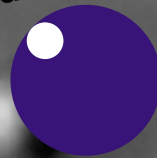


World Blind Union



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Our right to knowledge

**Legal reviews for the ratification of the Marrakesh Treaty for
persons with print disabilities in Asia and the Pacific**

Viet Nam edition

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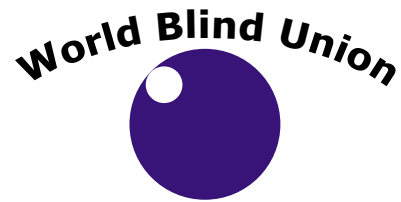
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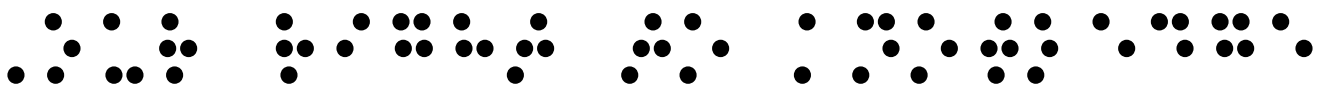
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United Nations Development Programme
Viet Nam Country Office
304 Kim Ma, Ba Dinh, Ha Noi
Email: registry.vn@undp.org
Tel: (+84 4) 38 500100
Fax: (84-4) 37265520
Web: <http://www.vn.undp.org/>

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Foreword

Access to knowledge is a human right. It is a prerequisite for achieving full human potential and inclusive development, as it opens the door to education, employment, improved health, and social, cultural and political participation.

However, due to a lack of published works in accessible formats, the right to knowledge is often severely restricted for the nearly 300 million people globally who are blind, vision impaired, or have reading difficulties due to physical or learning disabilities. Ninety percent of these 'persons with print disabilities' are estimated to live in developing countries. The lack of equitable, timely and affordable access to written knowledge further exacerbates and perpetuates challenges and rights violations already faced by persons with disabilities. It ultimately hinders global efforts towards inclusive, equitable, and sustainable development.

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the Marrakesh Treaty) was concluded in 2013 and came into force in 2016. The Marrakesh Treaty can pave the way for an enabling legal environment for improved access to published works for people with print disabilities, striking the right balance between the protection of the rights of authors and the protection of public interests.

It is the second international treaty specifically addressing rights of persons with disabilities, subsequent to the Convention on the Rights of Persons with Disabilities (CRPD), which Viet Nam ratified in 2015, demonstrating the government's clear commitment to disability rights. Viet Nam has yet to become a Contracting Party to the Marrakesh Treaty.

The Marrakesh Treaty will provide a key legal framework and advocacy and policy opportunities to help advance the implementation of the CRPD in Viet Nam. Furthermore, the Marrakesh Treaty will also serve a key contributor to Viet Nam's progress on the Sustainable Development Goals (SDGs) as it resonates strongly with the key principles of "leaving no one behind" and "reaching the furthest behind first," – values at the core of the 2030 Agenda for Sustainable Development.

This report is the result of partnerships between the United Nations Development Programme (UNDP) and the World Blind Union - Asia Pacific. It is designed to provide practical guidance for the government, disability communities and development partners to facilitate policy discussions, community engagement and legal reforms towards the Marrakesh Treaty accession and implementation in Viet Nam. It is our collective hope that the report will contribute to fulfilling the rights of persons with disabilities as a critical component of efforts in pursuit of achieving the SDGs in Viet Nam.



Caitlin Wiesen
Country Director
UNDP Viet Nam



Michiko Tabata
President
World Blind Union - Asia Pacific

Glossary

Accessible format copy – The Marrakesh Treaty defines an accessible format copy as one that is in a form “which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.” This broad definition ensures that any format necessary can be created, which allows accommodations for multiple formats since some beneficiaries of the treaty are likely to require different formats than other beneficiaries. Accessible format copies can take different forms including braille, text-to-speech files, audio and others.

Authorized entity – The Marrakesh Treaty defines an authorized entity as “an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis.” The Treaty allows for-profit entities to qualify as an authorized entity, provided that they are providing education or information access to beneficiary persons on a non-profit basis. It “also includes a government institution or a non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations,” even if the organization is not specifically authorized or recognized by the government to do so.

Beneficiary person – The Marrakesh Treaty defines a beneficiary person as one who is a) blind; b) “has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works”; or c) “is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.” This definition is broad and encompasses more than just those who are blind or visually impaired.

Berne Convention – The Berne Convention for the Protection of Literary and Artistic Works is an international agreement first adopted in 1886 (but subsequently revised multiple times) and provides international minimum standards on copyright. The majority of the provisions of the Berne Convention are incorporated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Currently, 168 countries are members of the Berne Convention, with additional countries incorporating many of these standards as members of the World Trade Organization (WTO).

Convention on the Rights of Persons with Disabilities (CRPD) – The Convention on the Rights of Persons with Disabilities is a United Nations human rights treaty that requires parties to promote, protect and ensure the human rights of persons with disabilities. It opened for signature on 30 March 2007 and came into force on 3 May 2008. The CRPD has over 150 parties. Several sections of the CRPD support ensuring access to accessible format copies and the Marrakesh Treaty is a concrete way to implement these obligations of the CRPD and promote the rights of those who are blind, visually impaired or otherwise print disabled.

Digital Accessible Information System (DAISY) – DAISY is a format of digital talking books widely used by those who are blind, visually impaired or otherwise print disabled. It attempts to provide the same flexibilities that standard print readers enjoy, such as navigation by chapter or page, and the ability to read or skip footnotes and sidebars. DAISY is converging with the popular EPUB format to produce an accessible mainstream multimedia book format.

Print disability – A print disability is broadly defined as any disability that interferes with the effective reading of printed material. It includes those who are blind or visually impaired, but also applies to those who have a reading disability such as dyslexia, or those who have a physical disability that prevents the person from holding the book, turning the pages, or focusing their eyes on the page.

Technological Protection Measures (TPM) – Technological protection measures are a form of digital rights management, also known as a ‘digital lock’. TPMs can hinder access to accessible formats, such as a text-to-speech function on an electronic reader. Countries that have laws that prohibit circumvention of TPMs will need to ensure that their laws have an exception or other accommodation for beneficiaries of the Marrakesh Treaty.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – The TRIPS Agreement is a World Trade Organization agreement that sets forth minimum standards on intellectual property for members of the

WTO. While the TRIPS Agreement includes minimum levels of protections, it also preserves a number of flexibilities in implementation. While the TRIPS Agreement provides minimum international standards, some countries have obligations to adhere to higher standards, also known as 'TRIPS-plus' standards, due to other treaties or trade agreements to which a country is a party. Countries that are considered 'least developed countries' (LDCs) have been granted several waivers, extending a grace period where their laws must comply with TRIPS. However, some LDCs have already implemented the minimum standards under TRIPS.

WIPO Copyright Treaty (WCT) – The WCT is an international treaty on copyright adopted by the World Intellectual Property Organization (WIPO) in 1996. It focuses on additional protections for copyright in the digital age. Among other issues, it requires parties to provide “adequate legal protection and effective legal remedies against the circumvention of technological measures that are used by authors in connection with the exercise of their rights...” Some parties have implemented this obligation by providing laws that prohibit the circumvention of technological protection measures. The Marrakesh Treaty requires that if a 'Contracting Party' is not a member of the WCT, authorized entities can export an accessible format copy only if it limits exceptions implementing the Treaty consistent with the three-step test within the copyright system.

Works – The Marrakesh Treaty defines works as published literary and artistic works in the form of text, notation and/or illustrations, whether published or otherwise made publicly available in any media. A footnote adds that the definition includes such works in audio form. While audiovisual works such as films do not fall within the definition of works, textual works embedded in audiovisual works (such as educational multimedia DVDs) would appear to fall within this definition.



Executive summary

This report is a Viet Nam edition of the regional report *Our right to knowledge: Legal reviews for the ratification of the Marrakesh Treaty for persons with print disabilities in Asia and the Pacific* published in 2015. The original report is intended to facilitate policy dialogue, legal reforms and community engagement in the Asia-Pacific region with respect to efforts to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the 'Marrakesh Treaty' or 'the Treaty') and ensure that those with disabilities can realize their rights guaranteed in international law.

Promoting the rights of those with disabilities is important in achieving development goals and ensuring greater equity in terms of access to information, education and employment. This report will provide important background regarding access to information and individuals with disabilities; discuss development issues; and provide legal recommendations to implement the Treaty in Viet Nam.

Access to information, including information commonly found in written texts, is fundamental to a number of recognized human rights including the rights to take part in society, participate in cultural life, enjoy the benefits of scientific progress, exercise freedom of opinion and expression, seek and impart information, and access education and employment opportunities. These rights are espoused in numerous human rights treaties, including the Convention on the Rights of Persons with Disabilities (CRPD) which provides concrete obligations in promoting the rights of persons with print disabilities. Those with disabilities often do not have necessary access to information, leading to serious development impacts including lower rates of education and employment and higher rates of poverty. Individuals with disabilities are also particularly susceptible in times of disaster.

The right to knowledge is critical in achieving the principle of "leaving no one behind" – a value at the core of the 2030 Agenda for Sustainable Development, which depends on eliminating poverty and exclusion and improving education and employment, including for those with disabilities. The Sustainable Development Goals (SDGs) provide specific recognition for those with disabilities, including empowering and promoting social, economic and political inclusion of all. In 2014, the World Blind Union - Asia Pacific (WBUAP) issued the Hong Kong Statement, calling upon governments to ratify the Marrakesh Treaty to promote access to works of literature, culture and to educational materials (See Appendix 2).

Addressing disabilities is an important development issue because of the link between disabilities and poverty. Those with disabilities are likely to face an adverse impact on education, employment and income. Developing countries are likely to see a growth of non-communicable diseases, such as diabetes, and an aging population, both of which increase the risk and prevalence of disabilities, including print disabilities. As a result, greater access to published works in accessible formats will become even more important.

This report discusses the challenges that those with print disabilities face, particularly with respect to the 'book famine', where the vast majority of published works are not made in an accessible format. It is estimated that less than 10 percent of all books are made in accessible formats, which can take various forms, including translation into braille, audio versions, and text-to-speech technology for works available electronically. This percentage is even smaller in low-income countries.

The report explains in depth the key features of the Marrakesh Treaty and the benefits these provisions would provide for those who are print disabled. The report reviews the context and the law and makes recommendations regarding legal reforms that are necessary in Viet Nam to comply with the Marrakesh Treaty.

Following many years of advocacy by the World Blind Union (WBU) and allied organizations and extensive negotiations at the World Intellectual Property Organization, culminating in a diplomatic conference, the international community adopted the Marrakesh Treaty in June 2013, which came into force in 2016. The Marrakesh Treaty requires Contracting Parties (that is, the countries that have ratified it) to adopt copyright exceptions that allow the creation and distribution, including cross-border exchange, of accessible format works. The key benefits of the Treaty result from the obligations to provide, under certain conditions, limitations and exceptions to allow:

- 1) the making of accessible format copies;
- 2) the domestic distribution of accessible format copies;
- 3) the export of accessible format copies (including by digital transmission); and
- 4) the import of accessible format copies (including by digital download).

Providing an exception to allow the domestic creation and distribution of accessible format works without authorization of the copyright owner should promote a greater number of works in accessible formats. Ultimately, the Marrakesh Treaty should help address the book famine by alleviating the shortage of domestically created works, and also save resources by avoiding duplication, through the enjoyment of cross-border exchange, provided that countries ratify and implement the provisions of the Treaty. Countries with smaller collections will be able to greatly benefit from existing and growing collections in other countries, particularly where a common language exists. Because the publisher typically is not selling accessible format copies in the developing country, it would not lose any revenue by virtue of the operation of the Treaty.

In providing a limitation or exception to allow the creation of accessible format works, the Marrakesh Treaty does not *require* Contracting Parties to limit the exception to cases where there is not a commercially available accessible format. Additionally, the Marrakesh Treaty requires Contracting Parties to adopt an exception to a circumvention prohibition to permit the creation of an accessible format copy or ensure the ability to circumvent the prohibition through other mechanisms.

The Marrakesh Treaty does not dictate how these goals are to be achieved; rather, it provides Contracting Parties with great flexibility concerning the implementation of these obligations. This flexibility allows each country to tailor its limitations and exceptions to its domestic context, taking into account, for example, its own legal traditions and support for persons with print disabilities. While detailed and robust limitations and exceptions that directly replicate the language of the Marrakesh Treaty may be appropriate in some circumstances, for many countries the context of their laws suggest that less complex amendments may be sufficient and appropriate.

