marquette University Libraries).

17. Molly Land, *Human Rights Frames in IP Contests*, in BALANCING WEALTH AND HEALTH: THE BATTLE OVER INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES IN LATIN AMERICA 276, 279 (Rochelle C. Dreyfuss and César Rodríguez-Garavito eds., 2014). Intellectual property rights-holders also used a variety of frames to promote their objectives, including frames of theft and piracy. See Duncan Matthews, *When Framing Meets Law: Using Human Rights as a Practical Instrument to Facilitate Access to Medicines in Developing Countries*, in TRIPS AND DEVELOPING COUNTRIES: TOWARDS A NEW IP WORLD ORDER? 12, 13 (Gustavo Ghidini et al. eds., 2014).

18. DONALD A. SCHÖN & MARTIN REIN, *FRAME REFLECTION: TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES* 26 (1994); see also DANA BELDIMAN, *ACCESS TO INFORMATION AND KNOWLEDGE: 21ST CENTURY CHALLENGES IN INTELLECTUAL PROPERTY AND KNOWLEDGE GOVERNANCE* 209–10 (2013).

otherwise be an overwhelmingly complex reality. They give these elements a coherent organization, and they describe what is wrong with the present situation in such a way as to set the direction for its future transformation. Through the processes of naming and framing, the stories make the “normative leap” from data to recommendations, from fact to values, from “is” to “ought.”<sup>19</sup>

Framing theory focuses on the cognitive structures employed by actors within social movements to give events meaning in ways that “organize experience and guide action, whether individual or collective.”<sup>20</sup> Thus, “[a] human rights frame tells a story that characterizes the victims, labels the genre of abuse, locates the perpetrators, and suggests a response.”<sup>21</sup> There are many ways in which grievances can be understood, and the choice of frame affects how people define the underlying problem and the remedies they seek.<sup>22</sup> The initial framing of an issue is important, since “[w]ays of thinking about problems are generally path dependent.”<sup>23</sup>

Activists in South Africa and Brazil first used the frame of human rights to articulate their demands for greater access to life-saving pharmaceuticals in order to protect the human rights to health and life.<sup>24</sup> In South Africa, for example, the right to health was the central organizing element in the work of the Treatment Action Campaign (TAC), a community-based organization that took the lead in the South African effort to promote access to treatment in the context of HIV/AIDS.<sup>25</sup> Using a combination of grassroots mobilization, prevention, treatment literacy campaigns, and litigation, TAC sought to “[c]hallenge by means of litigation, lobbying, advocacy and all forms of legitimate social mobilization, any barrier or obstacle, including unfair discrimination, that limits access to treatment for HIV/AIDS in the private

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19. SCHÖN & REIN, *supra* note 18. For another perspective on “the way in which experiences become grievances, grievances become disputes, and disputes take various shapes, follow particular dispute processing paths, and lead to new forms of understanding,” see William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC’Y REV. 631, 632 (1980–81). In the framework of Felstiner et al., “naming” is when one first understands an experience to be an injurious event; “blaming” is when one attributes responsibility for that injury to another; and “claiming” is when one voices that grievance to the responsible entity and asks for remediation. *Id.* at 635. Framing operates throughout these processes to give salience to some facts over others and to provide direction about who should be responsible for what.

20. David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464 (1986).

21. ALISON BRYSK, *SPEAKING RIGHTS TO POWER: CONSTRUCTING POLITICAL WILL* 78 (2013).

22. See Snow et al., *supra* note 20, at 465–66.

23. Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States*, 9 GLOBAL NETWORKS 441, 452 (2009).

24. See generally Land, *supra* note 17.

25. Amy Kapczynski & Jonathan M. Berger, *The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa*, in HUMAN RIGHTS ADVOCACY STORIES 43, 44–45 (Deena R. Hurwitz & Margaret L. Satterthwaite eds., 2009).



and public sector.”<sup>26</sup> TAC’s litigation over access to medicines explicitly invoked the right to health under the South African Constitution, which was modeled on and drew inspiration from international instruments protecting the international right to health.<sup>27</sup>

Human rights shared a similarly prominent role in debates about access to medicines in Brazil. Although it currently boasts a robust program to combat HIV/AIDS that features universal access, the Brazilian government’s initial efforts were largely ineffectual.<sup>28</sup> The state’s response improved only after widespread civic mobilization within the gay community in São Paulo together with advocacy by health care reform activists, called the *movimento sanitária*.<sup>29</sup> The *movimento sanitária* was led by human rights organizations that had come of age challenging the country’s military dictatorship by advocating for democratic health policy and universal access to health care.<sup>30</sup>

Prior to the early 2000s, human rights authorities had paid little attention to intellectual property. The HIV/AIDS epidemic was increasingly being viewed as a human rights issue, but there was no discussion of the role of patents, despite a recognition that the price of medicines was inhibiting care. For example, the Guidelines on HIV/AIDS and Human Rights, produced by the United Nations in 1998,<sup>31</sup> emphasized the importance of affordability but failed to even mention the effect of patents on price.

It was only after the initial framing of intellectual property as a human rights issue in South Africa and Brazil and the media attention generated by these movements in the late 1990s and early 2000s that human rights groups and institutions became involved.<sup>32</sup> As Martha Finnemore and Kathryn Sikkink note, “[m]any international norms began as domestic norms and become international through the efforts of entrepreneurs of various kinds . . . . In other words, there is a two-level norm game occurring in which the domestic and the international norm

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26. Mark Heywood, *South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health*, 1 J. HUM. RTS. PRAC. 14, 15 (2009) (quoting the TAC Constitution).

27. Winston P. Nagan, *International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States*, 14 FLA. J. INT’L L. 155, 188–91 (2002).

28. Eduardo J. Gómez, *How Brazil Outpaced the United States When It Came to AIDS: The Politics of Civic Infiltration, Reputation, and Strategic Internalization*, 36 J. HEALTH POL. POL’Y & L. 317, 320 (2011).

29. *Id.*

30. Jane Galvão, *Brazil and Access to HIV/AIDS Drugs: A Question of Human Rights and Public Health*, 95 AM. J. PUB. HEALTH 1110, 1112 (2005).

31. Office of the High Comm’r for Human Rights & Joint United Nations Programme on HIV/AIDS, *HIV/AIDS and Human Rights: International Guidelines*, UN Doc. ST/HR/PUB/98/1 (1998).

32. See, e.g., Erika George, *The Human Right to Health and HIV/AIDS: South Africa and South-South Cooperation to Reframe Global Intellectual Property Principles and Promote Access to Essential Medicines*, 18 IND. J. GLOBAL LEGAL STUD. 167, 187 (2011) (noting that other human rights institutions became involved in the issue of access to medicines after the controversy over the lawsuit challenging the amendments to the Medicines Act in South Africa).

tables are increasingly linked.”<sup>33</sup> Thus, it was in the context of TAC’s South African lawsuit that Oxfam made one of the earliest invocation of the international human rights framework on issues of intellectual property. In 2001, it issued a press release in which it stated that “the companies’ court action against the South African government over its attempts to get cheap drugs to its people, prevent[s] the South African government from fulfilling its international human rights obligations.”<sup>34</sup>

The early 2000s then saw international human rights organizations and institutions engaged in a veritable flurry of activism and lawmaking activity in the area of intellectual property.<sup>35</sup> This included a General Comment by the Committee on Economic, Social and Cultural Rights on the role of medicines in ensuring the right to health<sup>36</sup> as well as a very influential resolution of the U.N. Sub-Commission on the Promotion and Protection of Human Rights entitled “Intellectual Property Rights and Human Rights.”<sup>37</sup> In 2001 alone, there was a report by the U.N. High Commissioner for Human Rights on the impact of TRIPS on human rights,<sup>38</sup> a report by the U.N. Secretary General on intellectual property and human rights,<sup>39</sup> and a resolution by the Commission on Human Rights calling on states to pursue policies that promote access to medicines as a part of the right to health.<sup>40</sup> Forman calls the flurry of activity on the international level a “norm cascade” precipitated by media furor over the South African litigation.<sup>41</sup>

The 2006 revision of the Guidelines on HIV/AIDS and Human Rights demonstrates this shift in framing most clearly. Between 1998 and 2006, Guideline 6, which addresses the accessibility of medicines, was revised to make explicit the need for equal and sustained availability of “antiretroviral and other safe and

33. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L.ORG. 887, 893 (1998).

34. Lissett Ferreira, *Note 196: Access to Affordable HIV/AIDS Drugs: The Human Rights Obligations of Multinational Pharmaceutical Corporations*, 71 FORDHAM L. REV. 1133 (2002) (quoting Press Release, Oxfam, Oxfam Says: Drug Giant Set to Cause Violation of Human Rights: Oxfam Calls for Urgent UN Investigation (Nov. 4, 2001)). Of course, efforts to address HIV/AIDS in South Africa were also frustrated by AIDS denialism, a position promoted by then-President Thabo Mbeki and other South African government officials. Kapczynski, *supra* note 14, at 852 & n.221. They argued “that HIV does not cause AIDS, that HIV/AIDS drugs are toxic, and that such drugs are in fact a possible cause of AIDS itself” and they rejected calls for access to medicines. *Id.* at 852 n.221.

35. See generally HELFER & AUSTIN, *supra* note 5, at 53–56.

36. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

37. Sub-Comm’n on the Promotion & Prot. of Human Rights, Intellectual Property Rights and Human Rights, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000).

38. Comm’n on Human Rights, The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001).

39. U.N. Secretary-General, *Intellectual Property and Human Rights*, U.N. Doc. E/CN.4/Sub.2/2001/12 (June 14, 2001).

40. Comm’n on Human Rights, Rep. on the Fifty-Seventh Session, U.N. Doc. E/CN.4/2001/L.50 (Apr. 12, 2001).

41. Lisa Forman, “Rights” and Wrongs: What Utility for the Right to Health in Reforming Trade Rules on Medicines?, 10 HEALTH & HUM. RTS. 37, 44 (2008).

effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV and related opportunistic infections and conditions,” particularly to vulnerable individuals and populations.<sup>42</sup> In addition, the new Guidelines contain an extensive discussion of intellectual property. They note the responsibility of states, in both their domestic and international activities, to make sure that intellectual property laws and international instruments do not impede access to medicines, diagnostics, or related technologies,<sup>43</sup> and caution states to utilize flexibilities in these agreements to the fullest extent possible.<sup>44</sup>

In part, the new emphasis on antiretrovirals and other forms of treatment was a reflection of changes in what de Mello e Souza calls the “conventional wisdom on health policy.”<sup>45</sup> Prior to the late 1990s, institutions ranging from the World Bank to the Gates Foundation had concluded that in resource-poor settings, funding should be directed toward HIV/AIDS prevention, not treatment, because the barriers to treatment—from a lack of infrastructure to resistance risks of inconsistent treatment—made prevention more cost-effective.<sup>46</sup> Activism in the late 1990s began changing that perception. Pointing to Brazil’s universal access policy and the real costs of lack of treatment,<sup>47</sup> activists argued that decreases in the cost of generic anti-retrovirals—to just over one dollar a day—made failure to treat morally indefensible.<sup>48</sup>

With new possibilities for care, the human rights frame became even more salient. Because treatment began to be seen as feasible even in low-resource settings, the failure to make provision for such treatment was more easily framed as a violation of the right to life and to health. Moral claims were thus paired with the language of rights to support a demand for access to treatment as a human right. This is reflected in the 2006 Guidelines’ emphasis on state obligations to take advantage of IP treaty flexibilities in order to satisfy their obligations under human rights treaties.

