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Not the African Copyright Pirate Is Perverse, But the Situation in Which (S)he Lives-Textbooks for Education, Extraterritorial Human Rights Obligations, and Constitutionalization "From Below" in IP Law

Klaus Beiter

North-West University (South Africa), klausbeiter@hotmail.com

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CONSTITUTIONALIZATION “FROM BELOW”
IN IP LAW

*Klaus D. Beiter**

Student: “Piracy? To deny access simply because of resources, that’s ridiculous in this day and age. So, kudos to the author for his textbook, but I need a degree. Sorry!”¹

Another student: “Fears about illegal copying? No, worried about graduating.”²

* Klaus D. Beiter, B.Iur. LL.B. (UNISA, Pretoria), Dr. iur. (LMU Munich); Associate Professor, Faculty of Law, North-West University, Potchefstroom, South Africa; Affiliated Research Fellow, Max Planck Institute for Innovation and Competition, Munich, Germany. This Article is based on research supported in part by the National Research Foundation of South Africa (Grant Number: 111697).

¹ Eve Gray & Laura Czerniewicz, *Access to Learning Resources in Post-Apartheid South Africa*, in SHADOW LIBRARIES: ACCESS TO KNOWLEDGE IN GLOBAL HIGHER EDUCATION 107, 141–42 (Joe Karaganis ed., 2018) (citing examples of South African higher education students’ non-responsiveness to anti-piracy rhetoric in the context of educational materials; student statement slightly adapted here).

² *Id.* at 142 (student statement slightly adapted here).

ABSTRACT

Printed textbooks remain crucial for education, particularly in developing countries. However, in many of these countries, textbooks are unavailable, too expensive, or not accessible in learners' native tongues. Digital content, for many reasons, does not prove a wondrous solution. Cheaply (translating and) reproducing textbooks would be a strategy. However, reprography is highly regulated under copyright law. Copyright also adds to the cost of textbooks. The availability, accessibility, and acceptability of learning materials constitute essential elements of the right to education under international human rights law. Intellectual property (IP) law has so far refrained from endorsing the concept of extraterritorial state obligations (ETOs) under international human rights law (IHRL), that is, of states, in appropriate circumstances, bearing human rights obligations toward those living beyond their own territory. This reluctance is regrettable if it is borne in mind that most IP, including copyright law originates at the international level, where each state plays a role in designing rules that may affect the lives of those in other countries. ETOs could assume a key function in "civilizing"—as it were, "constitutionalizing"—IP law. This Article will demonstrate the significance of ETOs for IP law by focusing on the issue of how the right to education under IHRL prescribes requirements that international copyright law must comply with to facilitate access to textbooks in schools and universities. Drawing on the expert Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 2011, and applying the well-known tripartite typology of state obligations to respect, protect, and fulfill human rights, the ETOs concept will be introduced and twenty typical ETOs under the right to education in the international copyright context that safeguard access to printed textbooks will be identified. A final central aim of the Article will be to explain how exactly, within international law as a unified system, ETOs can lead to a "constitutionalization" of IP law. Although the discussion relates to issues of accessibility in developing countries more generally, the dire situation of access to textbooks in education in Africa strongly motivated this research.

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I. COPYRIGHT LAW AND ACCESS TO TEXTBOOKS IN DEVELOPING COUNTRIES

Printed textbooks are crucial for education, particularly in developing countries. Hard-copy materials remain important in schools and universities.³ Not denying the educational value of digital texts, research shows that in-depth understanding still requires browsing through and marking sections in printed texts.⁴ Furthermore, in developing countries, information and communication technology often is not available or accessible: “[L]evels of both computer ownership (and computer use or access) and Internet access . . . are far below those found in rich, industrialised countries.”⁵ Hence, only one in five people in Sub-Saharan Africa used the internet in 2017.⁶ Constraints result from lack of electricity, computer illiteracy, high costs of internet services, and the difficulty of provision in rural areas.⁷ Other problems of accessibility relate to the fact that, generally, open access is not a common feature, peer-to-peer platforms are not quite legal, access is restricted by technological protection measures (TPMs) which summarily negate permissible copyright limitations and exceptions, and the circumvention of TPMs is often a crime. Altogether, therefore, digital content does not prove to be a wondrous solution, wherefore the textbook remains important. It remains “extremely important” in the countries of the global South.⁸

However, “[t]extbooks are a rare commodity in most developing countries. One book per student (in any subject) is the exception, not the rule, and the rule in most classrooms is, unfortunately, severe scarcity or

³ See SUSAN ISIKO ŠTRBA, INTERNATIONAL COPYRIGHT LAW AND ACCESS TO EDUCATION IN DEVELOPING COUNTRIES: EXPLORING MULTILATERAL LEGAL AND QUASI-LEGAL SOLUTIONS 202 (2012) (“[D]eveloping countries depend primarily on printed copies of copyrighted works, as opposed to electronic works, for educational purposes. Therefore, the textbook represents the most important source of information.”); Caroline B. Ncube, *Using Human Rights to Move Beyond Reformism to Radicalism: A2K for Schools, Libraries and Archives*, in Critical Guide to Intellectual Property 117, 129 (Mat Callahan & Jim Rogers eds., 2017) (“In the Global South . . . bulk hard copies [of learning materials] are required.”).

⁴ The Evolution of Reading in the Age of Digitisation (E-READ) research network, an Action of the European Cooperation in Science and Technology, the latter funded by the European Union, in its Stavanger Declaration concerning the Future of Reading of January 2019, thus refers to its research findings showing that, when compared to reading in print, “reading digitally . . . in particular when under time pressure, lead[s] to more skimming and less concentration on reading matter.” It is also stated that “[a] meta-study of 54 studies with more than 170.000 participants demonstrates that comprehension of long-form informational text is stronger when reading on paper than on screens, particularly when the reader is under time pressure.” E-READ COST, Stavanger Declaration concerning the Future of Reading, <https://ereadcost.eu/wp-content/uploads/2019/01/StavangerDeclaration.pdf>.

⁵ Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 Hous. L. Rev. 763, 797 (2003).

⁶ See Daniel Gerszon Mahler, Jose Montes & David Newhouse, *Internet Access in Sub-Saharan Africa*, No. 13 Poverty & Equity Notes 1 (World Bank, Mar. 2019) (relying here on data of the International Telecommunications Union).

⁷ *Id.* at 4.

⁸ Story, *supra* note 5, at 797.

the total absence of textbooks.”⁹ Where textbooks are available in developing countries, they are often very expensive, and, accordingly, unaffordable. A newspaper article of 2014 thus reported for South African university students the high cost of textbooks meant that many students could not buy all the books they needed for their studies.¹⁰ Some textbooks may be available, but not in the relevant local languages in which they are needed. As for Africa, UNESCO notes for reading books in children’s languages a scarcity in all African languages and the virtual absence of books in many key languages.¹¹ All this is problematic, of course, where access to textbooks is held covered by the human right to education.

The lack of access to textbooks in developing countries has many reasons. There is a lack of reliable data on student enrollments; teaching and learning material systems are poorly managed due to a lack of trained manpower or good communication facilities; in upper secondary and higher education there is a continued dependence on expensive imported textbooks; financing is “inadequate, irregular, and unpredictable”;¹² and distribution and school storage systems are dysfunctional.¹³ Moreover, textbook procurement is uncompetitive and bribery by suppliers not uncommon.¹⁴ However, copyright must also be considered a reason inhibiting access to textbooks.¹⁵

⁹ PERNILLE ASKERUD, A GUIDE TO SUSTAINABLE BOOK PROVISION 16 (UNESCO, 1997). This remains true today. For Sub-Saharan Africa, *see, e.g.*, UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, EDUCATION FOR PEOPLE AND PLANET: CREATING SUSTAINABLE FUTURES FOR ALL 190 (UNESCO, 2016), https://unesdoc.unesco.org/ark:/48223/pf0000245752_eng (“In some sub-Saharan African countries, few primary school students have personal copies of textbooks.”) [hereinafter UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016]; INT’L COMM’N ON FIN. GLOB. EDUC. OPPORTUNITY, THE LEARNING GENERATION: INVESTING IN EDUCATION FOR A CHANGING WORLD 66 (2016), https://report.educationcommission.org/wp-content/uploads/2016/09/Learning_Generation_Full_Report.pdf (“[I]n many [Sub-Saharan African] countries, textbooks are underfunded, priced too high, unavailable to many students, or poorly used.”).

¹⁰ Bongani Nkosi, *Students Hurt by Pricey Textbooks*, MAIL & GUARDIAN (Oct. 3, 2014), <https://mg.co.za/article/2014-10-03-students-hurt-by-pricey-textbooks>.

¹¹ UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, *supra* note 9, at 190 (referring to an inventory of reading materials from eleven Sub-Saharan African countries).

¹² TONY READ, WHERE HAVE ALL THE TEXTBOOKS GONE? TOWARD SUSTAINABLE PROVISION OF TEACHING AND LEARNING MATERIALS IN SUB-SAHARAN AFRICA 13 (World Bank, 2015).

¹³ *See id.* (mentioning these and other reasons for the Sub-Saharan African context).

¹⁴ INT’L COMM’N ON FIN. GLOB. EDUC. OPPORTUNITY, *supra* note 9, at 66–67.