Globally as of October 2018, there are 45 Contracting Parties to the Treaty, covering 70 countries, and only 7 in Asia.

Viet Nam ratified the CRPD in 2015 but has yet to become a Contracting Party to the Marrakesh Treaty. According to the 2009 census, people with disabilities represent 7.8 percent of Viet Nam's population. Those with disabilities in Viet Nam suffer from lower literacy, education and employment rates compared to the general population. The braille system in Viet Nam is derived from various languages, though it closely resembles French braille. Braille formats, however, remain unaffordable for many students and one report found that more than 50 percent of visually impaired students do not have the necessary books to study. While Viet Nam's copyright law (i.e. Law on Intellectual Property) does provide a specific exception for "transcription" of works into braille, this language will need to be broadened to apply to any accessible format.

Additionally, Viet Nam's copyright law should be amended to include a clear importation right for authorized entities and an exportation provision to facilitate cross-border exchange of accessible format works. The copyright law should also be amended to ensure that individuals who are blind, visually impaired or otherwise print disabled are effectively able to circumvent technological protection measures through the purchase of equipment capable of rendering digital works accessible.

In order to effectively implement the Marrakesh Treaty, making full use of the benefits of the Treaty is necessary. Ratification of the Treaty and providing adequate implementing legislation is not enough. While it will create the necessary legal framework to address the book famine, governments and organizations must be prepared to

support the creation and distribution of accessible format works, and ensure that cross-border exchange of these works takes place.

The report examines Viet Nam's copyright law and makes specific recommendations regarding implementing legislation. Additionally, Appendix 1 provides a model statute based on the text of the Marrakesh Treaty which Viet Nam may wish to rely upon in drafting their own implementing legislation, depending on the context of their existing laws.

Although this edition covers only Viet Nam, information and analyses contained in this report can also be useful to other countries seeking to promote development, address disabilities and implement the Marrakesh Treaty. Countries committed to the CRPD and the Sustainable Development Goals should seek to improve access to information for those with disabilities, and ratify and implement the Marrakesh Treaty.



Chapter

1

Background

A 2014 fact sheet by the World Health Organization estimated that 285 million people are visually impaired.¹ Approximately 90 percent of these visually impaired people live in developing countries.² Furthermore, as people age, many lose their vision and their rate of visual impairment increases: 82 percent of people with visual impairments are over the age of 50.³

These individuals are at a severe disadvantage compared to sighted people due to the fact the vast majority of works are not made available in an accessible format, such as braille, audio or large print. In addition to people with visual impairments, there are individuals with print disabilities who cannot effectively read because of physical, perceptual, developmental, cognitive or learning disabilities. These individuals are unable to receive information contained in most printed works.

The World Health Organization and World Bank's 2011 *World Report on Disability* noted the link between disability and poverty:

Disability is a development issue, because of its bidirectional link to poverty: disability may increase the risk of poverty, and poverty may increase the risk of disability. A growing body of empirical evidence from across the world indicates that people with disabilities and their families are more likely to experience economic and social disadvantage than those without disability.⁴

The report found that disability had an "adverse impact on education, employment [and] earnings" and that there were "increased expenditures related to disability".⁵ The decreased level of education leads to reduced employment opportunities, and even when they do find employment, people with disabilities generally earn less than those without disabilities.⁶ Thus, "[i]t is harder for people with disabilities to benefit from development and escape from poverty due to discrimination in employment, limited access to transport, and lack of access to resources to promote self-employment and livelihood activities."⁷ Additionally, people with disabilities "may have extra costs resulting from disability – such as costs associated with medical care or assistive devices..."⁸

The recent growth of aging populations and increased incidence of non-communicable diseases observed in many developing countries is expected to increase the rate of disabilities. "The increase in diabetes, cardiovascular diseases (heart disease and stroke), mental disorders, cancer, and respiratory illnesses, observed in all parts of the world, will have a profound effect on disability. They are estimated to account for 66.5 percent of all years lived with

1 World Health Organization, Fact Sheet No. 282, *Visual Impairment and Blindness* (August 2014), available from <http://www.who.int/mediacentre/factsheets/fs282/en/>. However, a 2011 joint report by WHO and World Bank estimated a higher number of people with visual impairments. The report estimated that 314 million people are visually impaired, with 45 million of these people completely blind (*World Report on Disability* (2011), p. 172). Some statistics and estimations may vary due to differences in methodologies.

2 Ibid.

3 Ibid.

4 World Health Organization and World Bank, *World Report on Disability* (2011), p. 10.

5 Ibid., p. 47.

6 Ibid.

7 Ibid.

8 Ibid.

disability in low-income and middle-income countries.⁹ Further, longer life expectancy means that the number of older people, and thus the number of people with age-related visual impairments, is likely to increase.

Governments should find ways to address the expected rise in the number of people with print disabilities and the challenges those with disabilities face with respect to poverty.

1.1 The 2030 Agenda for Sustainable Development: Leave no one behind

Promoting access to knowledge is critical to achieve human development and the principle of “leaving no one behind,” a value at the core of the 2030 Agenda for Sustainable Development:

“As we embark on this great collective journey, we pledge that no one will be left behind. Recognizing that the dignity of the human person is fundamental, we wish to see the Goals and targets met for all nations and peoples and for all segments of society. And we will endeavour to reach the furthest behind first.”

Recognising the fact that people with disabilities are being left behind with over 80 percent of them living in poverty¹⁰ and that they are often among the poorest of the poor,¹¹ the Sustainable Development Goals include specific recognition for those with disabilities. Goal 4.a, for example, calls for education facilities “that are child, disability and gender-sensitive.”¹²

With respect to Goal 10’s efforts to reduce inequality, the Sustainable Development Goals call to “empower and promote the social, economic and political inclusion of all irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status” by 2030.¹³ Although the Millennium Development Goals did not include explicit mention of disability, the Sustainable Development Goals recognize the importance of advancing the rights of those with disabilities.

The SDGs recognizes the importance of education, employment and inclusiveness, noting that particular attention should be paid to, among other things, ensuring that persons with disabilities are afforded opportunities for development. Without accessible format works, however, persons with print disabilities are disadvantaged with respect to these opportunities and face the continuous risk of being left behind of development gains.

1.2 The right to knowledge and information

Access to knowledge, including information commonly found in written texts, is fundamental to the development goals noted above. The right to information underpins a number of recognized human rights including, among other things, the rights to take part in society, participate in cultural life, enjoy the benefits of scientific progress, exercise freedom of opinion and expression, seek and impart information, and access education and employment opportunities.¹⁴

These rights have been recognized in numerous international instruments including the Universal Declaration on Human Rights; the International Convention on Economic, Social, and Cultural Rights (ICESCR); the International Convention on Civil and Political Rights (ICCPR); the Convention on the Rights of a Child (CRC); and, most recently, the Convention on the Rights of Persons with Disabilities (CRPD).

At its core, access to knowledge and information—and therefore to accessible format works for those with visual impairments or other disabilities—is a human right because such access is fundamental to attaining the numerous rights espoused in these treaties.

The right to knowledge is critical in the ability to realize fundamental rights including:

9 Ibid.

10 Transforming our world: the 2030 Agenda for Sustainable Development, <https://sustainabledevelopment.un.org/post2015/transformingourworld>

11 WHO, *Disabled often among the ‘poorest of poor’*, <http://www.who.int/bulletin/volumes/83/4/news0405/en/>

12 Sustainable Development Knowledge Platform, *Open Working Group Proposal for Sustainable Development Goals*, <https://sustainabledevelopment.un.org/sdgsproposal> (last visited 3 July 2015).

13 Ibid.

14 For specific provisions guaranteeing these rights in various international human rights treaties, see Appendix 3.

- **The right to information and to exercise freedom of opinion and expression¹⁵:** At their core, many of the human rights that would require persons with print disabilities to have works in accessible formats flow from this right. Without accessible format works, persons with disabilities may have difficulty in receiving or imparting information, particularly that which is found in text-based works, a necessity in exercising and expressing one's freedom of expression.
- **The right to take part in society¹⁶:** This right includes the ability and opportunity to participate within one's community and in a political and public life. Accessible format works are necessary to ensure that people have the information—including access to laws, regulations, news and other materials—necessary to inform decision-making, ensure dignity and promote self-reliance.
- **The right to participate in cultural life¹⁷:** This right inherently depends on access to works. Literature, news and media are fundamental aspects of culture and without accessible format works, persons with visual impairments or other disabilities may not be able to realize this right. By facilitating access to accessible format works, individuals with print disabilities are not only able to enjoy culture, but also to contribute to it, because new works often rely on the existence of old works.
- **The right to enjoy the benefits of scientific progress¹⁸:** Similar to the right to participate in cultural life, the right to enjoy the benefits of scientific progress is dependent upon access to accessible format works. Often, scientific progress is discussed or published in print format and understanding such progress can only be achieved through access to information. Additionally, because of advances in technology, accessible works exist in numerous formats, including refreshable braille systems and text-to-speech formats on electronic readers.
- **The right to education¹⁹:** Reliance on written materials places those with print disabilities at a disadvantage in realizing this right due to the fact that only a small fraction of works are available in an accessible format. Students with print disabilities may be unable to achieve the same level of education as other students because they lack equal access to course materials and are therefore unable to achieve full participation.
- **Right to employment opportunities²⁰:** Many employment opportunities rely on being able to access written materials. For example, employment opportunities may depend on job preparation: the ability to complete training programmes or participate in continuing education programmes requiring the use of information that may be found in texts. Moreover, one must be able to read job listings to know what jobs are available, and to read a job application in order to fill it out. Without access to information, persons with disabilities are denied equal opportunities to and an equal basis for employment.

In a recent report presented to the Human Rights Council in March 2015 by the UN Special Rapporteur in the field of cultural rights, Farida Shaheed recognized the importance of copyright limitations and exceptions to a human rights framework. The report stated, "A human rights perspective also requires that the potential of copyright exceptions and limitations to promote inclusion and access to cultural works, especially for disadvantaged groups, be fully explored."²¹

While access to information is a critical right that underpins many other fundamental rights, persons with disabilities often do not have such access, leading to serious human development impacts. A 2011 report by the World Health Organization found "significantly lower rates of primary school completion and fewer mean years of education than respondents without disability."²² In a 2004 study, it was estimated that in developing countries where the vast majority of persons who are blind or visually impaired live, only two percent of children with print disabilities receive education and no more than five percent will find employment.²³ As a result, poverty and visual impairments are closely linked. As the World Blind Union has noted:

15 See ICCPR, Article 18.1; ICCPR, Article 19; CRC Article 13.1; CRC Article 14.1; CRC Article 17; CRPD, Article 21.

16 See CRC, Article 23.1; CRPD, Article 29; CRPD, Article 9.

17 See ICESCR, Article 15.1; CRC, Article 31; CRPD, Article 30.

18 See ICESCR, Article 15.1.

19 See ICESCR, Article 13; CRC, Article 28.1; CRC, Article 29.1; CRPD, Article 24.

20 See ICESCR, Article 6; ICESCR, Article 1.1; CRPD, Article 27.

21 Shaheed, Farida. UN Special Rapporteur in the field of cultural rights, *Copyright policy and the right to science and culture*, A/HRC/28/57 (24 December 2014) ¶166.

22 World Health Organization, *World Report on Disability* (2011) at Figure 7.1, available from http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf?ua=1

23 Rowland, William. *Blindness, Poverty and Development*, World Blind Union (December 2004).

Poverty is both a cause and a consequence of blindness. Poverty and blindness reinforce each other, contributing to increased vulnerability and exclusion. The majority of blind people find that their situation negatively affects their chances of going to school, obtaining work, and enjoying family and social life. Problematic attitudes in society and lack of opportunity are the determining factors, and not lack of ability.²⁴

Persons who are blind or visually impaired, like other persons with disabilities, are at particular risk during disaster and conflict situations because of lack of preparation, planning, access to information, and access to rescue services.²⁵

The World Health Organization has noted, “disaster education materials, early warnings and information given to the public during a crisis are often not presented in formats that are accessible to people with disabilities, e.g. those with impaired vision or hearing” and that some “disaster management policies and practices may result in the exclusion of people with disabilities and older people unless specific efforts are made to include them.”²⁶ Lack of access to information perpetuates cycles of poverty and prevents persons with disabilities from progressing and achieving the right to development.

1.3 Convention on the Rights of Persons with Disabilities

In addition to being a critical component of achieving the broad rights discussed above, the right to accessible format works is a concrete obligation under the Convention on the Rights of Persons with Disabilities. Specifically, it requires that parties ensure intellectual property does not create unreasonable barriers to access to information.