After the early 2000s, however, the pace of international framing of access to medicines as a human rights issue slowed considerably. Human rights institutions continued to consider the intersection of human rights and intellectual property, including through a 2006 interpretive comment of the Committee on Economic, Social and Cultural Rights on creator’s rights.<sup>49</sup> At the same time, a 2009 interpretive

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42. Office of the High Comm’r for Human Rights & Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*, U.N. Doc. HR/PUB/06/09 (2006) [hereinafter 2006 Guidelines].

43. *Id.* ¶ 52.

44. *Id.* ¶ 53.

45. De Mello e Souza, *supra* note 16, at 146.

46. *Id.* at 146–50.

47. *Id.* at 149–54.

48. Amanda Barratt, *The Curious Absence of Human Rights: Can the WIPO Development Agenda Transform Intellectual Property Negotiation?*, 14 L. DEMOCRACY & DEV. 14, 19 (2010).

49. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific,

comment on the right to take part in cultural life makes no mention of intellectual property rights,<sup>50</sup> despite the importance of copyright on the ability to create and enjoy cultural works.

Most recently, however, the impact of intellectual property on human rights was discussed by the last U.N. Special Rapporteur in the field of cultural rights, Farida Shaheed. Special Rapporteur Shaheed focused all of her work in 2015 on the subject of intellectual property and its relationship to culture, issuing a series of very influential reports discussing patent<sup>51</sup> and copyright policy.<sup>52</sup> These reports have been very important in terms of the normative framing they provide and in keeping these issues on the agenda of the United Nations.<sup>53</sup>

Yet despite initial mobilizations around human rights and intellectual property rights in South Africa and Brazil and then the considerable attention paid to these issues by United Nations institutions and experts, these issues have not translated down to further human rights advocacy on the domestic level. Transnational and domestic advocacy groups are challenging the expansion of intellectual property rules—just not in human rights terms. For example, in a 2009 study of advocacy around access to medicines in eleven Latin American countries, these issues were largely not framed in human rights terms, despite the social justice orientation of the study.<sup>54</sup> Further, although there has been some framing of access to medicine as an issue of human rights, particularly in the context of litigation of the right to health in Latin America,<sup>55</sup> human rights advocates have not engaged with the broader social welfare and human rights impacts of intellectual property.

### B. *Barriers to Domestic Translation*

Focusing on the horizontal and vertical “geography” of human rights and intellectual property<sup>56</sup> reveals that human rights approaches to intellectual property

Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1 (c), of the Covenant), U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) [hereinafter General Comment No. 17].

50. Comm. on Econ., Soc. & Cultural Rights, 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), U.N. DOC. E/C.12/GC/21 (Dec. 21, 2009).

51. Farida Shaheed (Special Rapporteur), *Rep. of the Special Rapporteur in the Field of Cultural Rights*, U.N. Doc. A/70/279 (Aug. 4, 2015) [hereinafter 2015 Shaheed Report].

52. Farida Shaheed (Special Rapporteur), *Rep. of the Special Rapporteur in the Field of Cultural Rights*, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014) [hereinafter 2014 Shaheed Report].

53. Peter K. Yu, *The Anatomy of the Human Rights Framework for Intellectual Property*, 69 SMU L. REV. 37, 41 (2016).

54. Land, *supra* note 17, at 277.

55. See generally LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? (Alicia Ely Yamin & Siri Gloppen eds., 2011); Benjamin Mason Meier et al., *Employing Human Rights Frameworks to Realize Access to an HIV Cure*, 18 J. INT'L AIDS SOC'Y 2 (2015).

56. This focus on the geography of human rights and intellectual property draws on the work of political scientists who study norm evolution and social mobilization. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Kathryn Sikkink, *Patterns of Dynamic Multi-Level Governance and the Insider-Outsider Coalition*, in *TRANSNATIONAL PROTEST AND GLOBAL ACTIVISM* 151, 156 (Donatella della Porta & Sidney Tarrow eds., 2005). It also draws on the work of legal scholars who address geographic scale in

were internationalized after their initial deployment in South Africa and Brazil, but that they then remained “stuck” at the United Nations. In the 2000s, for example, there continued to be considerable attention to human rights and intellectual property at the international level,<sup>57</sup> to the point where one scholar argued that human rights advocates have been successful in “captur[ing] or coloniz[ing] well-known elements of the international IP system.”<sup>58</sup> These arguments, however, were primarily made by experts and elites at the international level. The normative framings that the United Nations expert and political bodies provided were not taken up again in domestic contexts.

This incomplete translation is in part a result of choices made both by activists groups in prioritizing their work, as well as by transnational advocates in seeking to raise concern about issues of intellectual property. In particular, the social justice dimensions of IP policies were framed as issues of “access to knowledge,” which provided important tools for challenging the innovation narrative of IP rights-holders, but further crowded out human rights as a frame for understanding the welfare effects of patents and copyrights.

### 1. *Legal Embeddedness*

As an initial matter, whether intellectual property was framed as a matter of human rights was in part a function of legal strategy. The countries in which advocates used human rights frames to tackle intellectual property issues were also countries in which human rights were more firmly embedded in national law and public discourse.<sup>59</sup>

Human rights norms are more commonly used to frame intellectual property discussions when these norms are embedded in domestic constitutional law. Such embeddedness imbues the activists’ claims with additional legitimacy and makes human rights claims more powerful because they can be enforced against the state. In South Africa, for example, human rights norms are explicitly part of national constitutional law, which guarantees the right “to have access to health care services.”<sup>60</sup> The existence of this right on the books was a strategic resource in the South African campaign for access to medicines and a critical factor in TAC’s adoption of a human rights frame in challenging the role of intellectual property in making medicines unaffordable. As Heywood notes, “by framing drug company profiteering as a rights violation and challenging it with reference to the South African Constitution, TAC made it an issue that demanded a legal remedy.”<sup>61</sup>

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the design of regulatory systems. See Hari M. Osofsky, *The Complexities of Multipolar Approaches to Climate Change: Lessons from Litigation and Local Action*, 107 AM. SOC’Y INT’L L. PROC. 73 (2013).

57. Helfer, OXFORD HANDBOOK, *supra* note 4, at 125–28.

58. HENNING GROSSE RUSE-KHAN, *THE PROTECTION OF INTELLECTUAL PROPERTY IN INTERNATIONAL LAW* 261 (2016).

59. Land, *supra* note 17, at 278–79.

60. S. AFR. CONST., 1996, art. 27.

61. Heywood, *supra* note 26, at 20.

In Brazil, as well, access to health care is a constitutional right, protected in Article 196 of the 1988 Brazilian Constitution.<sup>62</sup> The Constitution establishes the Unified Health System (SUS, or Sistema Único de Saúde), which provides for a universal public health care system open to all regardless of means.<sup>63</sup> The 1988 Constitution, described as a “socially provocative [and] somewhat left-leaning [document,] . . . emphasizing human rights and providing universal health care,” has been an important factor in Brazil’s success in ensuring access to medicines for those with HIV/AIDS.<sup>64</sup> Access to medicines is also embedded in Brazilian legislation. Law 9.313, promulgated in 1996, requires the government to provide those with HIV/AIDS “all medication necessary for their treatment.”<sup>65</sup> The embeddedness of the right to health in Brazilian law played an important role in driving health care policy on access to medicines and to treatment.<sup>66</sup>

The use of a human rights frame in these situations offered the advantage of clarity as well as a narrative that emphasized justice and morality rather than incentives and cost. In their engagement with policymakers, the pharmaceutical industry had been relying on the rationales underlying intellectual property law to explain the debate in terms advantageous to itself—namely, in terms that focused on the cost of innovation. The complexity of this area of law also allowed industry to obscure the consequences of policy choices around intellectual property.<sup>67</sup>

Human rights law, with its focus on the individual, allowed activists to tell a much simpler story. Zackie Achmat, for example, the chairperson of TAC, explained that this was an issue of “greed on the one hand and the right to life on the other.”<sup>68</sup> A human rights framework also placed the impact of IP policies on individuals on the same level as their effect on innovation and development.<sup>69</sup> Although human rights are not necessarily trumps, the use of the human rights frame communicated that individual rights cannot simply be “traded for private

62. De Mello e Souza, *supra* note 16, at 179; *see also* DUNCAN MATTHEWS, INTELLECTUAL PROPERTY, HUMAN RIGHTS AND DEVELOPMENT: THE ROLE OF NGOS AND SOCIAL MOVEMENTS 127 (2011).

63. Virgílio Afonso da Silva & Fernanda Vargas Terrazas, *Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?*, 36 L. & SOC. INQUIRY 825, 829 (2011); *see also* Galvão, *supra* note 30.

64. Paul J. Flaer & Mustafa Z. Younis, *The Brazilian Experiment: HIV Drugs for All*, 36 J. HEALTH CARE FIN. 90, 92 (2009).

65. Florian F. Hoffmann & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* 100, 127 (Varun Gauri & Daniel M. Brinks eds., 2008).

66. *Id.* at 136–38 (noting that although access to medicines litigation did not lead to the 1996 law, litigation around access to medicines “show[s] that litigation can work as a signaling mechanism for demand for new medicines, and, hence, for the expansion of an existing public policy”).

67. De Mello e Souza, *supra* note 16, at 8.

68. *AIDS Drugs Case Adjourned*, CNN (Apr. 18, 2001, 8:44 AM), <http://www.cnn.com/2001/WORLD/africa/04/18/safrica.drugs.02/> [<https://perma.cc/FS8Z-8ABY>].

69. Heinz Klug, *Campaigning for Life: Building a New Transnational Solidarity in the Face of HIV/AIDS and TRIPS*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARD A COSMOPOLITAN LEGALITY* 118, 137 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

property interests or domestic economic growth.<sup>70</sup> This is not to say that incentives and innovation are not important. Rather, the deployment of human rights language in this context illustrates the way in which human rights provide a foundation for activism and organizing that enables advocates to describe an alternate set of values, concerns, and costs at stake in the pricing of medicines.

## 2. *Social Embeddedness*

For human rights to be effectively implemented into meaningful action, more than legal embeddedness is required. Domestic translation of intellectual property issues into human rights terms also depends on who takes up these issues and the way in which the issues are framed by these actors. Human rights frames require *social* embeddedness—the involvement of organizations that use human rights norms and institutions in their advocacy work as well as an awareness of human rights within public discourse.

The existence of an organization that had been exposed to, and had experience with, international human rights norms appears to be an important determinant of whether human rights law was used to frame intellectual property disputes. In tackling any human rights issue, advocates are simultaneously engaged in acts of framing and translation—framing the issue as a question of human rights and also translating the concepts of international human rights law into local terms. Sally Engle Merry and Peggy Levitt explain that translation, or vernacularization, is the process of appropriation and local adoption of international norms.<sup>71</sup> As norms move from one context to another, images and symbols are translated into local cultural narratives and thereby transformed in the process.<sup>72</sup> To Merry, the work of intermediaries in this process is crucial.<sup>73</sup>

The choice of intermediary also influences whether the issue will be framed in terms of human rights. When intermediaries with experience in human rights were the first to respond to a problem caused by the enforcement of intellectual property rights, the problem was much more likely to be defined in human rights terms. The importance of human rights “first responders” in putting intellectual property into a human rights context is particularly evident in the case of South Africa. In South Africa, human rights had been a central component of TAC’s work from the very start.<sup>74</sup> In large part, this orientation was a function of TAC’s leadership. The chairman of TAC, Zackie Achmat, had been active in the United Democratic Front, which had used a human rights approach to challenge apartheid.<sup>75</sup> TAC also formed alliances with lawyers and other organizations, such as the Law and Treatment

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70. Forman, *supra* note 41, at 39.

71. Levitt & Merry, *supra* note 23, at 446.

72. SALLY ENGLE MERRY, HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 136 (2006).

73. *Id.* at 229.