¹⁵ Various publications have addressed the conflict between copyright and access, or the right, to education in the past. In lieu of many sources, *see, e.g.*, SARA BANNERMAN, INTERNATIONAL COPYRIGHT AND ACCESS TO KNOWLEDGE 53–79 (2016); Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 U.C. Davis L. Rev. 803 (2007); GRAHAM DUTFIELD & UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 282–98 (2008); Sharon E. Foster, *The Conflict between the Human Right to Education and Copyright*, in INTELLECTUAL PROPERTY LAW AND

Where textbooks are unavailable, too expensive, or not available in relevant local languages, their cheap (translation and) reproduction by governments, educational institutions, or libraries would be a solution. However, “[r]eprography, which, from a developmental perspective, could facilitate access is often seen from the perspective of ‘piracy’ and is highly regulated.”¹⁶ Copyright also affects the price at which textbooks can be provided.¹⁷ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires World Trade Organization members to put in place a system of copyright protection in accordance with most of the provisions of the Berne Convention for the Protection of Literary and Artistic Works of 1971.¹⁸ Under the Berne Convention, the reproduction and translation of literary and artistic works are the exclusive rights of the copyright holder.¹⁹ Anyone else seeking to reproduce or translate such works, or larger portions thereof, requires the copyright holder’s consent. Copyright holders might not be traceable or refuse consent. Where they grant consent, they usually require the payment of a licensing fee. Especially in the developmental context, these factors tend to impede access to textbooks. The exact extent of copyright as an impeding factor in relation to other impeding factors is difficult to assess. Yet, one must agree with Laurence Helfer and Graeme Austin, where they state that, “[e]ven so, analysis . . . must also take account of situations in which intellectual property law may make a real difference to the provision of learning materials, and, in turn, the realization of the human right to education.”²⁰

HUMAN RIGHTS 333 (Paul L.C. Torremans ed., 3d ed. 2015); LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 316–63 (2011); ROBIN RAMCHARAN, INTERNATIONAL INTELLECTUAL PROPERTY LAW AND HUMAN SECURITY 65–71 (2013); Melissa Staudinger, *A Textbook Version of the Doha Declaration: Editing the TRIPS Agreement to Establish Worldwide Education and Global Competition*, 55 IDEA: INTELL. PROP. L. REV. 319 (2015); Alan Story, *Don’t Ignore Copyright, the “Sleeping Giant” on the TRIPS and International Educational Agenda*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 125 (Peter Drahos & Ruth Mayne eds., 2002).

¹⁶ RAMCHARAN, *supra* note 15, at 65.

¹⁷ HELFER & AUSTIN, *supra* note 15, at 318.

¹⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Part II, Section 1 (Copyright and Related Rights), Art. 9(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (entered into force Jan. 1, 1995) [hereinafter TRIPS].

¹⁹ Berne Convention for the Protection of Literary and Artistic Works, Arts. 8, 9(1), Sept. 9, 1886, revised at Paris July 24, 1971, 1161 U.N.T.S. 3 (entered into force Dec. 15, 1972), and amended Sept. 28, 1979 (Article 8 provides for the author’s exclusive right of translation, and Article 9(1) for the author’s exclusive right of reproduction) [hereinafter Berne Convention].

²⁰ HELFER & AUSTIN, *supra* note 15, at 357. *See also* Story, *supra* note 5, at 799 (“[C]opyright problems take a clear second or third place as an access hurdle. Nevertheless, copyright definitely creates a further barrier to access.”). Specifically in addressing higher education, *see* COMM’N ON INTELL. PROP. RTS. (CIPR), INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 103 (Sept. 2002 Report of the U.K. CIPR, 3d ed. 2003) (“[C]opyright is not the only issue . . . but high prices of books and materials . . . are still important parts of a worsening crisis.”) [hereinafter COMM’N ON INTELL. PROP. RTS., 2002 Report].

International copyright law does make provision for certain limitations and exceptions to copyright protection to safeguard the public interest in access to works that enjoy copyright protection, also for educational purposes. However, as the discussion will show, limitations and exceptions relevant to education hardly countenance the bulk provision of learning materials, this, as it were, being what is needed in developing countries. Moreover, the compulsory licensing scheme under the Appendix to the Berne Convention, conceived to serve bulk provision for educational purposes in developing countries, has proven ineffective in practice.

II. CONSTITUTIONALIZING IP LAW THROUGH EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS

More than twenty years ago, Philip Altbach remarked that

[t]he time has come to recognize that the production of books and journals is more than a business, and that trade in knowledge and knowledge products is somehow different than commerce in automobiles or coconuts. Those who control knowledge distribution have a *responsibility* to ensure that knowledge is available throughout the world at a price that can be afforded by the Third World.²¹

However, whose responsibility is referred to here? Who controls knowledge distribution? Would this be the big publishing firms operating from countries of the Global North, individual, especially developed states, intergovernmental organizations such as the World Trade Organization (WTO) or the World Intellectual Property Organization (WIPO) *as such*, states as members of such organizations, especially those influential in the formulation of copyright policy by such organizations—or more or all of these? As has been pointed out, and as will further be explained below, access to textbooks forms part of the human right to education. However, where, due to strict copyright laws imposed by a developing state, access to textbooks in that state is obstructed—and the right to education in that state therefore at peril—it does not really make sense to brand that state a human rights violator where the ultimate reason for the violation has a different, global, international source. The application of mere territorial human rights paradigms clearly does not suffice in a globalized world characterized by a harsh North-South divide.

The present context is one where TRIPS norms are increasingly considered minimum standards inviting expansive interpretations of copyright and other IP rights. Bilateral and plurilateral free trade agreements (FTAs) oblige developing states to provide for enhanced levels of IP rights protection, extending beyond TRIPS. WIPO pursues an unabated agenda of “harmonizing” global IP law. Developed states urge those states yet to attain more advanced stages of socio-economic

²¹ Philip G. Altbach, *The Subtle Inequalities of Copyright*, 8(15) THE ACQUISITIONS LIBRARIAN 17, 26 (1996) (emphasis added).

development to slavishly replicate the developed states' intricate IP systems. In this context, access to textbooks—in the same way as technological development, food security, access to essential medicines, participation in cultural life, or sustainable traditional community life, as goods similarly threatened by IP rights—will remain a distant dream in the developing world unless a novel approach to obligations and accountability is adopted. All those wielding power in the design and implementation of global copyright and other IP law should no longer remain beyond the reach of human rights just because their conduct does not harm those within their own physical (or conceptual) territory. Actors whose conduct may have a detrimental effect on the enjoyment of the human rights of those beyond such territory must, in certain circumstances at least, be considered to bear human rights obligations with regard to those people far away.

Remaining in the realm of international political misdemeanor falls short of what is needed today. Applying the normativity of international human rights to state conduct (also) in as far as such conduct may have extraterritorial repercussions has at least two distinct benefits: On the one hand, as has so aptly been stated by Katarina Tomaševski, at the time the U.N. Special Rapporteur on the Right to Education, “[t]he difference which human rights bring can be expressed in one single word—violation. The mobilizing power of calling a betrayed pledge a human rights violation is immense.”²² Certainly, no state wants to be labeled a violator of human rights. On the other hand, there is the benefit that a violations approach, once human rights have been legally defined at the international level, implicates the actual *legal* accountability of states toward the world's most vulnerable. Hence, whereas the violations approach had originally only been adopted with regard to the protection of civil and political rights within a state's territory, it was, during the 1990s and 2000s, in a first wave of extension, also made to apply with regard to the protection of economic, social, and cultural rights within a state's territory.²³ That approach now, in a second wave of extension, needs to be made applicable to all human rights in their extraterritorial application.

While it has been held that business enterprises should “respect internationally recognized human rights, wherever they operate”²⁴ and

²² KATARINA TOMAŠEVSKI, REMOVING OBSTACLES IN THE WAY OF THE RIGHT TO EDUCATION 10 (2001).

²³ This culminated in the adoption, in 2008, of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which allows individuals and groups of individuals, and also states in certain cases, to bring claims of violations of economic, social, and cultural rights before the U.N. Committee on Economic, Social and Cultural Rights. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Arts. 2, 10, Dec. 10, 2008, 2922 U.N.T.S. 27 (entered into force May 5, 2013) (individual and group, and inter-state communications, respectively). The U.N. Human Rights Committee has had effective competence to receive claims alleging violations of rights under the International Covenant on Civil and Political Rights since 1976 already. Both Covenants were adopted at the same time though, in 1966.

²⁴ John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*,

that international organizations have human rights obligations “under, *inter alia*, general international law and international agreements to which they are parties,”²⁵ the discussion here will focus on “extraterritorial *state* obligations” under international human rights law (IHRL) (in this sense, abbreviated ETOs here). IP law has so far refrained from endorsing the ETOs concept, the notion that states, in appropriate circumstances, hold human rights obligations toward those living beyond their own territory. Amongst others, international assistance and co-operation obligations would be implicated in this regard. This reluctance is regrettable if it is borne in mind that most IP, including copyright law originates at the international level. This is the level of state interaction, where each state, through the role it chooses to play in shaping and enforcing international IP law and policy, can advance or obstruct human rights in other states. It is in this context, therefore, that ETOs, also those arising under the right to education, could assume a key function in “civilizing”—that is, “constitutionalizing”—IP law.

The purpose of the discussion that follows is to demonstrate the significance of ETOs for IP law by recourse to the right to education as an example. The question is, in what way does the latter right, as protected by IHRL, by virtue of its extraterritorial application, prescribe requirements that international copyright law must comply with to facilitate access to textbooks in schools and universities. *Section VI* will provide an introduction to the ETOs concept. *Section VII* will then attempt to identify typical ETOs under the right to education in the Berne, TRIPS, and FTA context that safeguard access to textbooks.²⁶ The provisions of

Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Annex, Guiding Principle 23(a), U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

²⁵ MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Principle 16 (2011). On the Maastricht Principles, *see infra* note 167. Both WIPO and the WTO as such would thus be required to obey human rights obligations that are binding on them under customary international law or that form part of the general principles of law recognized by civilized nations. Moreover, while the WTO is not a U.N. specialized agency, WIPO is. As such, it has an obligation to obey the goals of the United Nations, one of these being respect for human rights, this goal being laid down in Article 1(3) of the U.N. Charter. U.N. Charter Art. 1(3).

²⁶ For a discussion of the topic of ETOs in relation to international IP law, specifically TRIPS, *see* Klaus D. Beiter, *Establishing Conformity between TRIPS and Human Rights: Hierarchy in International Law, Human Rights Obligations of the WTO and Extraterritorial State Obligations under the International Covenant on Economic, Social and Cultural Rights*, in *TRIPS PLUS 20: FROM TRADE RULES TO MARKET PRINCIPLES* 445 (Hanns Ullrich et al. eds., 2016) [hereinafter Beiter, *Conformity between TRIPS and Human Rights*]. This is the first, and it seems only, explicit discussion so far of this topic. There is an interesting book chapter by Ruth L. Okediji addressing the responsibility of the WTO, that of host and home states of corporations for these corporations’ conduct, and that of corporations themselves. The source of obligations is, however, it seems, seen essentially in the goals and objectives of TRIPS itself. Ruth L. Okediji, *Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations*, in *CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT AND NEW DUTY-BEARERS* 211 (Margot E. Salomon, Arne Tostensen & Wouter Vandenhole eds., 2007). For a wider

the expert Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 2011 and the familiar classification of states' human rights obligations as obligations to respect, protect, and fulfill human rights will help structure this part of the discussion. This exercise can, and should, be repeated for other fields of IP law in potential conflict with IHRL as well. *Section VIII* rounds off the analysis, concretizing the notion of “civilizing” IP, specifically copyright law. It is concretized by relying on the concept of the “constitutionalization” of IP law “from below.” This concept suggests that states are to take ETOs seriously as a matter of consistent practice—not least when creating, and defining the powers of, international courts and tribunals. The concept emphasizes recognition of de facto hierarchies in international law (many of which are human rights-associated) and respect for those obligations of general international law, which, as “rules of legitimacy,” cannot be “contracted out” of (likewise often linked to human rights), in the creation or application, and the decentralized enforcement of international law. The next two sections, *Sections III and IV*, will, however, first outline the constraints of current copyright law in facilitating access to textbooks. *Section V* will explain in what ways access to textbooks should be held covered by the right to education as protected by IHRL.