The CRPD provides concrete obligations in promoting these rights for persons with print disabilities. The CRPD had 82 signatories when it opened for signature on 30 March 2007, earning this convention the recognition of the largest number of signatories to a UN convention on its opening day. It entered into force on 3 May 2008. The high number of signatures and quick ratification emphasized the international community’s increasing recognition of the importance of recognizing and advancing the rights of persons with disabilities. Viet Nam ratified the CRPD in 2015.

In addition, the CRPD supports the creation and distribution of accessible format works for persons who are print disabled by explicitly recognizing intellectual property barriers. Article 21, for example, mandates:

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

- a. Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- b. Accepting and facilitating the use of sign languages, braille, augmentative and alternative communication and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions...²⁷

Article 30.3 specifically references intellectual property barriers and obligates parties to:

take all appropriate steps in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.²⁸

Like other human rights instruments, the CRPD recognizes the importance of international cooperation.²⁹

²⁴ Ibid.

²⁵ See, e.g., United Nations, *Disability-Inclusive Disaster Risk Reduction and Situations of Risk* (13 October 2014), <http://www.un.org/disabilities/default.asp?id=1546>.

²⁶ World Health Organization, *Disaster Risk Management Fact Sheet, Disaster Risk Management for Health: People with Disabilities and Older People*, WHO Global Platform (May 2011), http://www.who.int/hac/events/drm_fact_sheet_disabilities.pdf.

²⁷ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, 76th plen. mtg., U.N. Doc A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD], Art. 21.

²⁸ Ibid., Article 30.3

²⁹ Ibid., Article 32.

The CRPD also provides for an optional protocol that recognizes the competence of the Committee on the Rights of Persons with Disabilities and creates an individual complaint mechanism for violations of the Convention.

1.4. Disability rights in Asia and the Pacific: the Decade of Persons with Disabilities and the Incheon Strategy

In November 2012, governments in the Asia-Pacific region launched a ten-year regional strategy to promote inclusiveness of persons with disabilities in society, entitled the Decade of Persons with Disabilities 2013–2022. In creating the Decade of Persons with Disabilities, governments in the region “aim... to accelerate realization of the rights of the estimated 650 million persons with disabilities in the region, the majority of them poor, disadvantaged and discriminated against.”³⁰

Soon after declaring this strategy, these governments adopted a specific framework for promoting the rights of persons with disabilities. Known as the Incheon Strategy to “Make the Right Real” for Persons with Disabilities in Asia and the Pacific, this framework is based on the principles found in the CRPD including, for example, respect for inherent dignity, individual autonomy, non-discrimination, full and effective participation and inclusion in society, equality of opportunity, and accessibility.³¹

The Incheon Strategy contains 10 goals, 27 targets and 62 indicators with the objective of achieving these goals by 2022.³² Several of the goals are highly relevant to ensuring that persons who are print disabled have access to accessible format works:

- Goal 1: Reduce poverty and enhance work and employment prospects
- Goal 2: Promote participation in political processes and in decision-making
- Goal 3: Enhance access to the physical environment, public transportation, knowledge, information and communication
- Goal 5: Expand early intervention and education of children with disabilities
- Goal 9: Accelerate the ratification and implementation of the Convention on the Rights of Persons with Disabilities and harmonization of national legislation with the Convention
- Goal 10: Advance subregional, regional and interregional cooperation.³³

As discussed above, employment opportunities, participation in the political process, access to knowledge and communication, and education are all critical rights dependent on the availability of accessible format works to persons with print disabilities.

In achieving these goals and ensuring that the rights of persons with disabilities are realized, the Incheon Strategy calls on governments to, for example, adopt and implement legislative and administrative measures and ensure “[p]ersons with disabilities have access to... knowledge, information and communication, in a usable manner, through universal design and assistive technologies with reasonable accommodation provided.”³⁴

Ratification of the Marrakesh Treaty would support the goals of the Incheon Strategy. In 2014, the World Blind Union - Asia Pacific (WBUAP) issued the Hong Kong Statement which “[c]all[s] upon governments throughout the Asia-Pacific region to ratify the Marrakesh Treaty at the earliest opportunity so that persons who are blind or partially sighted or who have other print disability, have full access to works of literature, culture and to educational materials.”³⁵

30 United Nations Economic and Social Commission for Asia and the Pacific, *Asia-Pacific governments launch new Decade of disability-inclusive development*, G/58/12, (1 Nov 2012), available from <http://www.unescap.org/news/asia-pacific-governments-launch-new-decade-disability-inclusive-development>

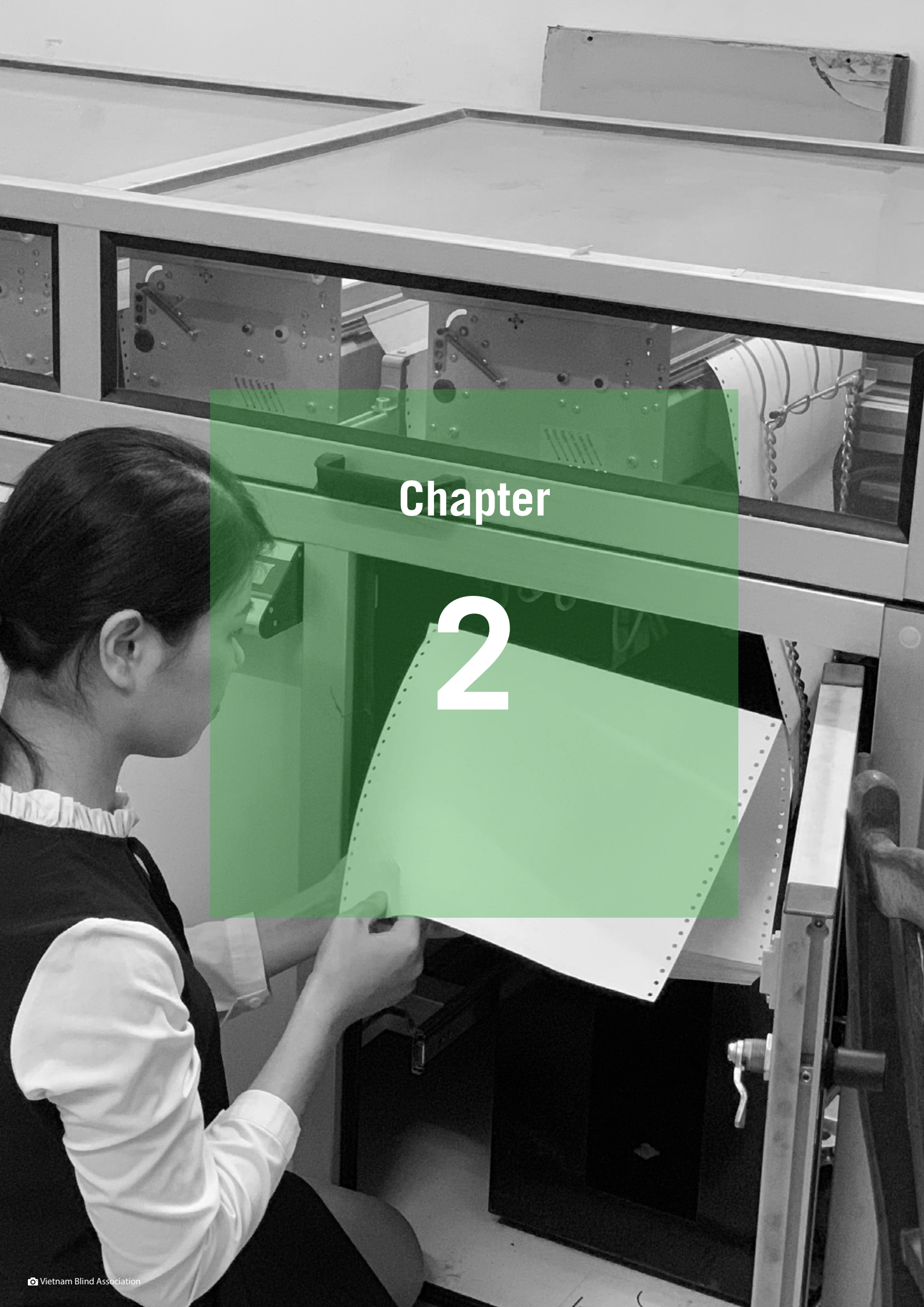
31 Incheon Strategy, p. 15.

32 Ibid., p. 8–9.

33 Ibid.

34 Ibid., p. 7.

35 World Blind Union - Asia Pacific (WBUAP), *Hong Kong Statement* (24 November 2014), available from <http://www.wbuapga2014.org/upload/editor/WBUAP%20Hong%20Kong%20Statement.pdf>.



Chapter

2

The Marrakesh Treaty

Key points:

- Those who are blind, visually impaired or otherwise print disabled face a serious shortage of accessible format works known as a 'book famine'. It is estimated that less than 10 percent of all books are made in accessible formats, which can take various forms, including transcription into braille, audio versions, or text-to speech technology for works available electronically. This percentage is even smaller in low-income countries.
- After extensive negotiations at the World Intellectual Property Organization (WIPO), culminating in a diplomatic conference, the international community adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the Marrakesh Treaty or 'Treaty') in June 2013,³⁶ which entered into force in September 2016.
- The Marrakesh Treaty requires Contracting Parties (that is, the countries that have ratified or acceded to it) to adopt copyright exceptions that allow the creation and distribution, including cross-border exchange, of accessible format works. The key benefits of the Treaty result from the obligations to allow under certain conditions, limitations and exceptions: 1) the making of accessible format copies; 2) the domestic distribution of accessible format copies; 3) the export of accessible format copies (including by digital transmission); and 4) the import of accessible format copies (including by digital download).
- Providing an exception to allow the domestic creation and distribution of accessible format works without authorization of the copyright owner should lead to a greater number of works in accessible formats. Ultimately, the Marrakesh Treaty should help address the book famine by alleviating the shortage of domestically created works and also save resources by avoiding duplication through the enjoyment of cross-border exchange, provided that countries ratify and implement the provisions of the Treaty. Countries with smaller collections will be able to greatly benefit from existing and growing collections in other countries, particularly where a common language exists. Because the publisher typically is not selling accessible format copies in the developing country, it would not lose any revenue by virtue of the operation of the Treaty.
- In providing a limitation or exception to allow the creation of accessible format works, the Marrakesh Treaty does not require Contracting Parties to limit the exception to cases where there is not commercially available accessible formats. Additionally, the Marrakesh Treaty requires Contracting Parties to adopt an exception to a circumvention prohibition to permit the creation of an accessible format copy or ensure the ability to circumvent the prohibition through other mechanisms.
- The Marrakesh Treaty does not dictate how these goals are to be achieved; rather, it provides Contracting Parties with great flexibility concerning the implementation of these obligations. This flexibility allows each country to tailor its limitations and exceptions to its domestic context, taking into account, for example, its

36 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted 27 June 2013, WIPO Doc. VIP/DC/8 Rev.

own legal traditions and support for persons with print disabilities. While detailed and robust limitations and exceptions that directly replicate the language of the Marrakesh Treaty may be appropriate in some circumstances, for many countries the context of their laws suggest that limited amendments may be sufficient and appropriate.

2.1 Background: Addressing the book famine

In order to promote access to knowledge and protect the fundamental human rights discussed above, it is essential to address barriers to accessible format works. Accessible formats can take various forms, including transcription into braille, an audio version, or text-to-speech technology for works available electronically. While these formats are necessary for the print disabled, only a small fraction of published books—estimated at less than 10 percent—are made in accessible formats.³⁷ This percentage is even smaller in low-income countries, resulting in a ‘book famine’ where persons who are print disabled have no access to the vast majority of works.³⁸

For those works that are distributed electronically, technological protection measures may be applied that prohibit the enablement of the text-to-speech function on an electronic reader.

This lack of accessible format works is largely a function of market forces. Publishers are not willing to bear the additional cost of creating accessible format copies for the relatively small and low-income market of people with print disabilities.

While there is an obvious market failure, copyright law may prevent entities that serve the print disabled from addressing this need. The works are covered by copyright, meaning that the entities that serve the print disabled may not adapt texts into accessible formats, unless they receive permission from the copyright owner (typically the publisher) or the copyright law in their country contains an exception that permits the creation of accessible format copies.³⁹

Even in countries with limitations and exceptions that allow entities to create and distribute copies in accessible formats, only a small fraction of existing works are adapted into accessible formats due to high production costs. In the United States, for example, the National Federation of the Blind estimates that no more than five percent of published works are available to the blind and print disabled.⁴⁰

Moreover, even where a work exists in a particular accessible format, it may not be available in the format a particular person with a print disability needs. For example, a work may be available in an audio format, but an individual who is deaf and blind may need a braille version.