74. Heywood, *supra* note 26.

75. Matthews, *supra* note 17, at 17–18.

Access Unit of the AIDS Law Project, which used a human rights frame for their work.<sup>76</sup>

Human rights were also socially embedded in the public discourse of South Africa as a result of the transition from apartheid. As Heinz Klug notes, the transition from apartheid and South Africa's ratification of the TRIPS Agreement occurred nearly simultaneously.<sup>77</sup> The transition from apartheid resulted in a strong rights consciousness both within TAC and the general public, and played an important role in framing the issue of medicines in terms of human rights.<sup>78</sup> As Duncan Matthews explains, "TAC's formation was grounded in . . . a distinctly post-apartheid period of South Africa's history when human rights issues were particularly to the fore and, by linking the right to health to human rights principles, TAC shared historical continuities with the late 1980s and early 1990s anti-apartheid and gay rights activism."<sup>79</sup> Indeed, TAC's advocacy strategy expressly drew on the symbols of the anti-apartheid struggle. For example, TAC commemorated Human Rights Day in 2003 by organizing a march in support of access to treatment to a police station where anti-apartheid protestors had been killed in 1960.<sup>80</sup>

In Brazil, human rights were also deeply embedded both in public discourse and in the practices of the organizations that first worked for access to medicines. Human rights played an important role in Brazil's transition from a military dictatorship in 1985 and, as a result, "held a special place in the national psyche."<sup>81</sup> As Jane Galvão explains, "[t]he dismantling of authoritarian rule in Brazil was accompanied by a strong orientation toward human rights, which formed the sociopolitical framework of Brazil's response to the HIV/AIDS epidemic."<sup>82</sup> It was during this period in the early 1980s, as Brazil was transitioning from authoritarianism, that activists within the democratization movement began working to recognize health care as an individual right.<sup>83</sup> This *movimento sanitária* sought a variety of reforms for the health care system, including greater participation and universal and free access to care, and it led directly to the creation of the SUS.<sup>84</sup>

The *movimento sanitária* not only created a legal framework establishing health as a fundamental human right,<sup>85</sup> it also socialized activists to think of health issues in rights terms. Human rights organizations within the *movimento sanitária*—those

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76. *Id.* at 18; see also Heywood, *supra* note 26, at 21.

77. Klug, *supra* note 69, at 126.

78. Land, *supra* note 17, at 278; see also MATTHEWS, *supra* note 62, at 95.

79. Matthews, *supra* note 17, at 17.

80. Klug, *supra* note 69, at 118.

81. MATTHEWS, *supra* note 62, at 237.

82. Galvão, *supra* note 30, at 1110.

83. *Id.* at 1112.

84. De Mello e Souza, *supra* note 16, at 179.

85. See *id.* (arguing that Brazil's AIDS treatment program, the first to establish universal access and widely viewed as groundbreaking in the area of access to treatment, "was made possible by the accomplishments of an extensive movement for health reform and democracy that incorporated in the country's 1988 Constitution a conception of health as a right of citizenship and created a new health system based on the principles of integrality and community participation").



who had also opposed the country's military dictatorship and advocated for a democratic health policy and universal access to health care during the transition—allied with civic groups in the gay community to lead the challenge to the government's response to HIV/AIDS.<sup>86</sup> These activists used strategies, including the demand for democratized access to information and the defense of human rights, that had been effective in challenging military regime.<sup>87</sup> Many in this movement eventually became part of the government and continued to work in support of access to medicines in their new positions.<sup>88</sup>

### 3. *Competing Frames & Crowding Out*

Why did human rights constituencies in other countries not take up issues of intellectual property? There are certainly domestic human rights groups in many countries that are active on a range of issues affected by IP policies—including the rights to health, food, education, and freedom of expression, among others. In part, it may simply have been that the transnational advocates that raised IP issues in these contexts were not initially connected with domestic human rights groups, but rather with other advocacy groups that relied on different frames. In contrast to Brazil and South Africa, where the activists leading the campaign thought of themselves as human rights advocates, in other countries, those leading the mobilization around IP policy identified more closely as trade or consumer protection organizations.<sup>89</sup> Although international human rights institutions began addressing issues of intellectual property in the early 2000s, this framing was not taken up by transnational advocacy networks. Only one of the organizations that continued to work on issues of access to knowledge, an organization called 3DThree, explicitly used a human rights framework to do so.<sup>90</sup>

A second and more fundamental reason, however, relates to the way in which these issues were framed in transnational and then domestic activism in many countries. After the mid-2000s, international regulatory activity, lawmaking, and activism on intellectual property and the public interest began to coalesce around a frame of “access to knowledge” or A2K, which allowed new groups of activists—from farmers to doctors to open source software engineers—to make common cause.<sup>91</sup> This frame of “access to knowledge” allowed advocates with otherwise divergent agendas to mobilize around social justice concerns with a variety of different kinds of intellectual property impacts.

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86. Gómez, *supra* note 28; see also Galvão, *supra* note 30.

87. Galvão, *supra* note 30; see also Matthews, *supra* note 17, at 21.

88. Gómez, *supra* note 28, at 321 (activists “gradually filtered into state AIDS programs and health institutions” and once there were able to support the work of HIV/AIDS organizations).

89. Land, *supra* note 17, at 279.

90. See *3D Completes Its Work*, 3D-TRADE-HUMAN RIGHTS-EQUITABLE ECONOMY, <http://www.3dthree.org/en/pages.php?IDcat=15> [<https://web.archive.org/web/20120413142848/http://www.3dthree.org/en/pages.php?IDcat=15>] (last visited Apr. 13, 2012).

91. Kapczynski, *supra* note 14, at 807.

In connecting these disparate IP-related issues, the A2K frame implicitly relied on the language and metrics of intellectual property. In part, this is due to historical contingencies; much of the work of this mobilization arose as a response to increasingly strong intellectual property rights, and advocates naturally took up these arguments in crafting their responses. The focus on intellectual property within the A2K movement is also practical, a reflection of the dominant role that intellectual property plays in regulating the distribution of, access to, and the ability to utilize, knowledge. Gaëlle Krikorian argues that the focus on intellectual property is “undoubtedly inevitable, because A2K advocates are engaged in discussing and criticizing the effects of intellectual property rights, and consequently they incorporate the legal language that articulates those rights and engage with the institutional frame that produces them.”<sup>92</sup> Amy Kapczynski notes that over time, “the discourse of access-to-medicines campaigners has become intimately bound up with the logic of intellectual property, because their attempt to contest the legitimacy narrative of intellectual property law has drawn them into the economic discourse that dominates the field.”<sup>93</sup>

Those using the A2K frame tend to make arguments in terms of economic development and incentives to innovate, the dominant modes of intellectual property law. Although they deny that intellectual property is required for innovation, the logic of this mobilization has nonetheless accepted innovation as a primary metric of evaluation. As Kapczynski explains, “while the A2K mobilization sometimes makes claims in the idiom of culture, equality, or human rights, many—and perhaps most—of its claims are made within the framework of information economics and the incentive effects of IP systems.”<sup>94</sup> In addition, many of the organizing devices of this mobilization—the public domain and the commons—draw on fundamental concepts of property law.<sup>95</sup>

The focus on innovation and intellectual property has been important for the A2K movement in several ways. First, the efficacy of the A2K frame is in part derived from its central location in IP discourse; this basis has provided a strong foundation for deepening the engagement with the IP rationales with which human rights advocates have less expertise and comfort.<sup>96</sup> Second, the shift away from human rights was also a result of concerns that human rights discourse could be and was being hijacked by IP owners to justify stronger intellectual property rights.<sup>97</sup> IP rights-owners were using the language of fundamental rights to diffuse

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92. Gaëlle Krikorian, *Access to Knowledge as a Field of Activism*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 57, 68 (Gaëlle Krikorian & Amy Kapczynski eds., 2010).

93. Amy Kapczynski, *Access to Knowledge: A Conceptual Genealogy*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 17, 38 (Gaëlle Krikorian & Amy Kapczynski eds., 2010).

94. Kapczynski, *supra* note 14, at 866.

95. Kapczynski, *supra* note 93, at 30.

96. Land, *supra* note 17, at 282–83. The diverging rationales and expertise are part of the reason the regimes evolved in isolation from one another. See Helfer, OXFORD HANDBOOK, *supra* note 4, at 121.

97. Land, *supra* note 17, at 282–83.

competing human rights claims to limit intellectual property rights. Finally, mobilization around the concept of A2K also provided advocates with a way of seeing how innovation policies, writ large, affect our ability to take part in and enjoy the products of scientific knowledge and innovation.<sup>98</sup> The “gravitational pull” of intellectual property law that Kapczynski identifies<sup>99</sup> resulted from the way in which an intellectual property frame allowed advocates to connect disparate issues under a common heading to better challenge the bargains reflected in intellectual property law.

Nonetheless, this focus on intellectual property also had the effect of crowding out alternative narratives around the human rights impact of intellectual property. Kapczynski observes that “groups in the A2K mobilization implicitly reject alternative alliances and frameworks when they suture themselves to one another through the rubric of IP.”<sup>100</sup> First, the focus on intellectual property discouraged engagement by human rights groups because of the perceived need for expertise in intellectual property law that would be costlier to obtain than the benefits it would bring. Second, the lens of intellectual property law limited the extent to which human rights organizations, which tended not to have experience working on issues of intellectual property law and policy, viewed themselves as natural allies for advocacy on these issues. Third, the attenuated connection between intellectual property and human rights harms in many cases made it difficult to identify a “violation” that demanded attention as a matter of priority. Copyright contributes to the limited availability of textbooks in developing countries, but there are many other factors affecting the right to education or to culture that may seem more pressing. Fourth, the complexity of violations once identified made it challenging to use human rights tools to advocate on these issues. If copyright is only one among many reasons affecting access to books, it is more challenging for advocates to pressure those who might have the power to increase access.

*Expertise.* The focus on intellectual property made this set of issues seem inaccessible to those who might not have expertise in intellectual property law.<sup>101</sup> Human rights organizations are often highly risk averse because of the limited resources with which they have to work.<sup>102</sup> Faced with the prospect of investing time and energy to develop expertise and compared to highly pressing immediate needs, expanding their work to address intellectual property policy issues may have been beyond their capacity. As Levitt and Merry note, “the easier diffused material is to comprehend, theorize and put into place, the quicker it is adopted.”<sup>103</sup>

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98. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOMS* (2007).

99. Kapczynski, *supra* note 14, at 860.

100. *Id.* at 865.

101. Land, *supra* note 17, at 284.

102. Ella McPherson, *Risk and the Pluralism of Digital Human Rights Fact-Finding and Advocacy*, in *NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE* 188, 190 (Molly K. Land & Jay D. Aronson eds., 2018).

103. Levitt & Merry, *supra* note 23, at 444.

*Constituencies.* The emphasis on the logics and language of intellectual property also meant that there was no natural human rights constituency to take up these issues. Normative frame diffusion depends on the existence of agents of transmission—the presence of actors who are able to articulate and maintain particular messages.<sup>104</sup> Framing involves three principal tasks—identifying the problem, developing solutions, and motivating adherents.<sup>105</sup> There are many ways in which grievances can be understood, and the choice of frame affects how people define the underlying problem and the remedies they seek.<sup>106</sup>

A human rights frame is rights-driven—that is, it is oriented toward and around individual rights, and it defines the problem accordingly. Thus, human rights organizations view themselves as focused on “health” or “education” or “civil liberties.” A2K concerns, in contrast, were framed as concerns about “intellectual property.” In other words, A2K advocates defined their work in terms of the cause of the problem, rather than the problem itself—but human rights groups do not organize their work in this way. Framing the issue in terms of the problem (intellectual property) rather than the right at issue (e.g., health or education) made it less likely that human rights constituencies would see these issues as relevant to their work.