The discussion relates to issues of accessibility in developing countries generally, but, in particular, the critical lack of access to textbooks in education in Africa motivated this research. The term “textbook” as used in the Article may mean typical textbooks designed for instructional use in schools and universities (or larger portions of such textbooks), all other books that may have an educational purpose (or larger portions of such books), or both. In the present context, the reference is not so much to scholarly literature for pure research purposes. The reference is further to printed textbooks. The term “learning materials,” by contrast, would be wider, including notably digital content too.²⁷

III. CONSTRAINTS OF CURRENT COPYRIGHT LAW: LIMITATIONS AND EXCEPTIONS

Copyright is to serve as an incentive for the creation of knowledge or culture. Recourse to such knowledge or culture by others occurs against a reward being paid to the author. In accordance with the orthodox underpinnings of copyright law, the fact that the skill, labor, and judgment extended in producing new works is rewarded, is considered as crucial in leading to the production of literary, artistic, and other creative works that

analysis of ETOs arising under the right to education, see Klaus D. Beiter, *Is the Age of Human Rights Really Over? The Right to Education in Africa: Domesticization, Human Rights-Based Development, and Extraterritorial State Obligations*, 49 *GEO. J. INT'L L.* 9, 48–87 (2017).

²⁷ See HELFER & AUSTIN, *supra* note 15, at 318–19 (discussing differences between the two terms).

will enhance learning in society.²⁸ However, the mere availability of such works does not, of course, mean that everyone will also have access to these. There will be those unable to pay the reward. There will further be instances in which types of use of a work do not justify the lengthy process of obtaining author consent and/or the payment of any, or “the full,” reward. International copyright law provides for certain limitations and exceptions (L&Es) to copyright protection to safeguard the public interest in access to works that enjoy copyright protection, also for educational purposes. L&Es may allow use without the author’s consent, but against (a potentially reduced) payment, or they may entail use without consent and without a reward. Remuneration becomes relevant where, and to the extent that, without this, the copyright holder’s right of economic exploitation would be unreasonably prejudiced.²⁹ Far-reaching entitlements to use that would usually only be available under contractual terms may further be awarded under a “compulsory license.” This is a very special type of L&E. As understood here, “compulsory licenses” are granted by a designated national agency in exceptional cases of urgency, or in certain other cases, where this is justifiable in the public interest. They must be specifically applied for and (typically) entail an obligation to pay fair remuneration.³⁰

Articles 9 and 10 of the Berne Convention, for example, contain L&Es relevant in this context. Article 9(2) allows the reproduction of literary or artistic works in circumscribed circumstances.³¹ On the basis of Article 9(2), states parties could enact provisions that would permit students to make limited copies from textbooks (available in the library of an educational institution, for example) for purposes of personal or private use, research, or study. It may well be asked whether this could also cover students using such copies from typical or any other textbooks in class. If this is not private, it may yet be personal use.

Article 10(1) permits quotations from a literary or artistic work.

²⁸ This is a standard assumption of IP law. “[M]odern economic arguments . . . assume that the motivation towards creativity will be strengthened through the use of property rights in abstract objects and weakened by their absence.” PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 27 (1996). Specifically as regards copyright law, however, empirical evidence does not conclusively prove this point. Christopher J. Sprigman, *Copyright and Creative Incentives: What Do(n’t) We Know?*, in *FRAMING INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY: INTEGRATING INCENTIVES, TRADE, DEVELOPMENT, CULTURE, AND HUMAN RIGHTS* 32 (Rochelle C. Dreyfuss & Elizabeth Siew-Kuan Ng eds., 2018).

²⁹ On “remuneration-based L&Es,” see specifically *infra* Section VII(B)(8). “Remuneration-based L&Es” are sometimes also termed “statutory licenses,” with (ordinarily) statutory law granting “automatic” authorization to use a work against remuneration in these cases.

³⁰ On “compulsory licenses,” see the discussion *infra* of the Appendix to the Berne Convention in Section IV and further the aspects raised *infra* in Section VII(B)(6) and VII(D)(16).

³¹ Berne Convention, *supra* note 19, Art. 9(2). See *infra* notes 44–48 and accompanying text for a description of the three-step test of copyright law, as embodying these circumscribed circumstances.

Obviously, a quotation signifies a limited portion of a work.³² Of significance for education is the teaching L&E in Article 10(2). This permits the utilization of literary or artistic works “by way of illustration” in, for example, publications “for teaching.” Such use may take place “to the extent justified by the purpose” and must be “compatible with fair practice.”³³ Use “by way of illustration” indicates that passages of a work or an entire small work may be used.³⁴ “Teaching” means non-commercial teaching in educational institutions from the elementary up to the advanced level.³⁵ Sam Ricketson and Jane Ginsburg note the restrictive nature of the accepted interpretation, as it excludes adult education courses not offered by the formal educational institutions of a country and also adult literacy campaigns.³⁶ “Teaching” could further be interpreted not to include distance education as this does not take place within the physical location of an educational institution.³⁷ Beyond the requirement of “fair practice,” Article 10(2) does not impose any restriction on the number of copies that may be made.³⁸ “Fair practice” would however entail that, where large numbers of copies are made for individual classroom use by students, the *amount* copied will be “a highly relevant factor.”³⁹

Martin Senftleben maintains that Article 10(2) permits the use of all works, except those “intended for the use in schools, like a schoolbook,” as, in this instance, “the utilisation for teaching constitutes a major source of royalty revenue.”⁴⁰ Daniel Gervais proposes a similar, but more stratified approach. Utilization does not extend to “material created for

³² The making of quotations must be “compatible with fair practice” and “their extent [must] not exceed that justified by the purpose.” Berne Convention, *supra* note 19, Art. 10(1). The source and the name of the author are to be mentioned. *Id.* Art. 10(3).

³³ Hence, to cite the provision as a whole: states parties may “permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.” *Id.* Art. 10(2). Again, the source and the name of the author are to be mentioned. *Id.* Art. 10(3).

³⁴ MARTIN R.F. SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 234 (2004). *See also* SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND ¶ 13.45 (2d ed. 2006) (stating that the words “by way of illustration” “would not exclude the use of the whole of a work in appropriate circumstances,” mentioning the example of a short literary work, such as a poem or short story).

³⁵ DANIEL J. GERVAIS, (RE)STRUCTURING COPYRIGHT: A COMPREHENSIVE PATH TO INTERNATIONAL COPYRIGHT REFORM 93 (2017); RICKETSON & GINSBURG, *supra* note 34, ¶ 13.45.

³⁶ RICKETSON & GINSBURG, *supra* note 34, ¶ 13.45.

³⁷ *See* Story, *supra* note 5, at 798 (pointing out that this problematic interpretation is variously chosen). *See also* RICKETSON & GINSBURG, *supra* note 34, ¶ 13.45 (arguing that there is “no reason” to exclude distance education).

³⁸ RICKETSON & GINSBURG, *supra* note 34, ¶ 13.45.

³⁹ *Id.*

⁴⁰ SENFTLEBEN, *supra* note 34, at 198. In effect, his argument is that the use of primary instructional materials would conflict with “a normal exploitation of the work” and would thus not comply with the second leg of the three-step test of copyright law. *Id.* at 197–98. He further holds that all permitted uses covered by Article 10(2) should be modestly remunerated. *Id.* at 234, 240.

education.”⁴¹ When material is not created for education but “education is a significant market,” in that material is occasionally used by schools, “small-scale, spontaneous use” is permissible.⁴² When education is not a significant market (for example, publicly-available online resources), more generous spontaneous use is permissible.⁴³

Article 9(2) permits the limited reproduction of works. The provision, as drafted in the wake of the 1967 revision of Berne, sets out the famous three-step test of copyright law. States parties may accordingly enact national L&Es that permit the reproduction of works. Such permission may only apply:

1. “in certain special cases,”
2. if reproduction “does not conflict with a normal exploitation of the work,” and
3. if it “does not unreasonably prejudice the legitimate interests of the author.”⁴⁴

L&Es under Article 10 are *leges speciales*. Yet, their inclusion of a test of proportionality and a reference to “fair practice” suggest a close link to reasoning under the three-step test, which requires a balance between the interests of right holders, those of users, and those of the wider public to be established.⁴⁵ In any event, Article 13 of TRIPS now makes the three-step test applicable to L&Es in copyright law more generally. While the three-step test could be read constructively and dynamically as “a clause not merely limiting limitations, but empowering contracting States to enact them, subject to the proportionality test that forms its core and that fully takes into account, *inter alia*, fundamental rights and freedoms and the general public interest,” the reality is that it is widely read restrictively as “imposing limits on the ‘erosion’ of copyright.”⁴⁶ The WTO itself, for example, does not construe the test holistically with an emphasis on the third leg, which stresses compromise between diverse interests, but initially focuses on its first leg, interpreting this very literally as requiring L&Es to be “narrow in quantitative as well as a qualitative sense.”⁴⁷ Contesting such disempowering readings of the test, a group of respected copyright law experts, in a formal statement of 2008, held that “certain interpretations of the Three-Step Test at international level [are] undesirable,” and that “national courts and

⁴¹ GERVAIS, *supra* note 35, at 227–28.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Berne Convention, *supra* note 19, Art. 9(2).

⁴⁵ See GERVAIS, *supra* note 35, at 93 (“To determine fairness [under Article 10(2)], a WTO panel would likely apply a rule of reason compatible with the three-step test.”); RICKETSON & GINSBURG, *supra* note 34, ¶ 13.45 (Article 10(2) “would require consideration of the criteria referred to in article 9(2).”).