Alternatively, a work may be available as text-to-speech on a particular electronic reader, but that reader may lack general accessibility features or the individual may own a different reader where the work is not available because the file is not interoperable between readers.

Because the creation of accessible format copies requires time, effort and cost, the creation and distribution of such copies should be done as efficiently as possible so as to maximize the number of accessible works. However, countries that share a common language generally do not share accessible formats that have been created.

Again, copyright law acts as an obstacle. Even if the copyright laws of two countries contain exceptions that permit the creation of accessible copies—for example, those of Australia and the United Kingdom—those exceptions might not permit the export or import of those copies. Thus, the cost of creating an accessible format of a work must be incurred in each country where the print disabled desire to read that work. Cross-border sharing would greatly increase efficiency and allow developing countries, which may have an even smaller percentage of accessible works available nationally, to benefit from the existing formats in other countries.

37 See, World Blind Union. Millions of People are Denied Access to Books and Printed Materials - Press Release for World Book and Copyright Day (23 April 2016), available from <http://www.worldblindunion.org/English/news/Pages/Millions-of-People-are-Denied-Access-to-.aspx>.

38 See, e.g., LaBarrem, Scott C., “Literacy Without Borders: The Road to Marrakesh”, *Braille Monitor* (August 2014), available from <https://nfb.org/images/nfb/publications/bm/bm13/bm1308/bm130811.htm>.

39 See, e.g., Shaheed, Farida. *Copyright policy and the right to science and culture*. (see footnote 27) ¶167 (“Disability advocates have long expressed concern that copyright law can impede the adaptation of works into format functional for people with disabilities when copyright holders fail to publish works in accessible formats, such as Braille, or allow others to do so.”)

40 National Federation for the Blind, *2015 Marrakesh Fact Sheet* (2015), <https://nfb.org/books-without-borders>.

The market failure represented by the book famine can be remedied by creating limitations and exceptions to copyright to allow the creation and distribution (including across borders) of accessible format works for persons who are print disabled. However, a 2007 World Intellectual Property Organization study found that only about one-third of countries had national copyright exceptions to this end, the majority of which were found in the developed world.⁴¹

The absence of copyright exceptions for the print disabled in two-thirds of countries led many to conclude that the most effective way to promote the adoption of exceptions in all countries, and thereby to end the book famine, was the adoption of a binding international treaty on minimum exceptions to copyright to permit the creation and distribution of accessible format works and to facilitate cross-border sharing of these formats. In 2011, the Special Rapporteur on the Right to Freedom of Expression and Opinion, Frank LaRue, urged WIPO Member States to agree to a binding treaty for persons with disabilities noting:

The digital age we now live in provides technology which could allow blind, partially sighted and other reading disabled people across the world to both receive and impart information regardless of frontiers, and therefore enjoy this human right fully.

This should be a wonderfully empowering development, helping reading disabled people to access information on an equal basis with others for the first time in history. However, the reality is starkly different. Blind and partially sighted people face a “book famine” in which the vast majority of books are never made into accessible formats like braille, audio or large print.⁴²

After extensive negotiations at WIPO, culminating in a diplomatic conference, the international community adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.⁴³ The Treaty harmonizes limitations and exceptions for the print disabled, obligating members to the Treaty to create minimum levels of exceptions to allow the creation and distribution of accessible format copies.

Fifty-one countries signed the Marrakesh Treaty on 28 June 2013, the day it opened for signature, a record number of signatures during a WIPO signing ceremony.⁴⁴ This signaled the commitment of the international community to overcoming the book famine and promoting the rights of the print disabled. The Marrakesh Treaty went into force on 30 September 2016. Globally as of October 2018, there are 45 Contracting Parties to the Treaty, covering 70 countries. In the Asia-Pacific region, only 7 countries so far have done so (Australia, Democratic People’s Republic of Korea, India, Mongolia, Republic of Korea, Singapore and Sri Lanka).⁴⁵ Continued ratifications and accessions by other countries worldwide is critical, to address barriers to accessible formats.

The UN Special Rapporteur in the field of cultural rights has recommended that states “ratify the Marrakesh Treaty... and ensure that their copyright laws contain adequate exceptions to facilitate the availability of works in formats accessible to persons with visual impairments and other disabilities, such as deafness.”⁴⁶

2.2 Key provisions and expected benefits

The Marrakesh Treaty requires Contracting Parties (that is, the countries that have ratified it) to adopt copyright exceptions that allow the creation and distribution, including cross-border exchange, of accessible format works. The key benefits of the Treaty result from the obligations to provide, under certain conditions, limitations and exceptions to allow:

- 1) the making of accessible format copies;
- 2) the domestic distribution of accessible format copies;

41 Sullivan, Judith. *WIPO Standing Committee on Copyright and Related Rights Study on Copyright Limitations and Exceptions for the Visually Impaired*, SCCR/15/7 (20 Feb 2007).

42 LaRue, Frank. WIPO Standing Committee on Copyright and Related Rights Declaration from the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (16 November 2011), available from <http://tacd-ip.org/archives/480>.

43 Marrakesh Treaty (see footnote 42)

44 Balasubramaniam, Thiru. 28 June 2013: 51 Signatories to the Marrakesh Treaty, Knowledge Ecology International. 28 June 2013. <http://keionline.org/node/1769> (Last visited 2 July 2013)

45 WIPO Contracting Parties to the Marrakesh Treaty. http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843

46 Shaheed, Farida. UN Special Rapporteur in the field of cultural rights, *Copyright policy and the right to science and culture*, A/HRC/28/57 (24 December 2014) ¶116.

- 3) the export of accessible format copies (including by digital transmission); and
- 4) the import of accessible format copies (including by digital download).

Significantly, the Marrakesh Treaty does not dictate how these goals are to be achieved; rather, it provides Contracting Parties with great flexibility concerning the implementation of these obligations. As Article 10(3) provides, “Contracting Parties may fulfill their rights and obligations under this treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof...”⁴⁷ This flexibility allows each country to tailor its limitations and exceptions to its domestic context, taking into account, for example, its own legal traditions and support for persons with print disabilities.

2.2.1 Definitions

As with any legal instrument, understanding the Marrakesh Treaty’s definitions are critical to understanding the Treaty’s scope. The most basic term is “**beneficiary person**”, the type of person the Treaty is intended to benefit.

Article 3 defines a beneficiary person as a person who is: a) blind; b) “has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works;” or c) “is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.”

Thus, the scope of who is a beneficiary person is significantly broader than blind people or even people with visual impairments. Footnote 3 further explains that the phrase “visual impairment or disability ... which cannot be improved” in Article 3(b) does not require “the use of all possible medical diagnostic procedures and treatments.” Thus, for example, any disabling visual impairment that cannot be improved by the use of corrective lenses should be understood to qualify.

The Treaty defines the type of works to which it applies. For purposes of the Treaty, “**works**” means published literary and artistic works in the form of text, notation and/or illustrations, whether published or otherwise made publicly available in any media.⁴⁸ Footnote 1 of the Treaty adds that this definition includes such works in audio form, such as audiobooks. Significantly, audiovisual works such as films do not fall within the definition of works, although textual works embedded in audiovisual works (such as educational multimedia DVDs) would appear to fall within the definition.

The Treaty then defines the formats into which these works can be converted. “**Accessible format copy**”⁴⁹ means a copy of a work in a form “which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.”⁵⁰ It further defines an accessible format copy as one “used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible...”⁵¹

The wording of the Marrakesh Treaty successfully avoids the ambiguity of whether an accessible format copy is a format *usable only* by a print-disabled person; “the accessible format copy is used exclusively by beneficiary persons” clearly refers to who is actually using the copy, not who is capable of using it. In this respect, the second sentence of Article 2(b) is not part of the definition of an accessible format copy, but rather a limitation on the uses of such a copy that are permitted under the Treaty. That is, the Treaty allows a Contracting Party to limit permissible distribution only to beneficiary persons or to prohibit editing or abridgment in ways beyond what the process of creating the accessible format copy requires, thereby ensuring that an author’s rights and interests are protected.

Finally, the Treaty defines the organization that will be making and distributing the accessible format copies as the “**authorized entity**”. An authorized entity is “an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis.”⁵² This definition permits a for-profit entity that is providing such education or information access to

47 Marrakesh Treaty (see footnote 42), Art. 10(3).

48 Ibid. Art. 2(a).

49 Accessible format copies can take a variety of forms including, but not limited to, DAISY format, braille, audio (such as works being read on a cassette tape, CD or digital format), or text-to-speech on an electronic reader.

50 Marrakesh Treaty (see footnote 42), Art. 2(b).

51 Ibid.

52 Ibid., Art. 2(c).

beneficiary persons to use the exceptions under the Marrakesh Treaty, provided that it is doing so on a non-profit basis. Footnote 2 elaborates that the phrase “entities recognized by the government” may include entities that receive financial support from the government for the purpose of providing services to beneficiary persons.

Furthermore, Article 2(c) provides that the term authorized entity “also includes a government institution or a non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations,” even if the organization is not specifically authorized or recognized by the government to do so. Thus, for example, both a specialized agency providing services to the blind and a general-service library with an institutional programme to promote accessibility would constitute authorized entities.⁵³

2.2.2 Making of accessible format copies

*The Marrakesh Treaty requires an exception to allow for the creation of accessible format copies for those who are blind, visually impaired or otherwise print disabled. No permission from the rightholder is necessary. The Marrakesh Treaty **does not** require that the limitation be restricted to cases where there is no commercially available accessible format.*

Article 4(1) of the Marrakesh Treaty requires Contracting Parties to provide in their national law an exception to the right of reproduction “to facilitate the availability of works in accessible format copies for beneficiary persons.”⁵⁴ Allowing the creation of accessible format works without requiring permission from the rightholder will promote a greater number and range of works available for persons who are print disabled.

Contracting Parties have significant flexibility in how they meet this obligation. Article 4(2) sets forth one way a Contracting Party can comply with Article 4(1), but Article 4(3) provides that Contracting Parties “may fulfill Article 4(1) by providing other limitations or exceptions in its national law.”⁵⁵ Thus, while a country may use Article 4(2) as a model for drafting legislation, a country may choose other language that is better suited to its legal traditions and context.

The Article 4(2) method of compliance has two subparts. First, consistent with Article 4(2)(a), an authorized entity would be permitted to make an accessible format copy, or obtain an accessible format copy from another authorized entity, and supply the copy to a beneficiary by any means, including non-commercial lending or electronic communication.⁵⁶ Second, consistent with Article 4(2)(b), the beneficiary person or someone acting on their behalf may make an accessible format copy for the use of the beneficiary person.⁵⁷

In providing a limitation or exception to allow the creation of accessible format works, the Marrakesh Treaty does not require Contracting Parties to limit the exception to cases where there is no commercially available accessible format.⁵⁸ This fact is significant. Even where an accessible format is available commercially, the work may not be in the particular format necessary for a specific individual. Additionally, a work may be available on one particular

53 Article 2(c) specifies that an authorized entity “establishes and follows its own practices” to establish that the people it is serving are beneficiary persons; to limit its distribution of accessible format copies to beneficiary persons or authorized entities; to discourage the reproduction and distribution of unauthorized copies; and to maintain due care in, and records of, its handling of copies of works. This provision concerning the establishment of practices appears not to be an element of the definition of “authorized entity,” but serves rather as a descriptive statement: authorized entities *generally* establish and follow these types of practices. Importantly, the authorized entity establishes its *own* practices; the Treaty does not contemplate rules being established for it by the government.

54 Marrakesh Treaty (see footnote 42), Art. 4(1).

55 *Ibid.*, Art. 4(3).

56 Four conditions would apply to this activity: (i) the authorized entity that is the source of the copy had lawful access to the work; (ii) the work is converted to an accessible format copy, which includes any means needed to navigate information in the copy, but does not introduce changes other than those needed to make the work accessible; (iii) the accessible format copy is supplied exclusively to be used by the beneficiary persons; and (iv) the activity is undertaken on a non-profit basis.