In many instances, efforts to frame intellectual property as a human rights issue were also driven by states themselves. In the context of intellectual property, states have engaged in considerable regime shifting—moving the issue of intellectual property from the WIPO to the WTO to the UN<sup>107</sup> and today to the investment arbitration regime<sup>108</sup>—to seek alternative avenues to obtain authoritative statements supporting their legal and political goals. The shift to human rights forums was similarly advanced in part by developing states seeking ways to expand the policy space available to them under international intellectual property rules. Non-governmental organizations also played an important role in

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104. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS* 1, 5 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999) (“The diffusion of international norms in the human rights area crucially depends on the establishment and the sustainability of networks among domestic and transnational actors who manage to link up with international regimes, to alert Western public opinion and Western governments.”).

105. Robert Benford & David Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 *ANN. REV. SOCIO.* 611, 615 (2000) (referring to these tasks as “diagnostic framing,” “prognostic framing,” and “motivational framing”). As Benford and Snow explain:

Collective action frames are constructed in part as movement adherents negotiate a shared understanding of some problematic condition or situation they define as in need of change, make attributions regarding who or what is to blame, articulate an alternative set of arrangements, and urge others to act in concert to affect change.

*Id.*

106. See Snow et al., *supra* note 20, at 465–66.

107. See generally Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT'L L.* 1 (2004).

108. James Gathii & Cynthia Ho, *Regime Shifting of IP Lawmaking and Enforcement from the WTO to the International Investment Regime*, 18 *MINN. J.L. SCI. & TECH.* 427 (2017).

this framing, including by initiating what became the UN Sub-Commission's Resolution 2000/7 on human rights and intellectual property.<sup>109</sup> Nonetheless, governments typically resist human rights framings to avoid accountability; in the context of intellectual property, however, they embraced this framing as a way of pushing back on international rules that limited their domestic authority.

*Violation.* For human rights advocacy, enforcement mechanisms are often lacking on both the domestic and international levels. As a result, one of the most common enforcement mechanisms is the deployment of shame. Ken Roth, Executive Director of Human Rights Watch, famously argued that advocacy on issues of economic rights is often unsuccessful because strategies based on shame are most effective when it is possible to identify a specific violation, violator, and remedy.<sup>110</sup>

Clarity about the violation can be difficult to achieve in the context of IP policy. For example, IP policies may be only one of many causes of rights violations. For example, while copyright is certainly one among many factors that contribute to the lack of textbooks for schools,<sup>111</sup> it is clearly not the only barrier. The extent to which copyright functions as a barrier also depends, for example, on the capacity of the state to create textbooks, as well as the extent to which there are authors who are able to write these textbooks, salaries to pay the authors, presses to print them, and trucks to deliver them.<sup>112</sup> Even when human rights constituencies see the relevance of intellectual property to their work, the more attenuated causal connection between IP policies and human rights harms in many cases may make it more difficult to justify taking up these issues as policy priorities.

Advocacy in Central America around the intellectual property provisions of the Central America Free Trade Agreement (CAFTA) provides a good example of diverging priorities in the work of A2K and human rights advocates.<sup>113</sup> Godoy notes that this was “undeniably a top-down story” in which the focus on intellectual property was driven by transnational groups rather than local human rights

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109. David Weissbrodt & Kell Schoff, *Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1, 26 (2003).

110. Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 63–73 (2004). Although Roth's argument is not necessarily an indictment of the ability of human rights organizations to work on economic rights issues, its emphasis on the challenges of this work has been used to marginalize and depoliticize these rights in ways that make it difficult for human rights organizations to grapple with the impact of globalization. Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 71–72 (2010).

111. Lea Shaver, *Copyright and Inequality*, 92 WASH. U. L. REV. 117 (2014).

112. See generally HELFER & AUSTIN, *supra* note 5, at 359–60; Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 832–33 (2007).

113. Angelina Snodgrass Godoy, *CAFTA, Intellectual Property, and the Right to Health in Central America*, in BALANCING WEALTH AND HEALTH: THE BATTLE OVER INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES IN LATIN AMERICA 111, 126 (Rochelle C. Dreyfuss & César Rodríguez-Garavito eds., 2014).

groups.<sup>114</sup> Local civil society groups had a hard time getting interested in the issue of intellectual property because “IP intersected only peripherally with the central concerns of longstanding health rights advocates in Central America.”<sup>115</sup> Godoy explains that, although “access to medicines has been a key concern of many in the region, the issue has historically been framed in terms of the dysfunctionality of state institutions in charge of purchasing and administering drugs, rather than the impact of international market forces on prices.”<sup>116</sup> Although the intellectual property provisions of CAFTA had important consequences for the right to health—and, like many violations of the right to health, were related to the failure of the state to organize itself in ways that ensure the right to health—transnational intellectual property advocacy groups were not able to articulate their concerns in ways that resonated with local human rights activists.

The difficulty of identifying a violation can be compounded by the absence of empirical evidence demonstrating the impact of intellectual property on rights such as education or cultural participation. As Jo Becker examines in her study of human rights mobilization, research is essential in catalyzing, supporting, and legitimizing the demands of rights-holders.<sup>117</sup> There is a need for more research on the extent to which the enforcement of intellectual property rules (such as copyright) results in human rights harms (such as a chilling effect on downstream expression and creativity).

Differing conceptions of public and private between A2K and human rights advocates also contribute to the way in which they each understand the nature of the violation, and, relatedly, identify solutions. For example, many of the solutions promoted by the A2K mobilization involve increasing the discretionary authority that states have under international intellectual property treaties to develop domestic policy. Human rights advocates, in contrast, tend to focus their work on the need to enforce more rigorously the constraints that international treaties place on states to respect rights, as well as for greater positive obligations on states to protect and fulfill rights.<sup>118</sup> These different perspectives on the nature of the violation complicates the solutions each group proposes, particularly in terms of their respective comfort with market-based solutions and with the involvement of private entities in providing public goods.

Advocacy around the impact of CAFTA on access to medicines again illustrates these different levels of comfort with private remedies. A2K advocates often promote the production of generic medicines as a way of bringing down prices and making medicines more affordable. Godoy explains, however, that advocacy groups in Central America resisted the intellectual property agenda because of a lack

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114. *Id.* at 127.

115. *Id.* at 117.

116. *Id.*

117. JO BECKER, CAMPAIGNING FOR JUSTICE: HUMAN RIGHTS AND ADVOCACY IN PRACTICE 251–53 (2013).

118. See Molly Beutz Land, *Protecting Rights Online*, 34 YALE J. INT’L L. 1, 9 (2009).

of trust in the quality of generic production and a concern that the generic producers would also charge high prices.<sup>119</sup> Local health rights advocates were less willing to adopt the A2K frame given the poor track record of local generic producers in terms of safety and consumer protection.

*Complexity.* The impact of intellectual property on human rights is not a simple story to tell. Clearly, the way in which knowledge is incentivized and produced, and our incentives for doing so, affects the ability to promote and protect all human rights. In any individual case, however, it is more challenging to establish connections between IP policy and a specific rights violation. Yet human rights campaigns are most successful when they can tell a clear causal story and identify those responsible for the harm in a direct and concise manner.<sup>120</sup> Keck and Sikkink explain, for example, that successful transnational advocacy tends to feature two kinds of issues: “(1) issues involving bodily harm to vulnerable individuals, especially when there is a short and clear causal chain (or story) assigning responsibility; and (2) issues involving legal equality.”<sup>121</sup> Often, this kind of clear causal story is not available for issues at the interface of intellectual property and human rights. Medicine and health is an easier case; in South Africa and Brazil, it was possible to directly connect the introduction of patents to increases in the cost of anti-retrovirals. In other areas, however, such as culture or education, intellectual property often affects individuals rights in a much more indirect way.

## II. WHY HUMAN RIGHTS?

Should we be concerned with this crowding out, with the failure of human rights organizations to more consistently take up issues of intellectual property? After all, it may simply be that human rights frames are helpful in some situations and not in others, and there is no need for intellectual property to be seen as a “human rights” issue. This section argues that a human rights framing of intellectual property is helpful because it provides a basis for challenging the fundamental power inequities that undergird the international intellectual property regime.

This section then argues that for this framing to be effective, it needs to engage local constituencies that have interests in the creation of domestic innovation systems oriented on the fulfillment of human rights. First, domestic constituencies are best positioned to press for political change. Thinking of human rights only in terms of the law is an incomplete model: human rights needs to be understood not just as law, but law “in practice.” Second, domestic human rights constituencies need to be involved in capacity building. Because of the unique features of the

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119. Godoy, *supra* note 113, at 117.

120. KECK & SIKKINK, *supra* note 56, at 27.

121. *Id.*; see also MATTHEWS, *supra* note 62 at 85 (observing less advocacy “where the direct impact of intellectual property rights is less clear, with no victims readily identifiable and the intellectual property issues involved often seen as complex, distant and moreover primarily a problem for the Global South”); Roth, *supra* note 110, at 67–68 (arguing that human rights advocacy is most effective when it is possible to identify a clear violator, violation, and remedy).

intellectual property conundrum, which results not only from state unwillingness to respect and ensure rights but also from the state's inability to legislate in ways that promote human rights, capacity-building is key. Domestic human rights constituencies are uniquely poised to augment national capacity-building in furtherance of human rights.

*A. The Contributions of a Human Rights Frame*

What is lost through an incomplete translation of IP policy into human rights terms? Clearly, not every social justice harm needs to be conceptualized within a human rights frame, and the A2K frame has been very effective in providing a platform for countering the arguments of rights-holders about the need for strong intellectual property rights.

In considering the contribution of human rights to discussions about intellectual property, many initially focused on the way in which human rights law might provide an important limit on or complement to intellectual property law. Scholars, for example, have explored different ways of understanding the relationship between these two regimes. Larry Helfer has written extensively on this relationship, identifying among other things, the way in which intellectual property and human rights norms can conflict and coexist with one another.<sup>122</sup> Others have addressed whether intellectual property rights *are* human rights, are *not* human rights, or are something in between.<sup>123</sup> Another body of literature considers the impact of intellectual property rights on human rights and possible strategies for reconciling these two fields,<sup>124</sup> while others have focused on systematic inconsistencies between human rights and intellectual property.<sup>125</sup>

The United Nations experts and institutions that have examined the relationship between intellectual property and human rights have further deepened our understanding of the relationship between human rights and intellectual property law. This includes, among other things, the General Comments on Article 15,<sup>126</sup> the work of Special Rapporteur Farida Shaheed,<sup>127</sup> reports by the U.N. High

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122. See generally HELFER & AUSTIN, *supra* note 5.

123. See, e.g., General Comment No. 17, *supra* note 49, ¶¶ 1–3; HELFER & AUSTIN, *supra* note 5, at 61–64; Rochelle Dreyfuss, *Patents and Human Rights: Where is the Paradox?*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX 72, 74, 80–81 (Willem Grosheide ed., 2010); J. Janewa OseiTutu, *Corporate “Human Rights” to Intellectual Property Protection?*, 55 SANTA CLARA L. REV. 1, 17–24 (2015); Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121, 150; Peter K. Yu, *The Anatomy of the Human Rights Framework for Intellectual Property*, 69 SMU L. REV. 37, 45–63 (2016).

124. See, e.g., HELFER & AUSTIN, *supra* note 5, at 64–90; Graeme W. Austin, *Authors’ Human Rights and Copyright Policy*, 40 COLUM. J.L. & ARTS 405 (2017); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 1018–20 (2007); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1075–1123 (2007).

125. Shaver, *supra* note 111, at 123–24.

126. General Comment No. 17, *supra* note 49.

127. 2015 Shaheed Report, *supra* note 51; 2014 Shaheed Report, *supra* note 52.