⁴⁶ P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report 25* (Institute for Information Law, University of Amsterdam & University of Minnesota Law School, Mar. 6, 2008), https://www.ivir.nl/publicaties/download/limitations_exceptions_copyright.pdf.

⁴⁷ Panel Report, United States—Section 110(5) of the U.S. Copyright Act, ¶ 6.109, WTO Doc. WT/DS160/R (adopted June 15, 2000).

legislatures have been wrongly influenced by restrictive interpretations of that Test.”⁴⁸

In the developing world, it is also problematic that L&Es under international copyright law are not compulsory. This renders many a developing country vulnerable to accepting the deceptive promises by developed states of funds for “capacity building” to help set up copyright structures in return for not making use of the L&Es and not undertaking copyright law reforms that would adequately address issues of access.⁴⁹ In the extreme, developed states might communicate outright threats of retaliation.⁵⁰ Moreover, the flexibility of international L&Es means that they must be concretized at the national level. This is a daunting exercise for countries that lack the institutional capacity to do so.⁵¹ Further, and fundamentally, even a benevolent construction of the above L&Es in terms of conventional copyright law wisdom will not solve problems of legitimate access as such for the masses. Ruth Okediji explains it as follows:

Limitations and exceptions to IP rights certainly can address specific challenges, but rarely are they sufficient to meet the development-related challenges—such as bulk access to educational works—facing many least-developed and developing countries. . . . Existing limitations and exceptions available in international copyright law, and in many domestic copyright laws, do not extend to institutional, community or group needs.⁵²

The L&Es would permit spontaneous, occasional use.⁵³ The L&Es would not, however, permit educational institutions photocopying (substantial portions of) a textbook and making that available for free or cheaply to students, or including it in a course pack. In more developed states, it is customary for educational institutions to conclude use agreements with collecting societies that regulate utilization under the L&Es, and beyond these, against remuneration. However, even these agreements would usually not provide for bulk access. Quite apart from that, educational institutions in developing countries frequently lack the necessary capacity and resources to conclude such agreements.⁵⁴ In

⁴⁸ Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law, Preamble, as presented in Christophe Geiger, Jonathan Griffiths, Reto M. Hilty et al., *Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law*, 39 INT’L REV. INTELL. PROP. & COMPETITION L. 707, 711 (2008) [hereinafter Geiger et al., *Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law*].

⁴⁹ Ruth L. Okediji, *Reframing International Copyright Limitations and Exceptions as Development Policy*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 429, 481 (Ruth L. Okediji ed., 2017).

⁵⁰ *Id.* at 480–81.

⁵¹ *Id.* at 480.

⁵² See Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. INT’L L. & POL. 1, 34 (2018).

⁵³ GERVAIS, *supra* note 35, at 93.

⁵⁴ See Chon, *supra* note 15, at 831 (referring to the questionable capacity of educational institutions in the developing world to participate in the exchange of royalty fees with reproduction rights organizations).

general, the collecting society model appears ill-suited for developing countries in the short to medium term.⁵⁵ Collecting societies are expensive and bureaucratic, have a propensity to wield significant market power, and in developing countries happen to collect far more royalties for IP right holders from rich countries than for local creators.⁵⁶

Beyond permissions to translate that may be covered under the above L&Es, the Berne/TRIPS system does not provide for special L&Es for translation. It is true that there are certain special provisions that would allow the translation of books. However, these are either irrelevant today—to wit, the clause on the so-called “ten-year regime”—or have proven unworkable in practice—thus, the provisions of the Appendix to the Berne Convention. The latter, envisioning a compulsory licensing scheme for developing countries, merit separate discussion under the following heading.⁵⁷ As far as the ten-year regime is concerned, Article 30(2) of the Berne Convention of 1971 allows states, in defined circumstances, on ratification or accession—and only at that time—by express declaration, to secure the application of the provisions of Article 5 of the Union Convention of 1886, as completed at Paris in 1896.⁵⁸ This had provided for the expiry of an author’s translation rights with regard to a specific language, if, ten years after the first publication of the original work, no translation into that language had been effected by the author or with his or her authorization. While the ten-year regime, in principle, could have facilitated large-scale access to works for educational purposes,⁵⁹ it has become irrelevant today as it could only be made applicable, in certain instances, on ratification or accession. Another complication is that developing countries that have chosen to apply the ten-year regime cannot then also rely on the translation provisions of the Berne Appendix, and vice versa.⁶⁰ Any election in favor of the one rather than the other, cannot, moreover, be reversed later.⁶¹ It may also be noted that ten years is a very long time for works of the natural and physical sciences and of technology, where knowledge becomes outdated very quickly.⁶²

The absence of L&Es for translation is highly problematic. The former U.N. Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, points out that whereas speakers of the world’s major languages may choose from among “millions of books,” speakers of local languages

⁵⁵ See COMM’N ON INTELL. PROP. RTS., 2002 Report, *supra* note 20, at 99 (holding, or appearing to hold, this view).

⁵⁶ *Id.* at 98–99.

⁵⁷ See *infra* Section IV.

⁵⁸ Berne Convention, *supra* note 19, Art. 30(2).

⁵⁹ See Alberto J. Cerda Silva, *Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright*, 60 J. COPY. SOC’Y U.S.A. 581, 585 (2013) (The scheme “may facilitate meeting the needs of developing countries because it enables the massive use of works for educational purposes.”).

⁶⁰ Berne Convention, *supra* note 19, app. at Art. V(1)(a).

⁶¹ *Id.* app. at Art. V(1)(c), (2).

⁶² See Silva, *supra* note 59, at 585–86 (discussing the various shortcomings of the arrangements). Generally for a comprehensive understanding of the ten-year regime, see RICKETSON & GINSBURG, *supra* note 34, ¶¶ 11.15–11.18, 11.25, 17.27(f)(ii).

have access to “very few.”⁶³ It is not only the limited size of the linguistic communities to which local language speakers belong, but more significantly the overall socio-economic situation of these communities, regularly characterized by general structural disadvantage, that has the effect that there usually does not exist a major publishing market for the languages spoken.⁶⁴ This is certainly true for the African context, where, in the production of materials, local languages are ignored in favor of English, French, or Portuguese.⁶⁵ The absence of L&Es for translation is problematic from a non-discrimination perspective, as it disproportionately affects those not speaking a globally used language.⁶⁶ However, it also poses a substantial barrier to the right to take part in cultural life⁶⁷ and further disregards the needs of linguistic groups for whom the ability to translate works into their own languages is essential for education.⁶⁸

In the same way that there is no single, broad international education L&E, none exists for libraries (including those of schools or universities). A 2017 WIPO study recognizes that L&Es for libraries “are fundamental to the structure of copyright law”⁶⁹ and “serve public interests by permitting libraries to make socially beneficial uses of copyrighted works.”⁷⁰ Countries currently provide for L&Es that allow libraries to make copies of mostly shorter works for individual readers or researchers on request, or that permit reproduction for preservation or replacement purposes.⁷¹ However, yet again, what is needed, at any rate in developmental contexts, is an L&E for libraries (and, generally, all kinds of cultural institutions and literacy-enhancing centers or initiatives) that could ensure access to works on a large scale.⁷² At present, a library cannot produce multiple copies of a textbook, or larger portions within, to satisfy demands for access by poorer students or other readers.

⁶³ Farida Shaheed, *Report of the Special Rapporteur in the Field of Cultural Rights, Copyright Policy and the Right to Science and Culture*, ¶ 68, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014).

⁶⁴ See Lea Shaver, *Copyright and Inequality*, 92 WASH. UNIV. L. REV. 117, 117 (2014) (“Copyright protection is likely to be an ineffective incentive system for the production of works in ‘neglected languages’ spoken predominantly by poor people.”).

⁶⁵ Story, *supra* note 5, at 798.

⁶⁶ See Shaver, *supra* note 64, at 135 (Shaver describes current copyright law’s effect of discriminating on the ground of language. For South Africa, she says that copyright protection is failing in its intended purpose. “[The publishing] industry effectively serves only a tiny sliver of society . . . affluent English speakers. . . . Very few books are being produced in the needed languages . . . [spoken by] . . . the disadvantaged majority.”).

⁶⁷ Shaheed, *supra* note 63, ¶ 68.

⁶⁸ *Id.* ¶ 69.

⁶⁹ Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised (2017 Edition)*, World Intellectual Property Organization [WIPO], Standing Comm. on Copyright and Related Rights, at 6, SCCR/35/6 (Nov. 2, 2017) [hereinafter Crews, *L&Es for Libraries and Archives*].

⁷⁰ *Id.* at 8.

⁷¹ *Id.* at 7.

⁷² See Okediji, *supra* note 49, at 479–80, 491–92 (roughly making this proposition).

IV. CONSTRAINTS OF CURRENT COPYRIGHT LAW: THE BERNE

APPENDIX

The Appendix to the Berne Convention of 1971 (also made a part of TRIPS)⁷³ provides for a compulsory licensing scheme, permitting translation or reproduction of a (whole) work against compensation without the consent of the copyright holder. Developing countries, as per U.N. definition, may avail themselves of the arrangements of the scheme.⁷⁴ They must notify their intention to do so to WIPO.⁷⁵ The scheme must then be implemented domestically. Licenses are to be granted by a “competent authority.”⁷⁶ Whereas the L&Es discussed above relate to entitlements to utilize portions of a copyrighted work of which one holds a legitimate copy, the Berne Appendix is precisely about access to legitimate copies; it is about bulk access in developing countries, that is, the provision of multiple copies of a work at affordable prices.⁷⁷ Compulsory licensing under the Appendix is subject to complicated rules, however. Translation and reproduction licenses are governed separately.

A *translation license* may be applied for if, three years after the first publication of a work, no translation into the relevant local language (“a language in general use” in the developing country) has been published (anywhere in the world) by, or with the consent of, the holder of the right of translation.⁷⁸ A license may only be granted “for the purpose of teaching, scholarship or research.”⁷⁹ A *reproduction license* may be applied for if, after five years⁸⁰ of the first publication of a particular edition of a work, copies of such edition have not been distributed in the developing country to the general public, or in connection with systematic instructional activities, at a normal price in that country, by, or with the consent of, the holder of the right of reproduction.⁸¹ A license may only

⁷³ TRIPS, *supra* note 18, Art. 9(1).

⁷⁴ Berne Convention, *supra* note 19, app. at Art. I(1).

⁷⁵ *Id.* Broadly, a declaration in this regard is valid for ten years and may be renewed. *Id.* app. at Art. I(2).