57 Marrakesh Treaty (see footnote 42), Art. 4(2)(b).

58 The Marrakesh Treaty does not require a commercial availability standard. Article 4(4) uses permissive language stating that a party *may* confine exceptions to works where an accessible format cannot be obtained commercially under reasonable terms. Where a country does implement a commercial availability standard, Article 4(4) provides that the accessible copy must be available under terms that are reasonable for beneficiary persons in that market. Thus, in a developing country, the accessible format copy must be available at a reasonable price for a beneficiary person in that country. In addition, the Marrakesh Treaty leaves it to “national law to determine whether limitations or exceptions under this Article are subject to remuneration.” A Contracting Party may therefore choose to implement this section by adopting a statutory license or through an absolute exception.

electronic reader, but the file may not be interoperable between readers. If there were a requirement involving commercial availability, it could make it harder to use the exceptions that allow the creation and distribution of accessible formats, given that searches for a commercially available copy could consume time and resources.

2.2.3 Domestic distribution of accessible format copies

The Marrakesh Treaty requires an exception to allow distribution of accessible formats for the blind, visually impaired or otherwise print disabled. Such distribution includes digital transmissions.

Article 4(1) also requires Contracting Parties to provide an exception to the right of distribution and making available to the public with respect to accessible format copies for beneficiary persons.⁵⁹ The phrase “making available” is understood to encompass digital transmission. The exception regarding domestic distribution of accessible format copies is subject to the same flexibilities noted above.

2.2.4 Export of accessible format copies

The Marrakesh Treaty requires a provision to allow authorized entities to export accessible format copies to a beneficiary person or another authorized entity. This Marrakesh Treaty does not require that export be limited to cases where there is no commercially available accessible format.

A key objective of the Marrakesh Treaty is to permit the cross-border distribution of accessible format copies. Because of the high cost of producing accessible format copies and the relatively low demand for many individual titles, the ability to share accessible format copies across borders would benefit the print disabled in both developed and developing countries.

Persons with print disabilities can benefit from the import of existing accessible format works in other countries, greatly increasing the number of works available. For cross-border distribution to occur, it must be lawful for an accessible format copy to be exported from the country in which it is made; and it must be lawful for that copy to be imported into the country in which it will be read by a print-disabled person.

Article 5(1) provides that a Contracting Party must permit an authorized entity to distribute (or make available by digital transmission) an accessible format copy made under an exception to a beneficiary person or an authorized entity in another Contracting Party.⁶⁰ In other words, the domestic copyright law of a Contracting Party must allow an authorized entity to export an accessible format copy to a beneficiary person or authorized entity in another Contracting Party.

Exporting accessible format works will help solve the book famine worldwide, allowing those works that have already been adapted to an accessible format to be accessed by persons with print disabilities in other countries. Authorized entities creating accessible formats will not need to waste resources through duplication of accessible formats that already exist.

The Marrakesh Treaty provides Contracting Parties with flexibility on how to implement this obligation, including setting forth one approach. Under Article 5(2), a Contracting Party may adopt an exception in its national copyright law that permits an authorized entity to distribute an accessible format copy to an authorized entity or a beneficiary person in another Contracting Party.⁶¹

During the Marrakesh Treaty negotiations, some delegations proposed the inclusion of a provision in Article 5 concerning commercial availability, which would have restricted the exportation of accessible format works to cases

⁵⁹ Marrakesh Treaty (see footnote 42), Art 4(1).

⁶⁰ Ibid., Art. 5(1).

⁶¹ This may occur only if “the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.”

where no accessible format were offered commercially. This provision was ultimately not included in the Treaty, allowing countries to export accessible format works regardless.

Article 5(4)(b) of the Marrakesh Treaty provides that if a Contracting Party is not a member of the WIPO Copyright Treaty (WCT), it can permit an authorized entity to export an accessible format copy only if it limits exceptions implementing the Treaty to “certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder”, known as the “three-step test”. The agreed statement regarding this article confirms that the provision does not impose a three-step test obligation beyond the scope of the Treaty’s provisions concerning exceptions for beneficiaries.

2.2.5 Import of accessible format copies

The Marrakesh Treaty requires a provision to allow authorized entities or beneficiary persons to import accessible format copies. This provision will allow those who share a common language to benefit from existing accessible format copies in other countries.

Article 6 of the Marrakesh Treaty contains a provision that is the matching bookend to Article 5. Just as Article 5 obligates Contracting Parties to permit authorized entities to export accessible format copies to authorized entities or beneficiary persons in other Contracting Parties, Article 6 obligates Contracting Parties to allow authorized entities or beneficiary persons to import accessible copies from other Contracting Parties.⁶²

Allowing the import of accessible format copies is a critical component in improving domestic access to accessible formats. Countries can take advantage of accessible formats that already exist in other countries, provided that a common language is shared or for those with print disabilities who are learning a new language.

2.2.6 Relationship with technological protection measures

The Marrakesh Treaty requires an exception to anti-circumvention provisions. This exception must permit authorized entities to make an accessible format copy or ensure the ability to circumvent a digital lock through other mechanisms. The Marrakesh Treaty does not require authorized entities to place a technological protection measure on an accessible format copy.

Article 7 of the Marrakesh Treaty provides that when a Contracting Party prohibits circumvention of technological protection measures in its general copyright legislation, it “shall take appropriate measures, as necessary, to ensure that ... this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.”⁶³ Thus, a Contracting Party must adopt an exception to a circumvention prohibition to permit an authorized entity to make an accessible format copy or ensure the ability to circumvent the prohibition through other mechanisms, for example, by requiring the rightholder to provide the authorized entity with a key to open the digital lock.

The agreed statement to Article 7 notes that an authorized entity may choose to apply a technical protection measure to an accessible format copy, but the **Treaty does not require this practice.**

2.2.7 Additional provisions

Article 8 of the Marrakesh Treaty provides that Contracting Parties “shall endeavor to protect the privacy of beneficiary persons on an equal basis with others.”⁶⁴ This provision should be viewed as a floor and not a ceiling.

⁶² Marrakesh Treaty (see footnote 42), Art. 6.

⁶³ Ibid., Art. 7.

⁶⁴ Ibid., Art. 8.

Even in countries with few privacy protections, authorized entities should be encouraged to protect the privacy of the reading habits of the beneficiaries of the Treaty.

Article 10 of the Marrakesh Treaty underscores the flexibilities Contracting Parties have in how they implement the treaty.⁶⁵ Article 11, however, stresses that the flexibility to implement the Marrakesh Treaty is limited by existing treaty obligations. Particularly relevant for most countries is the Berne “three-step test”⁶⁶ and the formulations of the test found in the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the WIPO Copyright Treaty.

It is understood that if a Contracting Party’s implementation closely follows the provisions of the Treaty, for example its definitions and the provisions of Article 4(2), the implementation would satisfy the requirements of the three-step test.

Article 12(1) states that Contracting Parties may adopt additional copyright exceptions for the benefit of beneficiary persons “having regard to that Contracting Party’s economic situation, and its social and cultural needs, in conformity with that Contracting Party’s international rights and obligations, and in the case of a least developed country taking into account its special needs and its particular international rights and obligations and flexibilities thereof.”⁶⁷ This provision provides benefits, for example, to least developed countries that have been granted waivers of compliance with TRIPS provisions or to developing countries that may make use of the Berne Appendix.⁶⁸

Article 12(2) provides that the Treaty is without prejudice to other limitations and exceptions for those with disabilities.

2.2.8 Key overall benefits of the Marrakesh Treaty

Providing an exception to allow the domestic creation and distribution of accessible format works without authorization of the copyright owner should promote a greater number of works being made available to persons with print disabilities. By not requiring remuneration to the copyright owner, the Marrakesh Treaty envisions the possibility of lower costs as licence fees will not need to be paid. Furthermore, by removing any requirement that permission be sought from the copyright owner, a significant transactional cost is eliminated.

Additionally, allowing for the import and export of accessible formats, without copyright owner permission, can help avoid the duplication of time and resources in different countries. Countries with smaller collections will be able to greatly benefit from existing and growing collections in other countries, particularly where a common language exists. For example, in the Asia-Pacific region, many residents of different countries share languages such as English, Chinese, Bengali, Bahasa and Malay; works created in these languages can be shared with beneficiary persons in the countries where these languages are used. Additionally, some specialized schools for the blind and visually impaired place an emphasis on teaching English to its students; beneficiaries of the Treaty would benefit from the ability to import works from countries with large existing collections in English, such as the United States and other countries.

Ultimately, the Marrakesh Treaty should help address the book famine by alleviating the shortage of domestically created works and also save resources by avoiding duplication through the enjoyment of cross-border exchange provided that countries ratify and implement the provisions of the Treaty.

Significantly, the Treaty’s approach of making an exception to copyright law is the least costly means of addressing the book famine from the perspective of governments and copyright owners. Governments could enact laws requiring publishers to produce accessible format copies of the works they publish. This obviously would impose

65 Article 10(2) states that “[n]othing shall prevent Contracting Parties from determining the appropriate method of implementing the provisions of the Treaty within their own legal system and practice.” Furthermore, Article 10(3) provides that “Contracting Parties may fulfill their rights and obligations under this Treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof, within their national legal system and practice.” Article 10(3) adds that these exceptions or limitations “may include judicial, administrative, or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses to meet their needs...”

66 Berne Convention, Article 9(2) provides, “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

67 Marrakesh Treaty (see footnote 42), Art. 12.

68 Cambodia and Nepal qualify as least developed countries.

significant costs on the publishers. Alternatively, a government could undertake to create accessible format copies themselves, which would be costly for the government.

Instead, the Marrakesh Treaty simply allows authorized entities to make and distribute accessible format copies at their own expense. It further allows authorized entities and print-disabled individuals to import, including by digital download, accessible format copies created in other countries. Thus, the Marrakesh Treaty would allow an authorized entity, or a print-disabled person, in a developing country to download an accessible format copy produced by an authorized entity in a developed country. And because publishers typically do not sell accessible format copies in developing countries, they would not lose any revenue by virtue of the operation of the Treaty.

It is acknowledged that if the authorized entities in a developing country lacked funds, they would not be able to take full advantage of the Treaty because they would not have the resources to produce accessible format copies of domestically published books in local languages. Nonetheless, they would be able to assist print-disabled people to obtain accessible format copies from better-resourced authorized entities in other countries. This would represent a significant improvement over the status quo.

2.3 Necessary conditions for ratification and implementation

To successfully address the book famine, governments, libraries, educational institutions, and other organizations will need to take advantage of domestic provisions to deliver accessible format works to persons with disabilities. Doing so will require the development of capacity. Institutions serving the print disabled will need to be created and funded, technology purchased, and personnel trained. Such developments obviously will take time.