Commissioner for Human Rights<sup>128</sup> and the U.N. Secretary General,<sup>129</sup> and resolutions by both the now-defunct Commission on Human Rights<sup>130</sup> and Sub-Commission on the Promotion and Protection of Human Rights.<sup>131</sup> Each of these contributions has advanced our understanding of the intersections, tensions, and synergies between human rights and intellectual property.

Nonetheless, there have also been deep critiques of efforts to use human rights to address imbalances in the intellectual property system. First, it is unclear whether human rights contributes much above and beyond what can already be accomplished through intellectual property law itself. Perhaps human rights law does mean that states should create exceptions and limitations to intellectual property rights,<sup>132</sup> avoid creating international intellectual property law that unduly limits the ability of other states to use IP flexibilities,<sup>133</sup> or design IP policy to achieve the shared values of intellectual property and human rights norms.<sup>134</sup> These recommendations—as much as they would certainly be advances over current policy—still feel like tinkering at the edges of intellectual property. If human rights can be vindicated through the application of doctrines embedded in intellectual property law, this raises the question of what work human rights is actually doing in this context.<sup>135</sup>

Second, and even more troubling, is the idea that human rights discourse, as it is currently deployed in the context of intellectual property policy, may even be reinforcing the status quo. Ruth Okediji, for example, critiques the current intellectual property and human rights nexus as “operat[ing] as a justification for the core architecture of the international IP system, with human rights considerations channeled through doctrines already hard-wired in contemporary IP jurisprudence.”<sup>136</sup> International human rights norms around patents and copyrights may have ceded too much ground to rights-holders by adopting the vernacular of intellectual property to meet and counter their demands.

Even the work of Farida Shaheed, the former Special Rapporteur in the field of cultural rights, implicitly assumes the logic and language of intellectual property. For example, although Shaheed’s patent report is careful not to equate the “moral

128. Comm’n on Human Rights, *supra* note 38.

129. U.N. Secretary-General, *supra* note 39.

130. Comm’n on Human Rights, *supra* note 40. The Commission was replaced by the Human Rights Council in 2006. G.A. Res. 60/251 (Apr. 3, 2006).

131. Sub-Comm’n on the Promotion and Prot. of Human Rights, *supra* note 37.

132. 2014 Shaheed Report, *supra* note 52, ¶ 104.

133. 2015 Shaheed Report, *supra* note 51, ¶ 89.

134. Sub-Comm’n on the Promotion and Prot. of Human Rights, *supra* note 37, ¶ 5 (requesting “[g]overnments to integrate into their national and local legislations and policies, provisions, in accordance with international human rights obligations and principles, that protect the social function of intellectual property”).

135. Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 50 N.Y.U. J. INT’L L. & POL. (forthcoming 2018) (manuscript at 4), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3202478](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202478) [<https://perma.cc/7F2B-GZ4Z>].

136. *Id.* (manuscript at 14).

and material” interests protected under Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) with intellectual property rights,<sup>137</sup> it appears to reaffirm the approach of the ICESCR Committee advocating a balancing approach to reconcile the two.<sup>138</sup> As Ruth Okediji notes, the emphasis on “balancing” human rights and intellectual property implicitly assumes that both are of equal weight and “reflects an implicit assumption—or acceptance of the assumption—that IP rights are an optimal means to advance human development in a globalized world.”<sup>139</sup> Shaheed’s report also advocates reconciling patent rights with the public interest by making greater use of exclusions, exceptions, and flexibilities.<sup>140</sup> As Okediji notes, exceptions and limitations are unlikely to be sufficient to meet the needs of many developing and least-developed countries.<sup>141</sup>

Finally, advocates also worry about the way in which the language of human rights is being used to advance the interests of intellectual property rights-holders. This co-optation of human rights is not unusual in human rights practice; as Goodale notes, human rights discourse has, particularly since the end of the Cold War, “increasingly acted as a conduit for specific—and much older—forms of transnational legal, economic, and political power.”<sup>142</sup> By appropriating the language of fundamental rights, IP rights-owners have transformed the debate into one of “competing rights” and thus diverted attention from the ways in which intellectual property law reifies and reinforces global inequality.

These critiques, although important and legitimate, are based on a limited understanding of human rights as primarily about laws and institutions. Human rights is not only about laws and institutions, but also about practices for mobilizing in the spaces these institutions enable and around the rights that the law creates. It is human rights in practice—human rights as the vehicle for political demands for justice and participation—that currently presents the most radical opportunities for redesigning innovation systems to promote human rights and development. Human rights can augment the A2K mobilization by providing a set of rhetorical, discursive, and political strategies for rights claiming that can be used to challenge not just the application of intellectual property law at the edges, but also the fundamental bargains that make up its essential structure.

Critiques of human rights as failing to respond robustly to the social justice inequities embedded in intellectual property law and policy echo broader

137. 2015 Shaheed Report, *supra* note 51, ¶ 10. Shaheed notes that this is particularly important in the context of patents, which protect economic interests. *Id.* ¶ 29; *see also* 2014 Shaheed Report, *supra* note 52, ¶¶ 28–29.

138. 2015 Shaheed Report, *supra* note 51, ¶ 11.

139. Okediji, *supra* note 135 (manuscript at 18).

140. 2015 Shaheed Report, *supra* note 51, ¶¶ 63–72; *see also* 2014 Shaheed Report, *supra* note 52, ¶¶ 61–73.

141. Okediji, *supra* note 135 (manuscript at 22).

142. Mark Goodale, *Locating Rights, Envisioning Law Between the Global and the Local*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 1, 30 (Mark Goodale & Sally Engle Merry eds., 2007).

contemporary ambivalences about human rights. In his most recent book, for example, Samuel Moyn criticizes human rights for adopting a politics of sufficiency rather than equality—a politics that sacrifices a concern with material inequality for progress in addressing basic needs. According to Moyn, by focusing on “status equality with an ethical and actual floor of distributive protection, [human rights] has failed to respond to—or even allowed for recognizing—neoliberalism’s obliteration of the ceiling on material inequality.”<sup>143</sup> Like the critics of human rights responses to intellectual property, Moyn argues that human rights is fundamentally a fairly thin vision of global justice.

A significant basis of Moyn’s critique is that human rights law appears to be compatible with substantial material inequality.<sup>144</sup> Here, however, Moyn is focusing on human rights as law, not practice. As Paul O’Connell emphasized in his contribution to a symposium on Moyn’s book, there are many human rights social movements that “routinely deploy the language of human rights alongside broader claims for redistribution, social transformation, decolonisation and, indeed, revolution.”<sup>145</sup> Focusing on the work of large international human rights organizations (which tend to privilege legalistic and technocratic aspects of human rights) as opposed to that of local organizations (which more often deploy the rhetoric of human rights in furtherance of a broad variety of social goals including redistribution), limits our vision of human rights. Legal tools, even those aimed at furthering human rights and social justice, are fundamentally conservative. It is law in practice—the exercise of rights claiming—that contains the potential to challenge structural inequality. A human rights agenda for innovation therefore must focus not just on legal tools, but also on structuring interactions to empower those affected by innovation policies to demand distributive justice.<sup>146</sup>

There are several dimensions to a reimagining of a human rights agenda for innovation policy. First, a human rights frame transforms an argument about justice into a demand for action. The human rights frame is a “social imaginary” founded on the “idea that all persons possess equal moral worth, that social order exists to realize the essential humanity of its members, and that therefore the exercise of all forms of authority is properly bounded by its impact on human dignity and well-being.”<sup>147</sup> In this way, human rights frames tell a story in which “suffering is

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143. MOYN, NOT ENOUGH, *supra* note 2, at 202.

144. *Id.* at 210, 213.

145. Paul O’Connell, *Capitalism, Inequality, and Human Rights*, L. & POL. ECON. (June 4, 2018), <https://lpeblog.org/2018/06/04/capitalism-inequality-and-human-rights/> [https://perma.cc/8X3A-R6VT].

146. In her contribution to the symposium on Moyn’s book, Amy Kapczynski argues that we need a vision of human rights in which the “‘center’ is at the ends of the network, where people are using human rights promiscuously as they build power locally.” Amy Kapczynski, *What Comes After Not Enough?*, L. & POL. ECON. (June 11, 2018), <https://lpeblog.org/2018/06/11/what-comes-after-not-enough/> [https://perma.cc/C8RA-CHMW]. In the context of intellectual property, this would include promoting capacity-building among local human rights and civil society organizations to contest the development of intellectual property policy in ways that are meaningful to them.

147. BRYSK, *supra* note 21, at 26.

political—caused by the abuse of power and alleviated by the rule of law.”<sup>148</sup> For example, the use of a human rights frame to address the relationship between widening inequality and extreme poverty has the potential to transform the issue of inequality from a regrettable side effect of neoliberalism into a question of justice that can and should be—indeed must be—remedied through political and judicial processes.<sup>149</sup>

Second, human rights explicitly require us to consider the distributional impacts of innovation policies. For example, as Lea Shaver has noted in examining the impact of copyright on the cost of books, traditional law and economics approaches to intellectual property entirely overlook the question of inequality. Copyright may be about promoting creation of printed materials, but “[m]ore books for whom?” is a question that the prevailing theoretical frameworks of copyright scholarship never ask.”<sup>150</sup> The question of who has access is exactly the kind of question that human rights can and does ask.

Third, a human rights frame also provides a forum in which advocates can advance the claim that states have obligations to citizens outside their borders. One important but underdeveloped area of international human rights law concerns that question of what, if any, obligations states might have to individuals in other states. The ICESCR, which includes the obligation to ensure that individuals and communities benefit from scientific progress, does not contain a territorial limitation. The global nature of these obligations combined with the right to development provide a basis for arguing that states ought to consider the impact on populations in other countries in the design and implementation of their innovation, trade, and IP policies.

### B. Human Rights Law “From Below”

To realize this more emancipatory vision of human rights, we must focus on human rights law not in the way it is articulated at the United Nations but rather in how it is deployed by human rights advocates and victims to advance their goals. Contemporary efforts to understand intellectual property in human rights terms tend to address only one dimension of international human rights—the dimension of law. Scholarship and United Nations interventions alike have emphasized the normative conflict between or coherence of the two regimes—how they relate to one another, whether they require states to make changes to policy, and if so how.

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148. *Id.*

149. As Philip Alston, the United Nations Special Rapporteur on Extreme Poverty, notes in his 2015 report:

It must be accepted that extreme inequality and respect for the equal rights of all persons are incompatible. Formal recognition of the fact that there are limits of some sort to the degrees of inequality that can be reconciled with notions of equality, dignity and commitments to human rights for everyone would be an important step forward.

Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, Philip Alston, ¶ 48, U.N. Doc. A/HRC/29/31 (May 27, 2015).

150. Shaver, *supra* note 111, at 150.

The purpose of this section is to suggest that these efforts miss a second and less visible, but no less important, function served by human rights—the function of law “from below.”

In this context, I use the term human rights law “from below” to refer to human rights *practice* in which advocates, activists, and human rights victims themselves use the legal norms of international human rights to make claims on duty bearers.<sup>151</sup> In this vision, human rights is not “a top-down, lawyer-driven, professional ‘game’” but rather a profoundly political practice.<sup>152</sup> Legalization is an essential element of rights practice because it is one of the mechanisms by which rights can be made effective in legal systems, but it also has a depoliticizing effect, turning what are essentially political disputes into technocratic legal issues.<sup>153</sup>

Law “from below,” in contrast, foregrounds the inherently political dimension of rights claiming. Human rights can be understood “as a discourse and set of practices for asserting claims.”<sup>154</sup> These discursive practices make use of human rights in different ways simultaneously—as a “system of law, a set of values, and a vision of good governance.”<sup>155</sup> As Kenyon argues, this requires a recognition of human rights “as living and changing experiences rather than codified universal standards.”<sup>156</sup> Such an approach recognizes that human rights is not only a legal system but also a set of rhetorical strategies used to make demands on the powerful.