⁷⁶ *Id.* app. at Arts. II(1), III(1).

⁷⁷ Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, at 15 (UNCTAD-ICTSD, Issue Paper No. 15, Mar. 2006), https://unctad.org/en/Docs/iteipc200610_en.pdf.

⁷⁸ Berne Convention, *supra* note 19, app. at Art. II(2)(a). In certain cases, the waiting period is less than three, but at least one year. *Id.* app. at Art. II(3). Translation licenses may also be applied for, under the same conditions, if all the editions of a published translation are out of print. *Id.* app. at Art. II(2)(b). “[A] language in general use” would include “the language of a small aboriginal tribe, regional languages, and ‘languages of government’ . . . in many former colonial territories.” RICKETSON & GINSBURG, *supra* note 34, ¶ 14.64. Accordingly, even if the expression is vague (Silva, *supra* note 59, at 605–607), the languages of cultural minorities would be covered.

⁷⁹ Berne Convention, *supra* note 19, app. at Art. II(5).

⁸⁰ *Id.* app. at Art. III(3). The waiting period is three years for works of the natural and physical sciences and of technology. It is seven years for works of fiction, poetry, drama and music and for art books. *Id.* app. at Art. III(3)(i), (ii), respectively.

⁸¹ *Id.* app. at Art. III(2)(a). Reproduction licenses may also be applied for, under the same conditions, if no authorized copies of an edition have been on sale at a normal price for a period of six months. *Id.* app. at Art. III(2)(b).

be granted “in connection with systematic instructional activities.”⁸² “Teaching” (translation license) or “instruction” (reproduction license) includes non-commercial elementary as well as advanced teaching.⁸³ However, it seems neither license can be used to provide access beyond “organized” education.⁸⁴ Hence, they cannot be relied on to stock local libraries or community centers—which may play a crucial role in informal education—with (multiple) copies of (translated) textbooks.⁸⁵ Furthermore, reproduced copies cannot be made available for free to students. The Appendix requires the charging of the normal or a lower price.⁸⁶

Where a translation or reproduction license is applied for, the Appendix further requires a grace period to elapse, beyond the time-limits mentioned, before the license may be granted.⁸⁷ This is to allow the copyright holder to have a translation published at a price normal for the developing country, or to have copies of an edition distributed in that country at a normal price, within that period in order to avoid a license being granted.⁸⁸ Accordingly, the grace period is meant to give the original copyright holder every opportunity to supply the local market concerned.⁸⁹ Moreover, it should also be noted that if an author chooses to exercise his or her moral right to withdraw all copies of the work or the specific edition from circulation, no license can be granted,⁹⁰ suggesting that in certain cases, works could be completely out of reach of users in developing countries.⁹¹

It appears that it is the states themselves, or state-owned enterprises, that may apply for licenses under the Appendix.⁹² Importantly, a license may only be granted if it has been shown that the copyright holder has

⁸² *Id.* app. at Art. III(2)(a).

⁸³ See RICKETSON & GINSBURG, *supra* note 34, ¶¶ 14.68, 14.86 (in effect, making this point).

⁸⁴ “Scholarship,” as an adjunct to “teaching” (translation license), appears to mean “organised educational activities” beyond “instructional activities . . . in . . . schools, colleges, and universities.” *Id.* ¶ 14.68 (emphasis added). “Systematic instructional activities” (reproduction license) appear to cover forms of “out-of-school education.” *Id.* ¶ 14.86. In both instances, the reference seems to be to types of systematic, non-formal (not informal) education. Systematic instructional activities further do not encompass research. *Id.* ¶ 14.86.

⁸⁵ See Caroline B. Ncube, *Calibrating Copyright for Creators and Consumers: Promoting Distributive Justice and Ubuntu*, in WHAT IF WE COULD REIMAGINE COPYRIGHT? 253, 270 (Rebecca Giblin & Kimberlee Weatherall eds., 2017) (cannot be used for purposes of cultural enrichment or literacy).

⁸⁶ Berne Convention, *supra* note 19, app. at Art. III(2)(a).

⁸⁷ *Id.* app. at Arts. II(4)(a), III(4)(a), (b), respectively. The grace period is between three and nine months. *Id.*

⁸⁸ *Id.* app. at Arts. II(4)(b), III(4)(c), respectively. If these measures take place after a compulsory license has been granted, the license will terminate. Existing copies may, however, be distributed. *Id.* app. at Arts. II(6), III(6), respectively.

⁸⁹ Okediji, *supra* note 77, at 15.

⁹⁰ Berne Convention, *supra* note 19, app. at Arts. II(8), III(4)(d), respectively.

⁹¹ Okediji, *supra* note 77, at 15.

⁹² HELFER & AUSTIN, *supra* note 15, at 338. Some of the preparatory works indicate that private companies or charitable organizations were also considered entitled to apply. See RICKETSON & GINSBURG, *supra* note 34, ¶¶ 14.63, 14.81 (referring to the various views).

been approached and has denied consent, or, that, after due diligence, the copyright holder could not be traced.⁹³ The Appendix provides for just compensation to be paid to copyright holders.⁹⁴ Licenses usually do not extend to the export of copies and they permit publication within the granting country only.⁹⁵ Export and import licenses would, however, be of vital importance in developmental contexts.⁹⁶ Developing countries will often lack manufacturing capacities or have a book market which is too small to justify publication in the circumstances.⁹⁷ Similar concerns may frequently be raised with regard to language minorities, as developing communities, in *developed* states. In the absence of a local book market for the languages concerned, the kin state of a language minority (that is, the “mother state” of a minority by virtue of ethnic or cultural affinity, as opposed to the “host state”) will often be in the best position to produce books for that minority. The initial problem here, of course, is that the Appendix does not apply to developed states whatsoever.⁹⁸

The Appendix has not been a success. Only 18 countries worldwide have made declarations relating to the Appendix so far.⁹⁹ In 2013, only three countries could be identified as having implemented the mechanism into domestic law.¹⁰⁰ As for Africa, only four countries (Algeria, Egypt, Niger, and Sudan) have made declarations relating to the Appendix.¹⁰¹ It seems only Uganda, not even a party to the Berne Convention, has implemented the mechanism.¹⁰² Simultaneously—as may be confirmed for developing states generally—various African states, beyond the Appendix framework, provide for arrangements adjusting those of the Appendix to develop highly idiosyncratic national solutions.¹⁰³ As

⁹³ Berne Convention, *supra* note 19, app. at Art. IV(1). There are documentation requirements in the latter case. The applicant must send copies of the application to a “national or international information center” specified by the government of the country in which the publisher is believed to have the principal place of business. *Id.* app. at Art. IV(2).

⁹⁴ *Id.* app. at Art. IV(6)(a)(i).

⁹⁵ *Id.* app. at Art. IV(4). Offshore printing (not publishing) appears permissible, though. Overcoming border measures may, however, be a complicated issue. On the legitimacy of offshore printing, see Silva, *supra* note 59, at 618 and the various sources cited there.

⁹⁶ *Id.* at 617–19, 628–29.

⁹⁷ *Id.* at 628.

⁹⁸ See *id.* at 622–23, 628–29 (pointing out these deficits of the Appendix with regard to language minorities, as developing communities, in developed states).

⁹⁹ This information has been drawn from the website of WIPO, https://www.wipo.int/treaties/en/SearchForm.jsp?search_what=N (last visited Mar. 13, 2019).

¹⁰⁰ Silva, *supra* note 59, at 594.

¹⁰¹ This information has been drawn from the website of WIPO, https://www.wipo.int/treaties/en/SearchForm.jsp?search_what=N (last visited Mar. 13, 2019) (Alg. (1994–2004, 2012–14, 2014–24), Egypt (1984–94), Niger (1974–84), Sudan (2004–14)).

¹⁰² Dick Kawooya, Ronald Kakungulu & Jeroline Akubu, *Uganda*, in *ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT* 281, 283, 288 (Chris Armstrong et al. eds., 2010).

¹⁰³ See Silva, *supra* note 59, at 590–605 (reporting on developing countries generally,

Alberto Cerda Silva describes it, “developing countries are doing it their own way.”¹⁰⁴ On the one hand, it remains a question whether the respective arrangements are in compliance with international copyright law. On the other, domestic authorities, fearing that they are not, do not, in fact, implement them.¹⁰⁵ As for Africa, for instance, “research . . . did not reveal any license granted within the framework of these provisions.”¹⁰⁶

Sam Ricketson and Jane Ginsburg comment that

[i]t is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix. . . . The fact that, to date, so few developing countries have invoked the Appendix may be an indication that authors and publishers in the developed countries have been far more willing to license their works than was previously the case. [An] [a]lternative explanation[] . . . [may be] . . . that the social and economic problems of some of these countries are so intense that concern about copyright matters is not going to be a high priority.¹⁰⁷

Probably, the social and economic problems are so intense that the Appendix’s way of addressing acute access needs is completely out of touch with reality. Silva holds that

[t]he Appendix of the Berne Convention does not work because it does not meet the needs of developing countries. Instead, the Appendix comes across as an obsolete, inappropriate, bureaucratic, and extremely limited attempt to provide an air valve for developing countries.¹⁰⁸

Ruth Okediji is also very outspoken. “By all accounts,” she says, the Berne Appendix has been “a failure.”¹⁰⁹ Effective application of the

comments also covering African states). *See also* Joseph Fometeu, *Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa*, World Intellectual Property Organization [WIPO], Standing Comm. on Copyright and Related Rights, at 42, SCCR/19/5 (Oct. 26, 2009) (reporting on African states). Countries in this group include Angola, Central African Republic, Republic of the Congo (Brazzaville), Malawi, Mali, Nigeria, Rwanda, South Africa, and Togo. *Id.*

¹⁰⁴ Silva, *supra* note 59, at 598 (capitalization omitted).

¹⁰⁵ *See id.* at 604 (raising these concerns).

¹⁰⁶ Fometeu, *supra* note 103, at 42.

¹⁰⁷ RICKETSON & GINSBURG, *supra* note 34, ¶ 14.106.

¹⁰⁸ Silva, *supra* note 59, at 590.