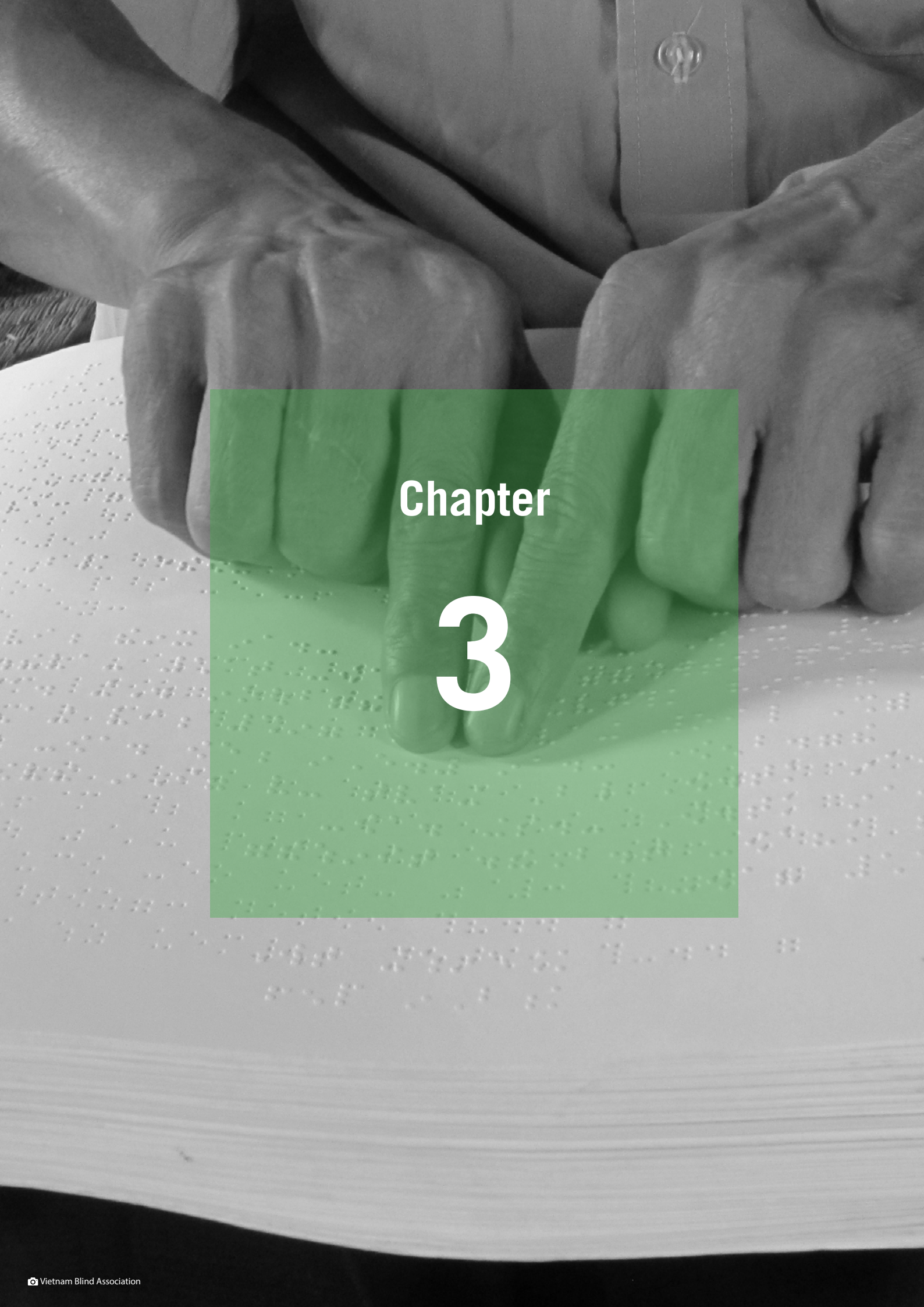
However, from a technical and legal point of view, there are no impediments to the immediate ratification and implementation of the Treaty. Viet Nam is already part of the international copyright treaty system is already a member of the Berne Convention or of the World Trade Organization (WTO), which means the country is covered by the TRIPS Agreement. Viet Nam already has a copyright law, and means of enforcing them, that comply with those international obligations.

The Marrakesh Treaty simply requires the adoption of an appropriate exception to these domestic copyright laws. While those working at institutions that currently serve the print disabled would need to be educated about the new exception's provisions, they would be able to begin making and distributing accessible format copies the day the exception takes effect.

Implementing legislation can take different forms. Appendix 1 to this document contains one method of implementation, which involves robust language that largely replicates language from the Marrakesh Treaty itself.

However, many countries already have some form of a copyright limitation or exception addressing those who are blind, visually impaired or otherwise print disabled. While these limitations and exceptions may not currently be sufficient to satisfy the requirements of the Marrakesh Treaty, they can form the basis for appropriate limitations and exceptions.

The context and structure of the current copyright law of Viet Nam is taken into account and reflected in the recommended amendments. While detailed and robust limitations and exceptions that directly replicate the language of the Marrakesh Treaty may be appropriate in some circumstances, the context of the law suggest that less complex amendments may be sufficient and appropriate.



Chapter

3

Review of Viet Nam's situation

Key points:

- Viet Nam ratified the CRPD on 5 February 2015. It is not a signatory to the Marrakesh Treaty.
- Currently, it is estimated that there are about 7 million people with disabilities in Viet Nam, including more than 1 million people who are blind or partially sighted. Those with disabilities in Viet Nam have lower literacy, education and employment rates compared to the general population.
- Viet Nam has a number of organizations and institutions to support people with disabilities that provide a wide range of services including education, early care programs for those with visual impairments, and publication of accessible formats such as braille, audio and large print.
- The braille system in Viet Nam is derived from various languages, though it closely resembles French braille. There was an effort in 2001 to unify the braille codes, which had been absorbed in different ways by different organizations. Braille formats are unaffordable for many students. One report found that more than 50 percent of visually impaired students do not have the necessary books to study. Thus, while there is a national organization as well as many local organizations and entities serving the blind and visually impaired, a serious shortage of resources remains.
- While Viet Nam's copyright law (i.e. Law on Intellectual Property) does provide a specific exception for "transcription" of works into braille, this language will need to be broadened to apply to any accessible format. Additionally, Viet Nam's copyright law should be amended to include a clear importation right for authorized entities and an exportation provision to facilitate cross-border exchange of accessible format works. The copyright law should also be amended to ensure the provision regarding anti-circumvention of technological measures does not impair the rights of beneficiary persons to accessible format works.

3.1 Background

Disability rights and laws in Viet Nam

Viet Nam's constitution provides that "Citizens have the right to work and to choose their occupations, employment and workplaces."⁶⁹ Additionally, in June 2010, Viet Nam enacted a comprehensive disability law, mandating that

⁶⁹ Constitution of the Socialist Republic of Vietnam (amended and supplemented, 2013), Art. 35.

people with disabilities have a right “to participate on an equal basis in social activities,” and providing for, among other things, accommodation and access to education, employment, vocational training and cultural services.⁷⁰

Viet Nam further confirmed a commitment to promoting the rights of people with disabilities, ratifying the Convention on the Rights of Persons with Disabilities on 5 February 2015. These recent commitments to promoting the rights of those with disabilities are encouraging developments and should provide evidence of a policy supportive of accession to and implementation of the Marrakesh Treaty.

People with Print Disabilities in Viet Nam

According to the latest Census (conducted in 2009), 7.8 percent of the population aged 5 years and above live with disability. Within this population, vision disabilities were found to be one of the most prevalent types of disability,⁷¹ accounting for 14 percent.⁷² Currently, it is estimated that there are about 7 million people with disabilities in Viet Nam,⁷³ including more than 1 million people who are blind or partially sighted.

Vietnamese people with disabilities have a lower literacy, education and employment rate compared to the general population. A 2011 study by the United Nations Population Fund, based on the 2009 census report in Viet Nam, found that people with visual disabilities only had a 76.6 percent literacy rate, compared to 95.2 percent for those without disabilities.⁷⁴ Those that are blind reported a literacy rate of only 38.5 percent, with an even lower rate of just 19.9 percent for youths aged 15 to 24, resulting in UNFPA concluding that “more attention and support are needed in education for the youth [with disabilities].”⁷⁵

Of children with visual impairments aged 6 to 10, only 71.3 percent were enrolled in school and 26.8 percent had never attended school; for children who are blind, only 12 percent had attended school.⁷⁶ In comparison, non-disabled children had a 97.8 percent rate of attendance with only 2.2 percent reporting that they had never attended.⁷⁷

The rate of employment for people with visual impairments was 75.5 percent and just under 21 percent for the blind, compared to 82.7 percent for those without disabilities.⁷⁸

These disparities in literacy, education and employment rates are even higher for individuals with multiple disabilities.⁷⁹

Organizations and entities providing assistance to People with Disabilities

There are a number of organizations and institutions to support people with disabilities in Viet Nam. According to a 2002 report, the Research and Education Center for Disabled Children of Ho Chi Minh City “manages the 20 special education schools within the City and some vocational activities in some provinces in the South and the North, trains teachers, implements early care programs for visually impairment holders, publishes braille books and holds cultural festivals for classes with children with disabilities.”⁸⁰ Additionally, the National Fund for Job Creation loaned 27.2 billion VND to create jobs for blind people and an additional 8 billion VND for other people with disabilities.⁸¹

70 Law on Persons with Disabilities (2010), No. 51/2010/QH12.

71 UNFPA (2011). People with Disabilities in Viet Nam. Key Findings from the 2009 Viet Nam Population and Housing Census. <https://vietnam.unfpa.org/en/publications/people-disabilities-viet-nam> <https://vietnam.unfpa.org/en/publications/people-disabilities-viet-nam>

72 Ministry of Labours, Invalids and Social Affairs (2009). Report on reviewing the implementation of the Ordinance on Disabled Persons of Ministry of Labours, Invalids and Social Affairs. Available at http://nccd.molisa.gov.vn/attachments/075_Baocaotongket.doc

73 Government of Viet Nam (2018). Viet Nam Initial State Report on the Implementation of the United Nations Convention on the Rights of Persons with Disabilities. Available at https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/VNM/CRPD_C_VNM_1_8348_E.pdf

74 Ibid., p. 58.

75 Ibid., pp. 27, 58.

76 Ibid., p. 60.

77 Ibid.

78 Ibid., p. 62.

79 Ibid.

80 Vietnam Country Report, The 9th ASEAN & Japan High level officials meeting on Caring Societies: “Human Resource Development in the sectors of Welfare and Health with a focus on capacity building of service providers and employability promotion of vulnerable people,” (25–28 October 2011), p. 20 (citing Nakanishi, Yukiko, Ajiataiheyio no shougaiha no kyouiku (Education for Person with Disabilities in the Asia Pacific, <http://www.din.or.jp/~yukin/ED.html>).

81 Ibid.

Several organizations are specifically targeted at assisting persons who are blind or visually impaired, including the Viet Nam Blind Association, which, in 2002, was the only national organization of persons with disabilities.⁸² The Vietnam Blind Association, in its 2013–2014 report, stated that it had 52 blind associations nationwide and more than 66,000 members (almost double of its membership of 35,000 in 2002) and that education is a “major activity” for the organization.⁸³

In 2006, a DAISY For All focal point was established, and it trained participants—including the Vietnam Blind Association (VBA), the Training and Rehabilitation Center for the Blind, the Hanoi Blind Association, the Hai Duong Blind Association and the Hue Blind Association—to use DAISY production tools to create DAISY files and digital audio books.⁸⁴ The Nguyen Dinh Chieu School for Blind Children participates in the production of accessible formats including braille, audio and large print formats.⁸⁵

Despite the fact that there are organizations that provide services to individuals with visual impairments, as noted above, there are still significant challenges that result in lower literacy, educational and employment rates. One of the reasons for this may be the fact that while the braille system was introduced in Viet Nam in 1898, the “codes were developed and absorbed in unique ways ... result[ing] in many variations in using the Braille codes from organizations to educational centers. Therefore, visually impaired people in Vietnam faced many difficulties in learning Braille.”

In 2001, to address this problem, the International Council for Education of People with Visual Impairments (ICEVI) organized a conference to unify the Vietnamese Braille codes.⁸⁶ While advancements have been made to unify the braille codes which would make the necessary codes more widely available, “[c]ommunication tools for persons with disabilities such as Braille letter boards [and] cassette tapes ... are still limited and expensive.”⁸⁷ A 2006 proposal for a national braille production center in Viet Nam confirmed:

The Braille textbook is still an unaffordable commodity for the visual impairment students in Vietnam. The organizations, educational centers and special schools for the visually impaired children prepare Braille books for their own students by manual methods. Only few special schools have mini Braille presses to emboss the Braille text. And they have not provided enough Braille books for their own students. Following the statistical record of the [Ministry of Education and Training (MOET)], more than 50 percent of visually impaired students still do not have the basic books to study. They are going to class without Braille books or sharing the Braille books with their visually impaired friends in the special school or studying with the help of their sighted peers in integrated schools...

Furthermore, as inclusive education is fast growing, when the ideal of inclusive education is implemented, demand for Braille books for children with visual impairment in general classrooms are increasing. And there is a real need to make cost effective Braille book production centers in Vietnam so that all children and adults with visual impairment can afford ... Braille books.⁸⁸

Thus, while there is a national organization as well as many local organizations and entities serving the blind and visually impaired, a serious shortage of resources remains.

3.2 Copyright law in Viet Nam

Viet Nam is a party to the Berne Convention and a member of the World Trade Organization (WTO), but has not yet joined the WCT (WIPO Copyright Treaty – see Glossary). However, it is party to the Comprehensive and Progressive

82 Japan International Cooperation Agency, Planning and Evaluation Department, Country Profile on Disability: Socialist Republic of Vietnam (March 2002).

83 Country Report of the Vietnam Blind Association (2013–2014), <http://wbuap.org/index/mid-term-general-assembly-2014/vietnam-country-report>

84 DAISY, DAISY For All: Vietnam, <http://www.daisy.org/daisyforall/vietnam> (last visited 15 May 2015). For more information about the DAISY For All project, see footnote 233.

85 CBM, *Programme: Nguyen Dinh Chieu School for Blind Children*, <http://www.cbm.org/programmes/Nguyen-Dinh-Chieu-School-for-Blind-Children-303237.php> (last visited 1 April 2015).