By itself, human rights law can be perceived as an elite discourse, a set of legal arguments that are deployed by lawyers and lobbyists in advancing their claims. However, when it is deployed not in the form of legal arguments but as a demand for participation and accountability, human rights becomes a powerful challenge to the status quo. As Merry and her collaborators note, “it is possible for less powerful and knowledgeable people to access human rights through coalitions with elites and by using human rights as an ideology of justice and a practice of claims-making rather than as a system of law.”<sup>157</sup> Thus, the emancipatory potential of human rights may well be located less in the power of its legal arguments than in the way in which the claims of justice that undergird these arguments create space for the powerless, and in particular those affected by rights violations, to claim their rights.

151. See, e.g., Jeremy Perelman & Lucie E. White, *Introduction* to STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 1, 2 (Lucie E. White & Jeremy Perelman eds., 2011) (introducing case studies as “theoriz[ing] human rights practices, as those practices are enacted by lawyers and others on the ground”).

152. *Id.* at 3.

153. Richard Wilson, *Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law*, in THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL, *supra* note 142, at 342, 351–52.

154. Sally Engle Merry et al., *Law from Below: Women’s Human Rights and Social Movements in New York City*, 44 L. & SOC’Y REV. 101, 101 (2010).

155. *Id.* at 102.

156. Kristi Heather Kenyon, *Building Up vs. Trickleing Down: Human Rights in Southern Africa*, OPENGLOBALRIGHTS (Nov. 16, 2017), <https://www.openglobalrights.org/building-up-vs-trickleing-down-human-rights-in-southern-africa/> [<https://perma.cc/8TNT-MAP7>].

157. *Id.*

This conception of human rights provides a vehicle for the vision of intellectual property “from below” proposed by Professor Maggie Chon. Chon used the term “from below” to refer to IP policies that are connected to distributive justice outcomes both within and between countries.<sup>158</sup> As such, her proposal is about orienting the rules of intellectual property on goals of distributive justice and the most vulnerable. At the same time, Chon also envisions an element of rights claiming as essential to these outcomes. In distinguishing her vision of intellectual property “from below” from others who would seek to orient intellectual property on socially just outcomes, Chon elaborates:

[A] key difference between an approach from below and other critiques of the current IP balance is its emphasis on distributive justice outcomes. The perspectives and actions of the least empowered among us are included in more than just a formal equality sense in shaping a normative legal agenda. Rather, an approach from below explicitly shapes IP outcomes with respect to knowledge goods by specific groups, in this case, users in developing countries, for specific goals, which could include innovation, access, and affordability. . . . [L]egal rights are limited in their capacity to affect structural change. Those legal rights will be acknowledged by the formal legal system only when there is “interest convergence” between the powerful and *those actors seeking distributive justice outcomes through rights rhetoric*.<sup>159</sup>

Thus, Chon’s view, while organized in the language of policy, seems to implicitly envision a role for discursive practices around rights claiming that echo the theories of Merry and others.

Drawing on this work, this Article refers to human rights “from below” as law that empowers individuals to make rights-based claims to participation and accountability. Human rights law is not just a set of legal principles that constrain or enable, or are to be reconciled with, intellectual property. It is also a rhetorical strategy for social mobilization that enables people to make claims on the power structures of globalization that have arranged innovation systems in ways that inevitably privilege the elite.<sup>160</sup> This dimension of human rights practice could be an important complement to existing efforts to challenge the logic of global intellectual property expansionism.

Human rights “from below” differs in its orientation from the experientialist governance model proposed by Gráinne de Búrca. In that model, de Búrca focuses on United Nations treaty bodies as the source of norms that are then implemented by “lower level” actors, who in turn provide feedback to the center.<sup>161</sup> De Búrca’s insights are essential for a more robust understanding of the way in which local actors “adapt or vernacularize international standards within domestic and local

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158. Chon, *supra* note 112, at 810.

159. *Id.* at 815–16 (emphasis added).

160. See, e.g., Goodale, *supra* note 142, at 6–7 (distinguishing between human rights as a body of international law and human rights as a normative concept).

161. Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT’L L. 277, 282 (2017).

contexts.”<sup>162</sup> Indeed, scholars have long emphasized the importance of local actors in mediating between the universal and the particular.<sup>163</sup> As Merry notes, “[r]ights need to be presented in local cultural terms in order to be persuasive, but they must challenge existing relations of power in order to be effective.”<sup>164</sup>

Nonetheless, privileging the role of the “global” and relegating the “local” to the margins would be overly simplistic and descriptively inaccurate.<sup>165</sup> Human rights norms are often catalyzed or generated locally, an aspect of the narrative that is overlooked through a focus on international institutions. Further, the process of implementation is not merely technocratic but indeed an act of meaning making itself.<sup>166</sup> De Búrca’s insight that this meaning feeds back into international processes is essential, but the approach advocated here seeks to widen the lens further. Understanding human rights as law *and* practice seeks to focus attention on “the local” in contrast to existing approaches that have emphasized legal argumentation over the experience of rights and of their violation.<sup>167</sup>

### C. Human Rights as Practice

A vision of human rights as law “from below” inevitably foregrounds its political nature. A human rights approach works most effectively when advocates are able to invoke it both as a set of laws and as a political practice. In other words, human rights that exists simply as a set of norms, principles, or rules, has little effect on social practices. The human rights practice of rights claiming, in turn, depends on normative statements of human rights experts and authorities to provide the basis on which advocates and victims can make political claims for participation, greater accountability, and changed practices.

For example, human rights law is most effective when it is used by advocates to make demands on governments.<sup>168</sup> Efforts to obtain recognition for the rights of LGBTQ individuals and to prohibit discrimination based on sexual orientation and gender identity began as a domestic social movement and later gained additional

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162. *Id.* at 280.

163. MERRY, *supra* note 72, at 1.

164. *Id.* at 5.

165. Goodale, *supra* note 142, at 14–15; *see also id.* at 17 n.13 (advocating for the adoption of a transnational approach because “human rights discourse is most often effective—or at least instrumental—in social spaces that are neither international nor national.”).

166. *Id.* at 18.

167. *Id.* at 14.

168. *See* Thomas Risse & Stephen C. Ropp, *Introduction and Overview*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 3, 6–7 (Thomas Risse et al. eds., 2013); Kiyoteru Tsutsui, Claire Whitlinger & Alwyn Lim, *International Human Rights Law and Social Movements: States’ Resistance and Civil Society’s Insistence*, 8 ANN. REV. LAW. & SOC. SCI. 367, 368 (2012). Beth Simmons has explained that human rights treaties can be valuable because they can raise the expected payoff of social mobilization “by providing a crucial tangible resource for nascent groups and by increasing the size of the coalition with stakes in compliance.” BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 15 (2009). Simmons notes that the value of treaties for social movements will depend on the country, and that treaties may have the greatest impact in countries in transitional phases. *Id.* at 153.

credibility through the pronouncements of human rights courts and United Nations experts.<sup>169</sup> The Yogyakarta Principles, a document that collected existing legal authority for understanding the obligation of non-discrimination to include sexual orientation and gender identity, was essential in providing political and legal actors with a foundation on which to take action at the United Nations, in regional institutions, and at the national level.<sup>170</sup>

Rights claiming is also essential for implementation. In South Africa, for example, a decision by the Constitutional Court on the right of the poor to housing had far less impact than might have been assumed given its progressive holding because it was not accompanied by an advocacy campaign.<sup>171</sup> Other decisions of that Court, including decisions on access to essential medicines, had greater impact because they were not only driven by advocacy and social mobilization, but were then used by those very groups to continue to press for change.<sup>172</sup> Similarly, studies of treaty ratification indicate that the two factors that contribute most to a positive impact are “some degree of political liberalization, the presence of an active civil society, and regular engagement by such civil society and by governmental actors in the treaty monitoring processes.”<sup>173</sup>

The example of the Special Rapporteurs is also instructive. Human rights groups often rely on the Special Procedures of the United Nations to articulate legal norms and focus attention on particular issues.<sup>174</sup> Jo Becker, in a book on human rights mobilization, offers several case studies of groups working with Special Rapporteurs in the Philippines, Brazil, and Jordan. Her book recounts the way in which the work of the Special Procedures in each of these cases was done in conjunction with non-governmental organizations (NGOs).<sup>175</sup> Citing a study by the Brookings Institution, Becker notes that the “ability of victims’ groups and local and international NGOs to communicate their grievances and conduct follow-up advocacy” was an essential element in the success of the visit.<sup>176</sup> Becker continues:

Special rapporteurs and NGOs can play effective, mutually reinforcing roles on behalf of human rights. NGOs can provide special rapporteurs with critical information, strategic advices regarding the priorities and logistics of a mission, suggest recommendations, and conduct follow-up

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169. PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 220–37 (2012).

170. Michael O’Flaherty, *The Yogyakarta Principles at Ten*, 33 NORDIC J. HUM. RTS. 280, 287–94 (2015).

171. Zackie Achmat, *Law, Politics, and Social Transformation*, 32 INT’L J. LEGAL INFO. 237, 240 (2004); see also Jeremy Perelman, *The Way Ahead? Access-to-Justice, Public Interest Lawyering, and the Right to Legal Aid in South Africa: The Nkenzi Case*, 41 STAN. J. INT’L L. 357, 387 n.143 (2005).

172. Achmat, *supra* note 171; see also Lisa Forman, *Justice and Justiciability: Advancing Solidarity and Justice Through South Africans’ Right to Health Jurisprudence*, 27 MED. & L. 661, 681 (2008); Brian Ray, *Polycentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT’L L. 151, 173–74 (2009).

173. De Búrca, *supra* note 161, at 304.

174. Finnemore & Sikkink, *supra* note 33.

175. See BECKER, *supra* note 117, at 79.

176. *Id.* at 91.



advocacy. Special rapporteurs, by contrast, can provide the moral authority of the UN, an international platform and spotlight, and access to senior policymakers. Together they may be able to achieve change that neither can achieve alone.<sup>177</sup>

Special Rapporteurs can also contribute to efforts to promote and protect human rights by articulating normative principles and clarifying and expanding the law. The work of former Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, provides an example. Many of the Special Rapporteur's reports were devoted to legal and policy analysis of different forms of violence against women as human rights violations.<sup>178</sup> The legal analysis in these reports was effective because domestic groups adopted the definitions of violence she provided in her reports to work for local change.<sup>179</sup>

Applying these insights to intellectual property, there have been tremendous contributions of the expert human rights bodies of the United Nations on issues of intellectual property and human rights. Farida Shaheed, for example, argued in her report on copyright that exceptions and limitations to copyright "constitute a vital part of the balance that copyright law must strike between the interests of rights-holders in exclusive control and the interests of others in cultural participation."<sup>180</sup> Shaheed's report recommended that both domestic and international copyright policy be subjected to human rights impact assessments to ensure the creation of safeguards needed to protect other human rights.<sup>181</sup> The report also recommended that states place no limits on the right to science and culture unless the limit "pursues a legitimate aim, is compatible with the nature of this right and is strictly necessary for the promotion of general welfare in a democratic society."<sup>182</sup>

Despite their importance, however, these norms have not been taken up in the practice of domestic human rights advocates. Certainly, these reports provoked controversy and were influential at the United Nations and with the owners of intellectual property.<sup>183</sup> Increasingly, regional courts appear to be relying on and integrating human rights arguments into their discussions of intellectual property.<sup>184</sup> Yet neither the UN reports nor this regional case law has gained significant traction in domestic advocacy around the effect of intellectual property rights on issues such as food, education, or health.