¹⁰⁹ Okediji, *supra* note 77, at 15. Likewise, *see, e.g.*, Salah Basalamah, *Compulsory Licensing for Translation: An Instrument of Development?*, 40 IDEA: J.L. & TECH. 503, 546 (2000) (observing notably “lack of consistence . . . with the developing countries’ needs”); Chon, *supra* note 15, at 829, 835 (remarking that the Appendix “contains provisions so complex and arcane that very few developing countries have been able or willing to take advantage of them,” and further that its provisions are unworkable, unfair, and require compensation for educational use that is covered by fair use in the U.S.); COMM’N ON INTELL. PROP. RTS., 2002 Report, *supra* note 20, at 104 (concluding, “it is

arrangements depends on developing countries enacting specific legislation and establishing an elaborate administrative implementation system, requiring expertise and resources already scarce in most of these countries.¹¹⁰ The discussion above has illustrated the complex and onerous requirements associated with the use of the Appendix—waiting periods of up to seven years, additional grace periods, notification to the copyright holder—and the many other limitations of the Appendix. Overall, the text conveys the impression that the granting of compulsory licenses is to be avoided by all means.

V. THE RIGHT TO EDUCATION AND ACCESS TO TEXTBOOKS

The right to education is a “hybrid” right, evidencing characteristics of civil and political, economic, social and cultural, and group or solidarity rights—therefore, of all three generations of human rights.¹¹¹ It covers classical freedoms in education (first generation rights), encompasses positive state duties to set up a comprehensive education system (second generation rights), and—very important in the context of this discussion—also implicates the right to development (and other third generation rights). In his recent book on *Development and the Right to Education in Africa*, Azubike Onuora-Oguno accordingly emphasizes the “inextricable link” between the right to education and the right to development.¹¹² The right to education, understood as a right to development, entitles nations—and simultaneously individuals and certain groups such as minorities or indigenous peoples within a state—vis-à-vis their own state and the community of states collectively, to meaningfully participate in achieving, and to enjoy, their freely chosen socio-economic, cultural, and political progress¹¹³ through education. The right to education is, moreover, an “empowerment right,” that is, a human right whose enjoyment constitutes a prerequisite for the exercise of most

clear to us that the special provisions . . . as set out in the Appendix, have not been effective”); Fometeu, *supra* note 103, at 6 (holding that “these licenses have been undermined by an extremely complex procedure which hampers their implementation”); Story, *supra* note 5, at 768–69 (making the sobering statement that “[t]he one addition made to Berne . . . which purported to improve the situation of poor countries—incorporation of the Paris Appendix—has certainly not done so”).

¹¹⁰ Ncube, *supra* note 85, at 273.

¹¹¹ On the right to education as a “hybrid” right, see KLAUS D. BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW: INCLUDING A SYSTEMATIC ANALYSIS OF ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 37–43 (2006).

¹¹² Azubike C. Onuora-Oguno, *Development and the Right to Education in Africa* 45 (2019). The author stresses “the need to drive development in Africa by relying on the place of an enhanced access to quality education.” *Id.* at 2.

¹¹³ This definition perhaps broadly reflects the present-day *acquis* of wisdom as to the gist of the right to development. For a good analysis of the right to development, see, e.g., Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 *HUM. RTS. Q.* 837 (2002). “The right-holder may be a collective . . . , but the beneficiary of the exercise of the right has to be the individual. . . . [T]he collective right . . . [is] . . . built on individual rights.” *Id.* at 862–63.

other human rights.¹¹⁴

The most prominent formulation of the right to education in IHRL is that found in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.¹¹⁵ With its 171 states parties (including China, but not the United States), the Covenant, and its Article 13, enjoy almost universal acceptance.¹¹⁶ If a common denominator exists in the way that international human rights treaties, such as the ICESCR, protect the right to education, then it looks as follows:¹¹⁷ there is usually a provision defining the aims of education, notably emphasizing that education should be directed to “the full development of the human personality.”¹¹⁸ Then there would be a provision calling upon states parties to make education at the primary, secondary, tertiary, and fundamental or adult levels available and accessible to varying degrees. State obligations would be formulated in a more rigorous fashion for the lower or basic levels and a less rigorous fashion for the higher or advanced levels.¹¹⁹ Where the provision of infrastructure and resources reflects the social or positive aspect of the right to education, the typical texts on the right to education would usually further contain provisions setting out the freedom or negative aspect of the right to education. This refers to notably the right of parents to guide their children’s religious and moral education in conformity with their own convictions and everybody’s right to set up private educational institutions.¹²⁰ The right to education in its developmental dimension is particularly evident in Article 28(3) of the Convention on the Rights of the Child of 1989.¹²¹ This states:

States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and

¹¹⁴ On the right to education as an “empowerment right,” see BEITER, *supra* note 111, at 28–30.

¹¹⁵ International Covenant on Economic, Social and Cultural Rights, Arts. 13, 14, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

¹¹⁶ Status of ratification as on Aug. 15, 2020, see United Nations Treaty Collection, Status of Treaties, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4. Thirteen declarations or reservations have been made by states parties with regard to Article 13. Of relevance in the context of this discussion would be the five (contentious) statements by Bangladesh, Barbados, Madagascar, South Africa, and Zambia to the effect of reserving the right to implement free primary education in Article 13(2)(a) progressively rather than immediately, as would be required by Article 13(2)(a). *Id.*

¹¹⁷ For a comprehensive discussion of the protection of the right to education by international law, including by relevant human rights treaties, see BEITER, *supra* note 111.

¹¹⁸ See, e.g., ICESCR, *supra* note 115, Art. 13(1), 2d, 3d sentence.

¹¹⁹ See, e.g., *id.* Art. 13(2)(a)–(e).

¹²⁰ See, e.g., *id.* Art. 13(3), (4), respectively.

¹²¹ Convention on the Rights of the Child, Art. 28(3), Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). Articles 28 and 29 of the Convention protect the right to education. *Id.* Arts. 28, 29.

technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Reverting to the social or positive aspect of the right to education, specifically the issue of available, free education: primary education must usually be compulsory and available free to all.¹²² Secondary education must be made generally available and accessible to *all*; higher education must be made equally accessible to *all those with capacity*—in both instances accessibility is to be advanced “by every appropriate means, and in particular by the progressive introduction of free education.”¹²³ In accordance with accepted human rights doctrine, the obligation that compulsory and free primary education be available to all is a so-called minimum core obligation.¹²⁴ This means that should primary education not be generally available, compulsory, and free, this constitutes a *prima facie* violation of the right to education.¹²⁵ Further, while states parties enjoy a certain measure of discretion when it comes to determining means and pace of making secondary and higher education free, they are not allowed to take deliberately retrogressive measures in as far as

¹²² ICESCR, *supra* note 115, Art. 13(2)(a) (“Primary education shall be compulsory and available free to all.”).

¹²³ *Id.* Art. 13(2)(b), (c), respectively (“Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.”; “Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”). A purposive interpretation of Article 13(2)(a) and (b) in light of the provisions of the ILO’s Minimum Age Convention, linking the minimum age for admission to employment to the age of completion of compulsory schooling, and stipulating that the former must not be less than fifteen years, means that also lower secondary education (years seven to nine of schooling in terms of UNESCO’s 2011 International Standard Classification of Education) must be compulsory—and also available free to all—*without extensive delay* (education can ultimately not be made compulsory if it is not also made free). See BEITER, *supra* note 111, at 303, 390, 519 (making this argument); Convention Concerning Minimum Age for Admission to Employment, Art. 2(3), June 26, 1973, I.L.O. Convention No. 138, 1015 U.N.T.S. 297 (entered into force June 19, 1976); UNESCO, INTERNATIONAL STANDARD CLASSIFICATION OF EDUCATION: ISCED 2011, ¶¶ 122, 141, 146 (2012). The highest standard with respect to free education is that set out in the Council of Europe’s Revised European Social Charter, obliging states parties to provide “a free primary and secondary education.” European Social Charter (Revised), Art. 17(2), May 3, 1996, 2151 U.N.T.S. 277 (entered into force July 1, 1999).

¹²⁴ U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], General Comment No. 13, The Right to Education (Art. 13 of the ICESCR), ¶ 57, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter General Comment No. 13]. In fact, in light of the comments made *supra* in note 123, compulsory and free education for all up to the age of fifteen years (thus including lower secondary education) should be held to constitute the minimum core obligation. See BEITER, *supra* note 111, at 643–47 (making this argument).

¹²⁵ General Comment No. 13, *supra* note 124, ¶ 59. Minimum core obligations are imposed because, not guaranteeing minimum essential levels of socio-economic provision deprives socio-economic rights of their *raison d’être*. U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], General Comment No. 3, The Nature of States Parties’ Obligations (Art. 2(1) of the ICESCR), ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter General Comment No. 3]. Non-compliance with a minimum core obligation automatically constitutes a *prima facie* violation of rights. *Id.*

(progressively) free education is concerned. Deliberately retrogressive measures in the provision of education are forbidden as a matter of principle.¹²⁶ Consequently, introducing or increasing costs in secondary or higher education constitutes a prima facie violation of the right to education.¹²⁷ Any justification for either type of prima facie violation—non-compliance with a minimum core obligation or deliberately retrogressive measures—would have to be related to legitimate pressing concerns and the full use of the maximum resources available to a state party.¹²⁸

To dwell on the social or positive aspect of the right to education a bit further: The U.N. Committee on Economic, Social and Cultural Rights (CESCR)—the independent expert body supervising implementation of the ICESCR—in its authoritative interpretation of Article 13 of the Covenant, General Comment No. 13, points out that education at all levels must be, *inter alia*, available, accessible, and acceptable.¹²⁹

“*Availability*” refers to the provision of schools and teachers, and, as the Committee stresses, also teaching materials and facilities such as a library.¹³⁰ Already in 1981, a study had found that—compared to other potential correlates of school achievement, such as teacher-training, class size, or teacher salaries—the availability of books is particularly consistently associated with higher levels of achievement.¹³¹ Subsequent studies have confirmed this.¹³² However, textbooks are scarce in Africa. The textbook famine in Africa has been referred to above.¹³³ As for the situation of libraries of educational institutions in Africa, the overall situation is sobering as well. University libraries are typically in a poor state.¹³⁴ For libraries in secondary schools, the World Bank in 2008 reports

[s]eriously inadequate funding, with little or no government financial support. . . . Where library stock exists it is generally old and often irrelevant to current curricula and teacher/student interests. More often than not there is virtually no appropriate stock available at all and there are rarely budgets for stock

¹²⁶ General Comment No. 13, *supra* note 124, ¶ 45. Deliberately retrogressive measures are forbidden in the provision of any socio-economic benefit protected by socio-economic rights. General Comment No. 3, *supra* note 125, ¶ 9.