86 Nguyen Van Khoa, 'Building a cost-effective Braille book production System in Vietnam', International Council for Education of People with Visual Impairments, E032, p. 1. available from http://icevi.org/publications/icevi_wc2006/01-access&inform_ation_technology/papper/ea_032_khoa.pdf

87 Japan International Cooperation Agency, Planning and Evaluation Department, Country Profile on Disability: Socialist Republic of Vietnam (MARCH 2002).

88 Nguyen Van Khoa, 'Building a cost-effective Braille book production System in Vietnam', (see footnote 297), p. 2.

Agreement of the Trans-Pacific Partnership (CPTPP), a large regional trade agreement, with 11 parties.⁸⁹ As will be discussed in greater detail below, the CPTPP requires Viet Nam to amend its copyright laws, including the possibility of being required to accede to the WCT and change its laws

Viet Nam's current copyright law (i.e. Law on Intellectual Property) conforms with its rights and obligations under the Berne Convention and TRIPS Agreement, including the enforcement of intellectual property rights and remedies for infringement.

While Viet Nam's copyright law does provide a specific exception for "transcription" of works into braille, this language will need to be broadened in order to comply with the Marrakesh Treaty. Additionally, Viet Nam's copyright law should be amended to ensure that cross-border sharing may be done and that its laws prohibiting circumvention of technological measures do not impair the rights of beneficiary persons to accessible format works.

Creation and distribution of accessible formats

Under current copyright law in Viet Nam, authors have the economic right to make derivative works.⁹⁰ However, a specific exception to copyright exists for the creation of at least a braille format for the blind. Article 25.1(i) provides that it is not necessary to seek permission or provide remuneration for "Transcription of works into braille or characters of other languages for the blind."⁹¹

This exception clearly provides for an exception for the creation of accessible formats in braille, though what "characters of other languages for the blind" encompasses is not clearly defined. Considering that braille was not standardized in Viet Nam until after 2001, it is possible that this language was designed to permit the creation of accessible formats into multiple codes. This exception, focusing on braille or "characters of other languages for the blind" does not appear to permit the creation of other accessible formats such as audio or large print, which may be necessary. Additionally, this exception applies only to the blind and may not include those who are visually impaired or those with other print disabilities.

As a result, the current exception is much narrower than provided for by the Marrakesh Treaty. In order to comply with the Treaty and take full advantage of its provisions, the text of Article 25 should be amended to expand the scope of the beneficiary and type of the accessible format copy that may be created.

In providing for this exception, Viet Nam's law does not explicitly provide for the distribution of accessible format copies. In order to fully comply with the Marrakesh Treaty, the law should be clarified to permit distribution, which in the context of the Treaty, includes digital transmissions of accessible format copies.

Importation and exportation

Article 20 provides authors with the economic right of distribution and importation.⁹² Article 28 further provides that it is an infringement of copyright to export, import or distribute works without permission of the copyright holder.⁹³ However, Article 25 provides for an exception, permitting the importation of copies for personal use.⁹⁴

Thus, beneficiary individuals of the treaty could use the personal importation provision to import accessible format works from other countries. However, Article 25 does not appear broad enough to permit authorized entities to import works. It also does not allow an authorized entity to export an accessible format copy.

Viet Nam should therefore amend its law to provide authorized entities the ability to import and export accessible format works.⁹⁵ This is a critical component not only to comply with the Marrakesh Treaty, but also to ensure that the full advantages of the treaty can be realized.

⁸⁹ The current parties to the CPTPP are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam.

⁹⁰ Law on Intellectual Property, No. 50 2005/QH11 (November 29, 2005), as amended by Law No. 36/2009/QH12 (June 19, 2009), and Law No. 19/2013/VBHN-VPQH (December 18, 2013).

⁹¹ *Ibid.*

⁹² *Ibid.*, Art. 20.1(d).

⁹³ *Ibid.*, Art. 28.16.

⁹⁴ *Ibid.*, Art. 25.1(j). This provision, like 25.1(i) which permits the creation of a braille copy, is subject to the requirement that it does not affect the normal use of the work or cause prejudice to the copyright holder.

⁹⁵ Vietnam is not a member of the WCT and therefore must comply with Article (5)(4)(b) of the Marrakesh Treaty. The recommended amendment to the Vietnamese copyright law is sufficiently narrow to meet the three-step test obligation under Article 5(4)(b).

Technological protection measures

Article 198, which applies to all forms of intellectual property rights, permits rightholders “to protect their intellectual property rights” by “applying technological measures to prevent acts of infringing upon intellectual property rights.”⁹⁶ It appears to apply only to prevent acts of infringement, however, and the making of an accessible format work could be interpreted as not infringing copyright.

Furthermore, while Article 198 provides a right to apply a technological protection measure, there is no provision prohibiting circumvention of these measures and remedies appear to apply only to infringement.

Article 28, which focuses specifically on copyright, prohibits the “manufacturing, assembling, transforming, distributing, importing, exporting, selling or leasing equipment when knowing or having grounds to know that such equipment may deactivate technical solutions applied by copyright holders to protect copyright to their works.”⁹⁷

While Article 28's prohibition does not apply directly to the act of circumvention, it does prohibit the manufacture, distribution, and importation of devices that can circumvent technological protection measures. This provision could be problematic in implementation of the Marrakesh Treaty as it may be necessary to overcome protection measures that are placed on digital works.

Article 28 places a broad prohibition on the manufacture and distribution of such devices, seemingly applying to all cases where there is knowledge of or grounds to know that the device or equipment “may deactivate” technological protection measures. Effectively, this provision would prevent individuals who are print disabled from being able to purchase devices designed to overcome technological measures to make works accessible.

There does not appear to be specific provisions in Viet Nam's copyright law expressly permitting circumvention or exceptions or limitations to allow the manufacture, distribution, importation or sale of devices that can circumvent technological protection measures, even for non-infringing uses.

Viet Nam's current status as a party to the CPTPP, and the likely changes to copyright law that will be required, should be taken into account in considering amendments for successful implementation of the Marrakesh Treaty.

Notably, the CPTPP's language on limitations and exceptions includes recognition of facilitating access to works for persons who are blind, visually impaired or otherwise print disabled, including a footnote specifically referencing the Marrakesh Treaty.⁹⁸

Viet Nam's copyright law should therefore be amended to ensure that technological protection measures do not prevent beneficiary persons from enjoying the limitations and exceptions under the Marrakesh Treaty. Additionally, the law should be amended to allow for the manufacture, distribution and importation of devices or equipment to overcome technological protection measures and enable the use of technology to make works accessible; individuals may not be able to overcome technological protection measures without the use of devices designed to make works accessible.

3.3 Conclusion and recommendations

Viet Nam should amend its copyright law to broaden its provision on the creation and distribution of accessible format works. Its law appears to be limited to braille and should be broadened to apply to any accessible format. Additionally, Viet Nam should provide a clear import right for authorized entities and an exportation provision to facilitate cross-border exchange of accessible format works. Furthermore, its law should clarify that beneficiary persons can circumvent technological protection measures.

96 Law on Intellectual Property (see footnote 301), Art. 198.1(a).

97 Ibid., Art. 28.14.

98 See Article 18.66: Balance in Copyright and Related Rights Systems and its footnote #78 <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/18.aspx?lang=eng>



In the following tables, the left column contains the current language of the copyright law while the right column contains recommended amendments to the current law. Text that is underlined represents new text, while text that is crossed out represents language that should be removed. Only suggested amendments to the current law are included in the right column.

Creation and distribution of accessible format works

Current law	Recommended amendments
<p>Article 25 1. Cases of use of published works where permission or payment of royalties and/or remuneration is not required include:</p> <p>[...]</p> <p>i/ Transcription of works into Braille or characters of other languages for the blind;</p>	<p>Article 25 1. Cases of use of published works where permission or payment of royalties and/or remuneration is not required include:</p> <p>[...]</p> <p>i/ <u>Creation and distribution of works into accessible format copies</u> Braille or characters of other languages for the blind, <u>visually impaired or otherwise print disabled</u>;</p> <p>2. Organizations and individuals that use works defined in Clause 1 of this Article must neither affect the normal utilization of such works nor cause prejudice to rights of the authors and/or copyright holders; and must indicate the authors' names, and sources and origins of the works.</p>
<p>Comment</p>	
<p>In order to comply with the Marrakesh Treaty, this exception needs to be broadened to ensure that accessible formats are not restricted to braille and can be made in a variety of necessary formats. The term “accessible format copies” is a term taken directly from the Marrakesh Treaty.</p> <p>Additionally, the Marrakesh Treaty is designed to serve not only the blind, but also those who are visually impaired or have other print disabilities, such as those who have a perceptual or reading disability, or have a physical disability preventing them from holding a book or turning its pages. The recommended additions of the terms “visually impaired” and “print disabled” appropriately extend the exception in accordance with the obligations of the Marrakesh Treaty.</p> <p>Viet Nam’s current law provides for a number of limitations and exceptions, including this article to allow the creation of a braille format for a person who is blind. However, the law does not explicitly also allow for distribution. It is possible that the chapeau to Article 25, providing that these are “cases of use” that do not require permission or remuneration, could be interpreted as also applying to distribution. However, in order to comply with the obligations of the Marrakesh Treaty, it is recommended that Article 25.1(i) be amended to permit distribution of accessible format copies.⁹⁹</p>	

⁹⁹ In explicitly including distribution in this provision, it may be desirable to include a savings clause to ensure that the inclusion of the term in subparagraph (i) does not prejudice the other limitations and exceptions under Article 25.

Importation and exportation

Current law	Recommended amendments
<p>Article 28 – Acts of infringing upon copyright [...]</p> <p>16. Exporting, importing, or distributing of works without permission of copyright holders</p> <p>Article 25 1. Cases of use of published works where permission or payment of royalties and/or remuneration is not required include: [...]</p> <p>j/ Importation of copies of others' works for personal use.</p>	<p>Article 25 1. Cases of use of published works where permission or payment of royalties and/or remuneration is not required include: [...]</p> <p>j/ Importation of copies of others' works for personal use <u>or for the benefit of the blind, visually impaired or otherwise print disabled.</u></p> <p>k/ <u>Exportation of copies of accessible format copies by the government, non-profit entities or other institutions that provide services to the blind, visually impaired or otherwise print disabled.</u></p>
<p>Comment</p>	
<p>In order to comply with the Marrakesh Treaty, entities that serve the print disabled as well as individuals who are blind, visually impaired or otherwise print disabled must be permitted to import works. Article 25.1(j) should be amended to allow entities that serve the blind, visually impaired or print disabled, as well as individuals acting on behalf of a person needing an accessible format, to import accessible copies of works.</p> <p>Viet Nam's copyright law should also include an amendment, either to Article 25.1(j) or through a new provision, Article 25.1(k), to allow the government, non-profit entities and other institutions that serve the intended beneficiaries of the Marrakesh Treaty to export accessible format copies. Cross-border exchange is a key feature of the Marrakesh Treaty and should be utilized to address the book famine.</p>	

Technological protection measures

Current law	Recommended amendments
<p>Article 28 – Acts of infringing upon copyright [...]</p> <p>14. Manufacturing, assembling, transforming, distributing, importing, exporting, selling or leasing equipment when knowing or having grounds to know that such equipment may deactivate technical solutions applied by copyright holders to protect copyright to their works.</p> <p>Article 198</p> <p>1. Intellectual property right holders shall have the right to apply the following measures to protect their intellectual property rights:</p> <p>a/ Applying technological measures to prevent acts of infringing upon intellectual property rights;</p> <p>[...]</p>	<p>Article 28 – Acts of infringing upon copyright [...]</p> <p>14. Manufacturing, assembling, transforming, distributing, importing, exporting, selling or leasing equipment when knowing or having grounds to know that such equipment may deactivate technical solutions applied by copyright holders to protect copyright to their works, <u>other than where such equipment is used to create an accessible format copy of a work.</u></p> <p>Article 198</p> <p>1. Intellectual property right holders shall have the right to apply the following measures to protect their intellectual property rights:</p> <p>a/ Applying technological measures to prevent acts of infringing upon intellectual property rights;</p> <p>[...]</p> <p>Article X <u>Technological measures may be circumvented to create or access an accessible work for the blind, visually impaired or otherwise print disabled.</u></p>
Comment	
<p>The addition to Article 28.14 is an important clarification to ensure that individuals who are blind, visually impaired or otherwise print disabled are effectively able to circumvent technological protection measures through the purchase of equipment capable of rendering digital works accessible. Additionally, a new Article X provides one method of ensuring compliance with Article 7 of the Marrakesh Treaty. Parties to the Marrakesh Treaty have an obligation to ensure that any anti-circumvention measures do not prevent beneficiaries of the Treaty from enjoying the limitations and exceptions discussed above.</p> <p>There are different ways of ensuring compliance with the Marrakesh Treaty and the recommended text here is merely one method of ensuring that beneficiaries can enjoy the limitations and exceptions that allow the creation and distribution of accessible format works and cross-border exchange of accessible copies.</p>	



Chapter

4

Summary and ways forward

Ending the book famine is one important component in promoting the rights of those who are blind, visually impaired or otherwise print disabled and achieving the Sustainable Development Goals. Access to knowledge and information is critical in achieving the many human rights discussed above. Ratification and implementation of the Marrakesh Treaty offers a concrete way to implement certain provisions of the CRPD and translate the spirit of human rights documents into reality for those who are print disabled. While there are 45 Contracting Parties to the Marrakesh Treaty covering 70 countries as of October 2018, it will be critical for countries worldwide to continue ratification efforts to address the book famine.