177. *Id.* at 93–94.

178. *See, e.g.*, Radhika Coomaraswamy (Special Rapporteur on Violence Against Women), *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996).

179. MERRY, *supra* note 72, at 61.

180. 2015 Shaheed Report, *supra* note 51, ¶ 61.

181. *Id.* ¶¶ 94, 96.

182. *Id.* ¶ 98.

183. Yu, *supra* note 53.

184. *See, e.g.*, Christophe Geiger & Elena Izyumenko, *Intellectual Property Before the European Court of Human Rights* (Ctr. for Int'l Intellectual Prop. Studies, Research Paper No. 2018-01, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3116752](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116752) [<https://perma.cc/2ZX3-ZFKW>].

In describing a local movement that sought to integrate human rights principles into municipal law, Merry and her colleagues note: “Using human rights law as a social movement strategy domesticated human rights ideology. As the human rights framework became more firmly integrated into the state political and legal process, it lost some of its idealism and radical vision.”<sup>185</sup> For human rights to be effective, it must engage both law and politics—it must be understood as not only a set of legal rules but also as a body of discursive practices around rights claiming. This is the distinction between what Richard Wilson calls “human rights law” and “human rights talk,” in which “the former refers to positivized rules in national or international law and the latter refers to how people speak about those norms, or aspire to expand or interpret them in new ways.”<sup>186</sup>

Finally, human rights as “practice” also provides a more effective frame for responding to the particular demands of creating a human-rights innovation policy in the current political environment. The use of human rights arguments to address the harms of intellectual property differs from other human rights violations because the state, by virtue of geopolitics and international trade obligations, is not (or does not see itself as) capable of responding to the claims made by advocates. Thus, the situation is not the one envisioned by many studies of human rights and domestic change, which focus on rights claiming by advocates, followed by tactical concessions that eventually mature into behaviors of compliance.<sup>187</sup> Rather, we might view the geopolitical constellations around intellectual property as a situation of limited statehood, in which the state is unable rather than unwilling to comply with human rights norms and where non-state actors such as companies are often the greatest rights-violators.<sup>188</sup> In such contexts, capacity building may be more effective than traditional techniques such as incentives, sanctions or persuasion, in ensuring the promotion of human rights.<sup>189</sup> Further, in these situations, human rights advocacy must be addressed not only to the government but also to the non-state actors contributing to the violations.<sup>190</sup>

### III. THE MARRAKESH TREATY AS TRANSLATION

The trajectory of human rights norms on IP policies indicates that the potential of human rights to be a vehicle for rights claims—for asserting demands on duty bearers to take some action or provide some essential good—requires a bottom-up approach that focuses on key domestic constituencies and tells a clear, simple story, backed up by compelling facts about the concrete harms experienced by those constituencies.

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185. Merry et al., *supra* note 154, at 125.

186. Wilson, *supra* note 153, at 350.

187. See, e.g., Risse & Ropp, *supra* note 168.

188. Tanja A. Börzel & Thomas Risse, *Human Rights in Areas of Limited Statehood: The New Agenda*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 63, 64 (Thomas Risse et al. eds., 2013).

189. *Id.* at 83.

190. *Id.*

A new treaty, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (“Marrakesh Treaty” or “Treaty”) is poised to accomplish precisely these goals. The Treaty requires ratifying states to create exceptions and limitations to copyright to allow individuals with print disabilities to create and share accessible format copies of printed materials, including across borders. There are several features of the Treaty that may allow it to provide a vehicle to translate IP issues into human rights terms. First, the Marrakesh Treaty identifies a clear human rights violation. Second, it contains explicit mechanisms that will activate domestic human rights constituencies, intermediaries, and other constituencies and empower them to engage with intellectual property experts and domestic lawmaking bodies.

#### A. Background to the Treaty

The Marrakesh Treaty is a new international instrument that is intended to help combat the lack of accessible reading materials for the estimated 300 million print disabled individuals around the world.<sup>191</sup> The Treaty employs the legal and policy tools of copyright law to advance human rights ends.<sup>192</sup> It requires states to create mandatory exceptions to copyright to allow individuals with print disabilities to make accessible format copies of books and other cultural materials and share them across borders.<sup>193</sup>

The current global “book famine”—the fact that only between one and seven percent of books are available in accessible formats to individuals with print disabilities<sup>194</sup>—is directly attributable to copyright laws. Technological advances have made it easier than ever before for individuals with print disabilities or their representative organizations to make accessible format copies of digitized books.<sup>195</sup> Copyright, however, prevents them from doing so without first obtaining a license from the copyright owner.<sup>196</sup> Moreover, even when an accessible format copy exists in one country, it cannot be shared with individuals in another country without a license.<sup>197</sup> Thus, accessible format copies of works in Spanish cannot be shared with other print disabled, Spanish speaking individuals in other parts of the world.

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191. WORLD HEALTH ORG., GLOBAL INITIATIVE FOR THE ELIMINATION OF AVOIDABLE BLINDNESS: ACTION PLAN 2006–2011, at 1, 3 (2007).

192. LAURENCE R. HELFER, MOLLY K. LAND, RUTH L. OKEDIJI & JEROME H. REICHMAN, THE WORLD BLIND UNION GUIDE TO THE MARRAKESH TREATY: FACILITATING ACCESS TO BOOKS FOR PRINT-DISABLED INDIVIDUALS 8–11 (2017).

193. *Id.* at 1.

194. *See* Press Release, World Blind Union, WIPO Negotiations Treaty for Blind People (June 17, 2013), <http://www.worldblindunion.org/English/news/Pages/June-17-Press-Release-for-WIPO-Book-Treaty.aspx> [<https://perma.cc/7QSR-YTQL>]; *see also* Shlomit Yanisky-Ravid, *The Hidden Though Flourishing Justification of Intellectual Property Laws: Distributive Justice, National Versus International Approaches*, 21 LEWIS & CLARK L. REV. 1 (2017).

195. HELFER ET AL., *supra* note 192, at xxi.

196. *Id.* at 5–6.

197. *Id.* at xxii.

Copyright law, which is territorial, would require new accessible format copies to be made for each jurisdiction.<sup>198</sup>

Although exceptions to copyright for the benefit of the blind are among the most longstanding of all exceptions and have been long recognized as compatible with international intellectual property law, not all states had enacted such exceptions.<sup>199</sup> States with relevant exceptions and limitations also defined beneficiaries in different ways, and these exceptions rarely allowed cross-border sharing.<sup>200</sup> An international treaty provided a solution to this problem.

Articles 2 and 3 of the Marrakesh Treaty provide key definitions of essential terms, including “works,” “accessible format copy,” “authorized entity,” and “beneficiary person.”<sup>201</sup> Beneficiaries are broadly defined to include not only the blind but also individuals who are unable to access printed materials to the same degree as others without a disability.<sup>202</sup> An authorized entity is an entity that provides services to beneficiaries “as one of its primary obligations or institutional obligations” and which “establishes and follows its own practices” to ensure it serves beneficiaries and to limit accessible works to those individuals.<sup>203</sup>

The core provisions of the Marrakesh Treaty are Articles 4, 5, and 6. Article 4 requires ratifying states to create a limitation or exception that allows beneficiaries or authorized entities to make an accessible format version of the work.<sup>204</sup> Articles 5, and 6 require ratifying states to allow cross-border exchange of such works—Article 5 provides for cross-border distribution, and Article 6 for cross-border importation.<sup>205</sup> Article 7 requires states to ensure that technological protection measures do not constitute a barrier to the rights provided for under the Treaty, and Article 8 obligates states to ensure the privacy of beneficiaries.<sup>206</sup>

The Treaty acknowledges and protects preexisting rights of copyright owners. It makes several references to existing international intellectual property obligations, including by disclaiming any impact on preexisting obligations in Article 1 and making several references in Article 11 to the three-step test (the test established in international intellectual property law for evaluating permissible exceptions and limitations).<sup>207</sup> Provisions in Article 4 and 5 also provide states with a roadmap for how to create these exceptions consistently with the three-step test.<sup>208</sup> States are welcome to create the required exceptions and limitations in any way they prefer,

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198. *Id.*

199. *Id.*

200. *Id.*

201. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled arts. 2, 3, June 27, 2013, 52 I.L.M. 1312, *reprinted in* HELFER ET AL., *supra* note 192, at 93–108 [hereinafter Marrakesh Treaty].

202. *Id.* art. 3.

203. *Id.* art. 2.

204. *Id.* art. 4.

205. *Id.* arts. 5, 6.

206. *Id.* arts. 7, 8.

207. *Id.* arts. 1, 11.

208. HELFER ET AL., *supra* note 192, at 43–45, 56, 70–73.

but they then need to ensure that their approach satisfies the three-step test.<sup>209</sup> The Treaty contains two optional provisions that states can, but are not required to enact. Specifically, the Treaty allows states to condition the making of an accessible format copy on payment of compensation, and to limit the creation of accessible format copies to works that are not commercially available in the desired form.<sup>210</sup>

The Marrakesh Treaty is a remarkable instrument for a variety of reasons. First, it is the first and only WIPO instrument creating mandatory exceptions and limitations to copyright.<sup>211</sup> As such, it represents a shift in the normative approach to the relationship between human rights and intellectual property “from challenging expansive IP protection rules and clarifying their consequences for realizing human rights, to providing concrete proposals for ceilings or limits on IP protection.”<sup>212</sup> Second, it presents the potential to reconceive of the three-step test and its relationship to human rights law. As my co-authors and I conclude in the WORLD BLIND UNION GUIDE: “E&Ls [exceptions and limitations] that are consistent with the TST [three-step test] are thus not merely permissible restrictions on copyright; they are affirmative expressions of government policy that embody socially desirable and salutary objectives, including the realization of a range of internationally protected human rights.”<sup>213</sup>

These, however, are all issues of law and policy. One of the most revolutionary aspects of the Marrakesh Treaty, however, is not its legal but its political impact—the effect that it might be able to have on human rights advocacy. The Marrakesh Treaty represents an opportunity to frame intellectual property as a human rights issue from the bottom up.

### B. *The Marrakesh Treaty as a “Bottom Up” Instrument*

Most who have considered the Treaty thus far have addressed the Treaty’s consequences for domestic and international intellectual property norms,<sup>214</sup> or the choice to pursue these changes through a binding instrument.<sup>215</sup> The Treaty has not, however, been examined in light of its contributions to the *process* of human rights domestication. The Treaty clearly has the potential to make a significant

209. *Id.* at 46.

210. Marrakesh Treaty, *supra* note 201, arts. 4(4), 4(5); *see also* HELFER ET AL., *supra* note 192, at 47–50.

211. Helfer, OXFORD HANDBOOK, *supra* note 4, at 135.

212. *Id.* at 134.

213. HELFER ET AL., *supra* note 192, at 68–69; 2015 Shaheed Report, *supra* note 51, ¶ 61 (“Copyright exceptions and limitations—defining specific uses that do not require a license from the copyright holder—constitute a vital part of the balance that copyright law must strike between the interests of rights-holders in exclusive control and the interests of others in cultural participation.”).

214. *See, e.g.*, HARPUR, *supra* note 1, at 78–82; Allan Rocha de Souza, *Fundamental Rights, Development and Cultural Inclusion: The Marrakesh Treaty in Brazil*, 8 WIPO J. 75, 78–86 (2016); Jerry Jie Hua, *Implementation of the Marrakesh Treaty for Visually Impaired Persons into the Chinese Copyright Law*, 1 CHINA & WTO REV. 7, 13–18 (2017); Yanisky-Ravid, *supra* note 194, at 29–31.