¹²⁷ On the impermissibility of retrogressive measures, notably in the form of introducing or increasing costs in secondary or higher education, *see* BEITER, *supra* note 111, at 387–89, 400–401, 457–58, 572–73, 592, 594, 650–51.

¹²⁸ Rendered here in simplified terms: General Comment No. 3, *supra* note 125, ¶¶ 9, 10; General Comment No. 13, *supra* note 124, ¶¶ 45, 57.

¹²⁹ General Comment No. 13, *supra* note 124, ¶ 6.

¹³⁰ *Id.* ¶ 6(a).

¹³¹ Stephen P. Heyneman, Joseph P. Farrell & Manuel A. Sepulveda-Stuardo, *Textbooks and Achievement in Developing Countries: What We Know*, 13 J. CURRIC. STUD. 227, 227 (1981).

¹³² *See, e.g.*, READ, *supra* note 12, at 33 (“The evidence for the impact of textbook provision on student achievement in repeated research studies over the past 40 years is overwhelmingly positive.”).

¹³³ *See supra* note 9 and accompanying text.

¹³⁴ COMM’N ON INTELL. PROP. RTS., 2002 Report, *supra* note 20, at 103.

upgrading or replenishment.¹³⁵

“*Accessibility*” refers to the abolition or reduction of school or university fees and also to the elimination of other impediments to access, such as race or gender discrimination.¹³⁶ Hence, the cost of textbooks should also not constitute an impediment to access. The question, of course, is whether “free” education in Article 13(2) actually includes textbooks. The Committee has held that “free” means

[the absence of] [f]ees imposed by the Government, the local authorities or the school, and other direct costs. . . . Indirect costs . . . can also fall into the same category. Other indirect costs may be permissible, subject to the Committee’s examination on a case-by-case basis.¹³⁷

Textbooks are commonly an example of an indirect cost. The Committee’s Concluding Observations—which comment on a state party’s compliance with Covenant obligations, following submission by that state party, in regular intervals, of a report elaborating on its implementation of the Covenant—seem to show that the Committee requires states parties to make textbooks at the secondary (or higher) level progressively, and at the primary level immediately, free for students. The Committee has thus called upon a state party to “gradually reduce the costs of secondary education, e.g. through subsidies for textbooks.”¹³⁸ Regarding another state party, the Committee categorially stated that it “is concerned about indirect costs in primary education, such as for textbooks.”¹³⁹ Those acquainted with the Committee’s working methods will know that, whenever the Committee “expresses its concern” at a situation, this may be considered indicative of a *prima facie* violation of human rights.

¹³⁵ WORLD BANK, TEXTBOOKS AND SCHOOL LIBRARY PROVISION IN SECONDARY EDUCATION IN SUB-SAHARAN AFRICA 71–72 (World Bank Working Paper No. 126, 2008).

¹³⁶ General Comment No. 13, *supra* note 124, ¶ 6(b).

¹³⁷ U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], General Comment No. 11, Plans of Action for Primary Education (Art. 14 of the ICESCR), ¶ 7, U.N. Doc. E/C.12/1999/4 (May 10, 1999). This is to be read with General Comment No. 13, *supra* note 124, ¶¶ 10, 14, 20, making the definition of “free” in General Comment No. 11 applicable to primary, secondary, and higher education, respectively.

¹³⁸ U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], Concluding Observations on the Initial Report of the former Yugoslav Republic of Macedonia, ¶ 47, U.N. Doc. E/C.12/MKD/CO/1 (Jan. 15, 2008).

¹³⁹ U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], Concluding Observations on the Initial to Third Reports of the United Republic of Tanzania, ¶ 26, U.N. Doc. E/C.12/TZA/CO/1-3 (Dec. 13, 2012). The African Commission on Human and Peoples’ Rights has clearly stated that the right to free primary education under the African Charter on Human and Peoples’ Rights—which, in Article 17(1), succinctly provides that “[e]very individual shall have the right to education”—entails the “provision of free textbooks.” African [Banjul] Charter on Human and Peoples’ Rights, Art. 17(1), June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African (Banjul) Charter]; Afr. Comm’n H.P.R., *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, ¶ 71(b) (2011).

“Free” education does not mean that textbooks must not cost anything. It just means that they, or their use, should be free for the end user, that is, the student. The cost of textbooks is the responsibility of the state. However, there is this inevitable correlation: where textbooks are expensive, it will be difficult for the state to bear that responsibility. Ultimately, students or their parents tend to be the ones bearing the cost—sometimes very indirectly through diverse compulsory, or notionally voluntary, other levies on students and their parents that educational institutions charge to supplement their state-allocated funds. At the upper secondary and higher levels of education, “free” education is subject to the notion of progressiveness. To the extent that upper secondary and higher education are still in the process of being made progressively free—a process that may, of course, take many years, even in developed countries—and students or their parents are (still) required to bear (a portion of) textbook costs, high prices will similarly tend to be at the expense of students and their parents. The reality of textbook cost for the African continent has been described as follows:

Primary textbooks are dominantly funded by the state even though budgets are widely considered to be inadequate, irregular, and unpredictable.¹⁴⁰ . . . Secondary textbooks are more widely subject to parental contributions even though a majority of parents probably cannot afford the costs of the specified textbooks and this has a clear impact on the quality of education that can be achieved.¹⁴¹ . . . [There is a] continued dependence, particularly at upper secondary grades, on imported textbooks carrying developed world overheads and profit expectations.¹⁴²

Copyright contributes to cost and severely complicates reprography. Specifically with copyright in mind, a study has suggested that, rather than procuring textbooks through (international) competitive bidding, it would be advantageous if textbooks were developed by subject experts identified by state agencies and went through “an extensive, well-defined consultation and evaluation process” to ensure adequate attention is paid to quality of content. Such an approach would eliminate the publisher as a middleman and enable the government to retain copyright, making reprints cheaper.¹⁴³

“*Acceptability*” means that education itself must conform to established human rights standards, be relevant, of good quality, and culturally appropriate.¹⁴⁴ Quality includes, inter alia, “a focus on the quality . . . of teaching and learning . . . materials.”¹⁴⁵ Acceptability

¹⁴⁰ READ, *supra* note 12, at 68.

¹⁴¹ *Id.*

¹⁴² *Id.* at 13.

¹⁴³ BIRGER FREDRIKSEN, SUKHDEEP BRAR & MICHAEL TRUCANO, GETTING TEXTBOOKS TO EVERY CHILD IN SUB-SAHARAN AFRICA: STRATEGIES FOR ADDRESSING THE HIGH COST AND LOW AVAILABILITY PROBLEM 104 (World Bank, 2015).

¹⁴⁴ General Comment No. 13, *supra* note 124, ¶ 6(c).

¹⁴⁵ U.N. Comm. on the Rights of the Child, General Comment No. 1, The Aims of

further entails that opportunities for instruction in the mother tongue must be maximized.¹⁴⁶ Note may thus be taken of the Organization for Security and Co-operation in Europe's (OSCE) important Hague Recommendations Regarding the Education Rights of National Minorities of 1996, a document purporting to be a consolidation of international legal obligations relating to the education rights of national minorities—that is, of the various language and cultural groups in any state.¹⁴⁷ For primary education, it is stipulated that “the curriculum should ideally be taught in the minority language,”¹⁴⁸ for secondary education that “a substantial part of the curriculum should be taught through the medium of the minority language,”¹⁴⁹ and for higher education that there should be “access to tertiary education in [one's] own language,” in accordance with need and student numbers.¹⁵⁰ A World Bank report of 2005 points out, research shows that first language instruction resulted in increased access and equity, improved learning outcomes, reduced repetition and dropout rates, socio-cultural benefits, and lower overall costs.¹⁵¹ Obviously, textbooks in the relevant language will play a crucial role in this context. As a recent World Bank study, based on research evidence, remarks, “for textbooks to be effective they must be not only available but also . . . in a language that is widely understood by students and teachers.”¹⁵² Yet, close to 40 percent of the world's population do not have access to education in their mother tongue and, therefore, are “potentially negatively affected” by official policy on language in education.¹⁵³ While 599 languages, including the “global” or known languages, are used in education, 7670 are not.¹⁵⁴ Specifically for the African context, it has been stated that

[t]here must be a move away from the banking and bookish model of education, which is a result of teaching through a language unfamiliar to both teachers and students, to a more active, empowering and transformative educational model based on African realities and educational needs and conducted in African

Education (Art. 29(1) of the Convention on the Rights of the Child), ¶ 22, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001).

¹⁴⁶ BEITER, *supra* note 111, at 493.

¹⁴⁷ THE HAGUE RECOMMENDATIONS REGARDING THE EDUCATION RIGHTS OF NATIONAL MINORITIES & EXPLANATORY NOTE 3 (OSCE High Commissioner on National Minorities, 1996).

¹⁴⁸ *Id.* Recomm. 12.

¹⁴⁹ *Id.* Recomm. 13.

¹⁵⁰ *Id.* Recomm. 17.

¹⁵¹ Penelope Bender et al., *In their Own Language: Education for All*, EDUC. NOTES (World Bank, June 2005), <http://documents.worldbank.org/curated/en/374241468763515925/pdf/389060Language00of1Instruct01PUBLIC1.pdf>.

¹⁵² READ, *supra* note 12, at 33.

¹⁵³ Stephen L. Walter & Carol Benson, *Language Policy and Medium of Instruction in Formal Education*, in THE CAMBRIDGE HANDBOOK OF LANGUAGE POLICY 278, 282 (Bernard Spolsky ed., 2012).

¹⁵⁴ *Id.* at 283.

languages.¹⁵⁵

Hence, UNESCO reminds states that “[t]he production and distribution of teaching materials and learning resources and any other reading materials in mother tongues should be promoted.”¹⁵⁶ In 2015, the CESCR, in its Concluding Observations, had expressed its concern at the situation of minority education in a state party. Inter alia, the Committee was concerned at “a shortage of textbooks in minority languages.”¹⁵⁷ Again, the language of “concern” indicates that human rights (seem to) have been violated.