The more countries that ratify the Treaty and effectively implement its provisions, the more successful efforts will be to ensure that those with print disabilities have access to knowledge and information. Countries that have ratified the Marrakesh Treaty with strong implementing legislation will not only be able to create and distribute accessible format works domestically, but can share them across borders with those in other countries that speak common languages.

Developing countries including Viet Nam will be able to greatly benefit from the ability to import works from countries with larger existing collections. Because some schools for the blind and visually impaired focus on teaching English, students in these countries will benefit from the collections of accessible formats in the United States and other English-speaking countries. It is therefore important to have a large number of countries ratifying and implementing the Marrakesh Treaty.

The Marrakesh Treaty provides minimum limitations and exceptions, requiring parties to the Treaty to permit the creation and distribution of accessible formats, the ability to import works, and the ability for authorized entities to export accessible works. These requirements can be implemented in a number of ways. While some countries may find it appropriate to use language closely modeled on the actual text of the Marrakesh Treaty,¹⁰⁰ other countries may find it more appropriate to have shorter and simpler language, to be consistent with their current laws and fit into their laws' current structure.

Regardless of whether implementing legislation is constructed with more or less detailed language, it is important to understand the differences between what the Marrakesh Treaty requires and what it permits. Critically, the Marrakesh Treaty does not impose any requirements that the benefits of the treaty be restricted to cases where there is no commercially available accessible format.

Countries that introduce implementing legislation should make use of this flexibility preserved in the Marrakesh Treaty and avoid including a standard of commercial availability. Inclusion of such a standard would impair the ability to use the exceptions provided for under the Marrakesh Treaty, as it could lead to more time and resources spent on determining whether a commercially available accessible format exists. Additionally, the availability of an accessible copy in one format may not be the format that is needed by the individual that needs access to the particular work. For example, not all beneficiaries of the Marrakesh Treaty read braille.

Additionally, an accessible format file on one electronic reader may not be interoperable with the electronic reader used by the individual in need of the work. Thus, it is unnecessary to create additional hurdles to the creation and

¹⁰⁰ See Appendix 1 for a model statute based on language from the text of the Marrakesh Treaty.

distribution of accessible formats. Parties to the Marrakesh Treaty should avoid implementing new standards of commercial availability into their laws, without serious consideration of the harms that such provisions would cause.

Meanwhile, while some authorized entities may want to place technological protection measures on formats that they distribute, the Marrakesh Treaty does not impose such an obligation.

While the recommendations in the report reflect the current status of each country's laws, particularly with respect to anti-circumvention provisions and technological protection measures, it is important to recognize that free trade agreements and other treaties may require changes to domestic laws that could have impacts on the Marrakesh Treaty. Provisions in these agreements and treaties regarding intellectual property often go beyond what is required by the TRIPS Agreement or other international treaties such as the Berne Convention or the WCT.

In these cases, parties to the Marrakesh Treaty will have to take care to ensure that anti-circumvention provisions do not impair the rights granted under the Treaty. A provision that explicitly permits circumvention for the creation of an accessible format copy would satisfy the obligation of the Marrakesh Treaty, though some countries may prefer a broader exception that permits circumvention for legitimate purposes that are allowed under the domestic law.

Providing the ability to circumvent technological protection measures is critical in ensuring that digital copies of works, including works that are born digital, do not pose additional barriers to the creation and distribution of accessible formats. It may be advisable for countries to include an explicit provision permitting circumvention of technological protection measures, even where they do not have existing obligations regarding anti-circumvention measures, to ensure that their laws will remain compliant with the Marrakesh Treaty, even if they later join an agreement imposing anti-circumvention obligations.

In signing agreements regarding intellectual property protection that goes beyond what is required by international law, countries should ensure that the provisions do not hamper access to affordable assistive technologies and devices for the blind, such as braille, printers, digital readers and other devices. While the recommendations in this report are intended to guide implementation of the Marrakesh Treaty given the current status of each country's domestic laws, additional provisions may be necessary should the country's current copyright laws change.

Ratification of the Marrakesh Treaty and implementing legislation to comply with the requirements of the Treaty are important first steps in creating an appropriate legal framework, but effective implementation requires that beneficiaries and authorized entities make use of the legislation. Organizations that serve the blind, visually impaired or otherwise print disabled must take advantage of the benefits of the Marrakesh Treaty to create and distribute accessible format works, including distribution across borders.

Realizing the right to knowledge of persons with print disabilities and ending the book famine constitute key elements for achieving inclusive, sustainable and equitable development in Viet Nam. The Marrakesh Treaty will be an effective instrument to guide governments, community organizations and development partners to pursue the spirit and principle of "leaving no one behind" firmly enshrined in the Sustainable Development Goals.

Appendices

Appendix 1: Model Statute for Implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled

Jonathan Band and Peter Jaszi

The Marrakesh Treaty provides Contracting Parties with great flexibility concerning the implementation of its obligations.¹ As Article 10(3) provides, “Contracting Parties may fulfill their rights and obligations under this treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof...” Article 4(2) sets forth one way a Contracting Party may meet its obligation under Article 4(1) to permit the making and distribution of accessible format copies domestically. Likewise, Article 5(2) sets forth one way a Contracting Party may meet its obligation under Article 5(1) to permit the cross-border exchange of accessible format copies. Below is a model statute for implementing the framework of Articles 4(2) and 5(2) in domestic law. We are not suggesting that this necessarily is the best approach for achieving the Treaty’s objective of increasing the availability of accessible format copies to the print disabled. Rather, this approach may be the most politically feasible for countries that do not already have an exception for the print disabled in domestic law because it hews so closely to the Treaty text.

SECTION X -- EXCEPTION FOR THE MAKING AND DISTRIBUTION OF ACCESSIBLE FORMAT COPIES

X.1 Definitions

For the purposes of this Section:

- (a) “works” means literary and artistic works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media, including such works in audio form;
- (b) “accessible format copy” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to navigate and have access as feasibly and comfortably as a person without visual impairment or other print disability, and which respects the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;
- (c) “authorized entity” means
 - (i) an entity that is authorized or recognized by [the government], or receives financial support from [the government], to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, or
 - (ii) a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.
- (d) A “beneficiary person” means a person who:
 - (i) is blind;
 - (ii) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

¹ The text of the Marrakesh Treaty is at http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf. For an explanation of Treaty, see Jonathan Band, “A User Guide to the Marrakesh Treaty,” <http://www.librarycopyrightalliance.org/bm~doc/user-guide-marrakesh-treaty-0913final.pdf>.

(iii) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading;

regardless of any other disabilities.

X.2 The Making and Distribution of Accessible Format Copies

- (a) An authorized entity is permitted, without the authorization of the copyright rightholder, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, when all of the following conditions are met:
- (i) the authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work;
 - (ii) the work is converted to an accessible format copy;
 - (iii) such accessible format copies are supplied exclusively to be used by beneficiary persons; and
 - (iv) the activity is undertaken on a non-profit basis.
- (b) An authorized entity meets requirements of subsection (a)(iii) when it establishes and follows its own practices:
- (i) to establish that the persons it serves are beneficiary persons;
 - (ii) to limit to beneficiary persons and/or authorized entities its distribution and making available of accessible format copies; and
 - (iii) to maintain due care in, and records of, its handling of copies of works.
- (c) A beneficiary person, or someone acting on his or her behalf (including a primary caretaker or caregiver), is permitted to make an accessible format copy of a work for the personal use of the beneficiary person or otherwise to assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.

X.3 Cross-Border Exchange of Accessible Format Copies

- (a) An authorized entity is permitted, without the authorization of the rightholder,
- (i) to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity in another country; and
 - (ii) to distribute or make available accessible format copies to a beneficiary person in another country; provided that prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.
- (b) An authorized entity, a beneficiary person, or someone acting on his or her behalf (including a primary caretaker or caregiver), is permitted, without the authorization of the rightholder, to import an accessible format copy, including by electronic communication by wire or wireless means.

X.4 Technological Measures [if circumvention of technological measures is prohibited]

An authorized entity, a beneficiary person, or someone acting on his or her behalf, is permitted, without the authorization of the rightholder, to circumvent effective technological measures exclusively for the purpose of enjoying the exceptions provided for in this Section.

X.5 Respect for Privacy

An authorized entity shall respect the privacy of beneficiary persons when providing services under this Section.

In addition to this statutory text, it may be appropriate for the legislature or an appropriate government agency to adopt findings or issue a statement stressing that the Section is intended to promote the making and distribution of accessible format copies, including across borders. Furthermore, authorized entities acting pursuant to the provisions of this Section could be encouraged to share information, solely on a voluntary basis, with the World Intellectual Property Organization International Bureau in an effort to assist authorized entities in identifying one another and thereby creating greater international exchange of accessible format copies.

September 25, 2013

Appendix 2: World Blind Union – Asia Pacific (WBUAP) Hong Kong Statement

We the participants at the WBUAP Mid-Term Regional General Assembly (Assembly) in Hong Kong, 24th November, 2014,

1. Call upon all governments throughout the Asia-Pacific region (region) to ratify the Marrakesh Treaty at the earliest opportunity so that persons who are blind or partially sighted (blind) or who have other print disability, have full access to works of literature, culture and to educational materials.
2. Welcome the opportunity to co-operate with the United Nations (UN) Development Programme to build capacity across the region so that persons who are blind or who have print disability are able to advocate for greater access to information.
3. Encourage development organisations to work with governments to support data collection, develop disability inclusive policies and strategies to progress the action plan of the Incheon Strategy.
4. Urge all governments and relevant bodies throughout the region to make all efforts toward the speedy ratification and effective implementation of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). In particular, prioritize to ensure the full and effective participation of persons with disabilities and their representative organizations in strengthening independent monitoring mechanisms, given that fewer than half of the countries in the world who have ratified the UNCRPD have presented country and shadow reports to the UN.
5. Being moved by the enthusiasm and strong determination, expressed by women who are blind through the Women's Forum, campaign for the acceleration of women with disabilities' empowerment programmes, in accordance with the Asian and Pacific inter-government Ministerial Declaration on Gender Equality and Women's Empowerment (UNESCAP, 2014).
6. In recognition of challenges and opportunities faced by youth who are blind in this region, and the tremendous success of the Youth Forum held during this Assembly in stimulating innovation and social entrepreneurship among youth of the region, it is recommended that:
 - a youth forum be held at future regional assemblies, and
 - the World Blind Union (WBU) be requested to hold an international youth summit.
7. Call upon all governments, businesses and other global partners to take the necessary steps to ensure that essential technologies are available, accessible and affordable to persons who are blind in the region, as it is through such technology that real inclusion can be advanced and social isolation eliminated.
8. Initiate and implement a web accessibility campaign at the regional level to promote the adoption of internationally recognised accessibility standards in web design, APPs, e-learning and other ICT products and services; in consultation with organizations of the blind.
9. Undertake to actively share best practice initiatives and programmes in areas of fundraising and capacity development.
10. Noting the high levels of unemployment and under employment of persons who are blind in the region, task all governments to implement programs that enable full participation in open employment including education programs for employers and the community, transition to employment programs and the provision of specialist equipment schemes by the government.
11. In recognising that social enterprises have demonstrated their impact in creating employment for persons who are blind, in changing public attitudes and in generating funds to further the cause of the movement for people who are blind, the Assembly urges the WBUAP and WBU to establish a task force to investigate how social enterprises can be promoted and advanced.



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United Nations Development Programme

Viet Nam Country Office

304 Kim Ma, Ba Dinh, Ha Noi

Email: registry.vn@undp.org

Tel: (+84 4) 38 500100

Fax: (84-4) 37265520

Web: <http://www.vn.undp.org/>