215. *See* Margot E. Kaminski & Shlomit Yanisky-Ravid, *The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty Was Preferable to Soft Law*, 75 U. PITTSBURG L. REV. 255 (2014).

contribution to human rights protection by virtue of the increased access its beneficiaries will have to printed materials in countries that ratify the Treaty—assuming that states that ratify the Treaty implement it in ways that promote its human rights objectives.<sup>216</sup> In addition, however, it provides a model for increasing collaboration between human rights advocates and other social movements working to make IP policies more just.

The Marrakesh Treaty represents a new approach to reconciling human rights and intellectual property because its text and structure enable the involvement of national human rights actors and institutions in intellectual property lawmaking. This is a “bottom up” approach to international lawmaking because it is aimed not at imposing norms from a position of hierarchical superiority, but rather creating a scaffolding and rhetorical frame for national actors to make rights claims and participate in IP decision-making. To be clear, this is not the “bottom up” of regulatory sovereignty in which state actors are seeking to reassert their policy making authority vis-à-vis international lawmaking processes.<sup>217</sup> Rather, it is “bottom up” in the sense of empowering individual victims of human rights abuses to claim their rights.

### 1. Normative Strategy

The Marrakesh Treaty has the potential to create this scaffolding in two ways. First, it involves human rights actors on an issue that is easily translatable into human rights terms—namely, access to books for print disabled individuals. This has the benefit of activating a particular constituency, rather than an issue. In other words, it frames the issue as a question of disability rights, not IP policy.

Focusing on the impact that copyright can have on the rights of individuals with disabilities also represents a more effective approach to framing IP policy as a human rights issue because it identifies a specific “violation” on which human rights organizations can then bring their advocacy techniques to bear. The Marrakesh Treaty, as a treaty affecting the “right to read,” implicates a range of fundamental human rights—including but not limited to freedom of expression, the right to science and culture (including the right to participate in culture), and minority cultural rights.<sup>218</sup>

The Marrakesh Treaty also provides a very compelling narrative backed up by empirical evidence. Digital technologies enable the ready conversion of works into accessible formats and sharing across borders. Individuals with disabilities could themselves create these copies, and they and their representative organizations could then share them with others around the world. Copyright stands in the way of 300 million individuals having access to books. Thus, the Treaty may be able to

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216. See HELFER ET AL., *supra* note 192 (providing recommendations for implementation that promote the Treaty’s human rights objectives).

217. Donald P. Harris, *The Power of Ideas: The Declaration of Patent Protection and New Approaches to International Intellectual Property Lawmaking*, 6 UC IRVINE L. REV. 343, 345 (2016).

218. Lea Shaver, *The Right to Read*, 54 COLUM. J. TRANSNAT’L L. 1 (2015).

activate human rights framing of copyright much in the same way that the debate in South Africa—where access to essential medicines was the difference between life and death—transformed the discussion of patents.

## 2. *Institutional Strategy*

The Marrakesh Treaty also embodies institutional strategies for activating human rights constituencies on intellectual property issues. First, the Treaty explicitly links the human rights and intellectual property regimes in a way that allows interpretations that draw on both sets of norms. Intellectual property and accessibility is already linked in Article 30 of the Convention on the Rights of Persons with Disabilities (CRPD), which provides that parties undertake to “ensure that laws protecting IP rights did not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”<sup>219</sup> As Paul Harpur notes, Article 30 of the CRPD shifts the paradigm of intellectual property and disability rights by “providing that copyright can exist up to the point at which it creates a conflict with the access of persons with disabilities to cultural material.”<sup>220</sup> The Marrakesh Treaty explicitly references the CRPD. The preamble of the Treaty also mentions both the Universal Declaration on Human Rights and the CRPD, and it emphasizes the broader importance of using copyright as a tool to realize both the human rights of creators and authors and the rights of persons with visual disabilities.<sup>221</sup> These cross-references between treaties represent a range of opportunities to integrate the interpretive institutions and methodologies of human rights with intellectual property policy making.<sup>222</sup>

Second, the Marrakesh Treaty also activates human rights and disability rights constituencies to be active on issues of IP policy. It does this most simply by locating implementation of the Treaty in beneficiaries themselves. Under the Treaty, individuals with print disabilities are directly empowered to create accessible format copies and share with others. Authorized entities such as libraries and schools may also create such copies.<sup>223</sup> Thus, the Treaty is largely self-enforcing. The government is not the gatekeeper, but rather individual beneficiaries can immediately begin making and sharing copies.<sup>224</sup>

Further, the Treaty also provides opportunities for disability rights organizations to be involved in the process of intellectual property lawmaking. Such involvement is mandated under the CRPD, which requires states to ensure that

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219. G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities art. 30 (Jan. 24, 2007) [hereinafter CRPD].

220. HARPUR, *supra* note 1, at 62.

221. Marrakesh Treaty, *supra* note 201, at 2.

222. HELFER ET AL., *supra* note 192, at 15–20.

223. *Id.* at 25.

224. *See generally* Laurence R. Helfer, Senior Professor of Law, Duke Univ., Keynote Address at the University of Cambridge Centre for Intellectual Property and Information Law: Using Intellectual Property Tools to Achieve Human Rights Ends: The Example of the Marrakesh VIP Treaty (Mar. 11, 2017).

policies that affect individuals with disabilities are made in consultation with them.<sup>225</sup> This consultation will need to be with a range of disability rights communities, since the definition of beneficiary under the Treaty is broad and focused on all disabilities that prevent access to printed materials on the same basis with others. Affording participation in IP policymaking will not be burdensome for states that are parties to the CRPD, since consultation mechanisms are or should already be in place. Involving national human rights institutions will also activate and involve the human rights community.

Key to the effective implementation of the Treaty will be to ensure that implementation of the Treaty is not vested solely in national IP offices, but that it is undertaken in consultation with human rights and disability rights communities.<sup>226</sup> For example, states that are parties to the CRPD might task the “focal points” that the Treaty calls for to conduct outreach to and coordination with intellectual property offices to ensure that those offices are working to implement the Treaty in ways that promote meaningful access to books for print-disabled individuals.<sup>227</sup> As Larry Helfer observed in a keynote address, one of the unique features of the Treaty is the engagement it fosters among domestic agencies:

Among human rights commissions within or alongside the government and copyright and IP offices, there is the possibility for a shared mandate or shared competence over the Treaty that would allow a kind of communication between different sets of stakeholders that we haven’t seen at this level of granularity.<sup>228</sup>

Broad and inclusive participation in the creation of innovative policymaking is an essential first step toward the creation of innovation policies that are attuned to local human rights needs.<sup>229</sup> Thus, the Marrakesh Treaty poses the potential for supporting what Melish calls a “*human rights-based approach* to community problem-solving”—an approach that “seeks to pry open spaces for negotiated settlement and policy engagement with government actors in the practical achievement of community-defined goals and priorities” and which “seeks to imagine and then establish parallel de facto accountability systems for private actors.”<sup>230</sup>

By explicitly connecting human rights and intellectual property law and creating mechanisms to involve both intellectual property experts and human rights communities in implementation, the Treaty presents real and concrete opportunities for translating intellectual property issues into human rights terms. For human rights organizations, the Treaty can raise awareness of the impacts of intellectual property and the importance of integrating this into their work, and it connects to areas already within their expertise. Hopefully, the relationships that the

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225. HELFER ET AL., *supra* note 192, at 19.

226. *Id.* at 78–81.

227. *Id.* at 79–80.

228. Helfer, *supra* note 224, at 9.

229. Melish, *supra* note 110, at 10.

230. *Id.* at 74.



implementation of the Marrakesh Treaty will foster between the human rights, disability rights, and intellectual property communities on the local level will lay the groundwork for future dialogue on other issues at the nexus of human rights and IP policy.

#### CONCLUSION

As an example of international lawmaking, the Marrakesh Treaty is simultaneously encouraging and discouraging. It is encouraging because it represents the culmination of years of hard work by countless dedicated advocates, experts, and politicians who succeeded in putting in place a treaty that has the potential to affect millions of lives.<sup>231</sup>

The Marrakesh Treaty is discouraging for precisely those same reasons. Exceptions and limitations for the blind are among the most well recognized and least controversial of all possible exceptions and limitations to copyright. If it takes this level of investment and effort to achieve agreement on these exceptions, the prospects for other efforts to harmonize exceptions for libraries<sup>232</sup> or create an instrument encouraging medial research on neglected diseases<sup>233</sup> do not look promising. Even the Marrakesh Treaty itself almost did not succeed. As Larry Helfer recently noted: “But there were political alignments, as well as factual and legal alignments, that made this multilateral instrument possible. I am not at all confident that those same alignments exist in other areas where claims for users’ rights and public interest exceptions are also quite strong.”<sup>234</sup>

Paul Harpur is also skeptical about the ability of the Marrakesh Treaty to have much more than incremental impact. Although he praises it for increasing access, he notes that the Treaty will at best only address disparities in access between individuals in the United States (where only 15% of books are in accessible formats) and individuals elsewhere in the world.<sup>235</sup> Harpur concludes:

Realisation of the notion of equality as envisaged by the CRPD will not be achieved by these small and important steps alone, but by the adoption of a regime that restricts the capacity of people to produce barriers to equality, as opposed to a regime that focuses on restricting people who are trying to obtain access.<sup>236</sup>

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231. See, e.g., Sean Williams, Comment, *Closing in on the Light at WIPO: Movement Towards a Copyright Treaty for Visually Impaired Persons and Intellectual Property Movements*, 33 U. PA. J. INT’L L. 1035, 1049–72 (2012); see also HARPUR, *supra* note 1, at 84–90 (discussing the opposition of the publishing industry).

232. World Intellectual Prop. Org. [WIPO], Standing Comm. on Copyright & Related Rights, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, SCCR/20/11 (June 15, 2010); see generally Helfer, OXFORD HANDBOOK, *supra* note 4, at 136.

233. Kapczynski et al., *supra* note 12, at 1064; see generally Helfer, OXFORD HANDBOOK, *supra* note 4, at 136.

234. Helfer, *supra* note 224, at 9.

235. HARPUR, *supra* note 1, at 81–82.

236. *Id.* at 92.

Despite these reservations, however, the Marrakesh Treaty is nonetheless a watershed development in human rights and intellectual property law. Not only is it the first intellectual property treaty to pursue human rights ends, but it is also the first to offer a platform for resolving some of the tension between human rights and intellectual property through bottom-up domestic reforms. As Helfer notes, “[d]omestic implementation provides a crucial opportunity to challenge interstate bargains or revisit disputes that could not be fully resolved during multilateral negotiations.”<sup>237</sup> The Treaty leaves some terms undefined and provides discretion to state authorities in implementing others. Intellectual property and human rights constituencies will need to engage with one another to find answers to these questions, and in the process, they may significantly extend our understanding of the relationship between these sets of norms.<sup>238</sup>

Thus, the Marrakesh Treaty should be viewed as a model, not only for its substance, but for its structure. Human rights practitioners have historically paid little attention to the consequences that increasingly stringent trade rules around intellectual property protection have on the issues on which they work. The Treaty has the potential to change this by activating an organized community, telling a clear story about a “violation,” and creating pathways for individuals affected by intellectual property rules and their representative organizations to engage with IP policymaking on the domestic level. Creating a foundation for future involvement of human rights rights-holders in intellectual property lawmaking is essential to realizing the emancipatory potential of human rights challenging the fundamental bargains of the international intellectual property system.

The impact that innovations systems have on a range of human rights—from education to health to freedom of expression—is extraordinary. The choice to fund our innovations through market-based mechanisms should be as concerning to human rights advocates as private prisons or private hospitals. Hopefully, the Marrakesh Treaty will begin to lay a foundation to enable collaborations to challenge these choices.

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237. Helfer, OXFORD HANDBOOK, *supra* note 4, at 143.

238. *Id.*