VI. EXTRATERRITORIAL STATE OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

With the right to education prominently protected in Article 13 of the ICESCR, note should be taken of Article 2(1) of the Covenant, which could be seen as embodying the notion of extraterritorial state obligations (ETOs) to fulfill the right to education and other Covenant rights. It lays down the general obligation of states parties to progressively realize Covenant rights—therefore also the right to education in Article 13—“individually and through international assistance and co-operation.”¹⁵⁸ While the Covenant’s travaux préparatoires seem not to provide a basis for “hard law” obligations of state parties to render international assistance and co-operation,¹⁵⁹ Philip Alston and Gerard Quinn, in a ground-breaking 1987 article on the nature and scope of state obligations under the Covenant assert that, “[i]n the context of a given right it may, according to the circumstances, be possible to identify obligations to cooperate internationally that would appear to be mandatory on the basis of the undertaking contained in Article 2(1) of the Covenant,”¹⁶⁰ moreover, that trends in the arena of international development cooperation could subsequently require a reinterpretation in support of legal

¹⁵⁵ Birgit Brock-Utne & Hassana Alidou, *Active Students: Learning through a Language They Master*, in *OPTIMISING LEARNING, EDUCATION AND PUBLISHING IN AFRICA: THE LANGUAGE FACTOR* 187, 215 (Adama Ouane & Christine Glanz eds., 2011).

¹⁵⁶ *UNESCO Guidelines on Language and Education*, Principle I(II), in *EDUCATION IN A MULTILINGUAL WORLD* 31 (UNESCO, 2003), <https://unesdoc.unesco.org/ark:/48223/pf0000129728>.

¹⁵⁷ U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], Concluding Observations on the Combined Second and Third Periodic Reports of Tajikistan, ¶ 37, U.N. Doc. E/C.12/TJK/CO/2-3 (Mar. 25, 2015).

¹⁵⁸ Article 2(1) of the ICESCR states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

ICESCR, *supra* note 115, Art. 2(1).

¹⁵⁹ Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS Q. 156, 188–91 (1987) (analyzing the Covenant’s travaux préparatoires on the point).

¹⁶⁰ *Id.* at 191.

obligations.¹⁶¹

In 1990 the CESCR, in its influential General Comment No. 3, held that international co-operation for development is “an obligation . . . particularly incumbent upon those States which are in a position to assist others.”¹⁶² In arriving at this conclusion, the Committee relied, *inter alia*, on Articles 55 and 56 of the U.N. Charter. While Article 55 mentions the promotion of “universal respect for, and observance of, human rights” as a U.N. goal in the sphere of socio-economic development,¹⁶³ Article 56 lays down the “pledge” of U.N. members “to take joint and separate action in cooperation with the Organization” for the achievement of this and the other goals of Article 55.¹⁶⁴ Commenting on the right to education in Article 13, this author has previously emphasized that, unless such a purposive interpretation of the Covenant’s assistance and co-operation obligations is adopted, the full realization of economic, social, and cultural rights in developing states might well never be achieved.¹⁶⁵ In as far as the actual provision of development aid is concerned, it has since 1970 been recognized that donor states should allocate 0.7 percent of their gross national income to official development assistance (ODA).¹⁶⁶

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 2011, a document prepared by a group of experts in international law, addressing all three dimensions of human rights obligations, recognizes that states have obligations to respect, protect, and fulfill civil, political, economic, social, and cultural rights within their territories and extraterritorially.¹⁶⁷ ETOs

¹⁶¹ *Id.* at 191–92.

¹⁶² General Comment No. 3, *supra* note 125, ¶ 14.

¹⁶³ U.N. Charter Art. 55(c).

¹⁶⁴ *Id.* Art. 56.

¹⁶⁵ BEITER, *supra* note 111, at 380 n.35.

¹⁶⁶ See DEVELOPMENT ASSISTANCE COMMITTEE, HISTORY OF THE 0.7% ODA TARGET (DAC, Mar. 2016), <https://www.oecd.org/dac/stats/ODA-history-of-the-0-7-target.pdf>.

¹⁶⁷ MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Principle 3 (2011) [hereinafter MAASTRICHT PRINCIPLES]. For a reproduction of, and commentary to, the Maastricht Principles, see Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084 (2012). For commentary on Principle 3, see *id.* at 1090–96. The Maastricht Principles may be regarded as reflective of the teachings of the most highly qualified publicists as a subsidiary means in determining rules of international law in the sense of Article 38(1)(d) of the Statute of the International Court of Justice. Meanwhile, there exists a notable body of literature on ETOs in the field of human rights. Academic books on ETOs that also address ETOs in the field of economic, social, and cultural rights include FONS COOMANS & MENNO T. KAMMINGA eds., *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (2004); FONS COOMANS & ROLF KÜNNEMANN eds., *CASES AND CONCEPTS ON EXTRATERRITORIAL OBLIGATIONS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (2012); MARK GIBNEY & SIGRUN SKOGLY eds., *UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS* (2010); MICHAŁ GONDEK, *THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (2009); TAHMINA KARIMOVA, *HUMAN RIGHTS AND DEVELOPMENT IN INTERNATIONAL LAW* (2016); MALCOLM LANGFORD ET AL. eds., *GLOBAL JUSTICE, STATE DUTIES: THE*

encompass:

- a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and
- b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.¹⁶⁸

ETOs to *fulfill* entail positive duties, and encompass, on the one hand, obligations to *facilitate*, requiring states to create an international enabling environment that allows for the realization of human rights in other states, and, on the other, obligations to *provide*, requiring states to provide financial, technical, co-operative, and other assistance, according to ability, where human rights in another state can otherwise not be guaranteed.¹⁶⁹ Less contentious than ETOs to fulfill are negative duties to respect and even positive duties to protect human rights extraterritorially. ETOs to *respect* oblige states to refrain from conduct that nullifies or impairs the enjoyment of human rights (for example, by reversing their levels of realization) of persons outside their territories, or which impairs

EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (2013); MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW (2007); MARGOT E. SALOMON, ARNE TOSTENSEN & WOUTER VANDENHOLE eds., CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT AND NEW DUTY-BEARERS (2007); SIGRUN I. SKOGLY, BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION (2006); WOUTER VANDENHOLE ed., CHALLENGING TERRITORIALITY IN HUMAN RIGHTS LAW: BUILDING BLOCKS FOR A PLURAL AND DIVERSE DUTY-BEARER REGIME (2015). For a list of articles, books, and documents, visit the website of the ETO Consortium, a network of human rights-related civil society organizations and academics advancing the cause of ETOs under IHRL, at <https://www.etoconsortium.org>.

¹⁶⁸ MAASTRICHT PRINCIPLES, *supra* note 167, Principle 8 (Definition of extraterritorial obligations). For commentary on Principle 8, *see* De Schutter et al., *supra* note 167, at 1101–104.

¹⁶⁹ These definitions are broadly based on those proposed by a former U.N. Special Rapporteur on the Right to Food, Jean Ziegler, who specifically also uses the terms “fulfil,” “facilitate,” and “provide” in this regard. Jean Ziegler, *Report of the Special Rapporteur on the Right to Food, The Right to Food*, ¶¶ 57, 58, U.N. Doc. E/CN.4/2005/47 (Jan. 24, 2005). *See also* MAASTRICHT PRINCIPLES, *supra* note 167, Principle 29 (Obligation to create an international enabling environment) and Principle 33 (Obligation to provide international assistance), as reflecting obligations to facilitate and to provide, respectively. In as far as compliance by states with their international human rights obligations *within their respective territories* is concerned, obligations to fulfill are usually categorized as positive obligations to facilitate (installing frameworks or systems, enabling individuals to exercise rights), to provide (making available actual hand-outs, money, and social assistance to individuals in case of need), and to promote (raising public awareness concerning rights, preparing the ground for subsequent realization). *See, e.g.*, MANISULI SSENYONJO, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 25–26 (2009) (broadly providing these definitions).

the ability of other states to respect, protect, and fulfill human rights.¹⁷⁰ ETOs to *protect* oblige states to protect individuals outside their territories against infringements of their rights as may be perpetrated by various private actors. In cases where a sufficient nexus exists between a state and the private actors concerned, these actors' anticipated conduct, or the harm they might cause, protection is to occur by regulating the conduct of private actors through legal standard-setting, or administrative, investigative, adjudicatory, or other measures. Where, due to the absence of a sufficient nexus, regulation is not possible, but also generally, states should, to the extent possible, "influence" the conduct of private actors.¹⁷¹

Extraterritorial jurisdiction arises by virtue of the fact that either: a state is the bearer of state authority (for example, it exercises effective control over foreign territory and persons there); its acts have foreseeable consequences on persons beyond its territory; or, regarding international assistance and co-operation, it is in a position to assist and co-operate.¹⁷² In accordance with the latter, the Maastricht Principles identify the obligation of states "that are in a position to do so" separately and jointly to provide international assistance.¹⁷³ The duty to seriously consider providing concrete assistance and co-operation is triggered by the related request of a state in need thereof.¹⁷⁴ Assistance and co-operation is to be rendered commensurate with capacity, resources, and influence.¹⁷⁵ Any assistance and co-operation rendered must itself observe international human rights standards, prioritize vulnerable groups, focus on minimum core obligations, and avoid retrogressive measures.¹⁷⁶ In General Comment No. 13 on Article 13 of the ICESCR, the CESCR reaffirms "the obligation of States parties in relation to the provision of international assistance and co-operation for the full realization of the right to education."¹⁷⁷

Four provisions laid down in the Maastricht Principles are of particular importance in a discussion of global copyright regulation and access to textbooks. Principle 15 states:

As a member of an international organization, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that

¹⁷⁰ This definition is broadly based on Maastricht Principle 20 (Direct interference) and Principle 21 (Indirect interference). MAASRICHT PRINCIPLES, *supra* note 167, Principles 20–21.

¹⁷¹ This definition is broadly based on Maastricht Principle 24 (Obligation to regulate), Principle 25 (Bases for protection), and Principle 26 (Position to influence). *Id.* Principles 24–26.

¹⁷² *Id.* Principle 9 (Scope of jurisdiction) (mentioning these three bases for jurisdiction). For commentary on Principle 9, see De Schutter et al., *supra* note 167, at 1104–109.

¹⁷³ MAASRICHT PRINCIPLES, *supra* note 167, Principle 33.

¹⁷⁴ *Id.* Principle 35. As it were, where a state "is unable, despite its best efforts, to guarantee economic, social and cultural rights within its territory . . . [it] has the obligation to seek international assistance and cooperation." *Id.* Principle 34.

¹⁷⁵ *Id.* Principle 31.

¹⁷⁶ *Id.* Principle 32(c), (a), (b), (d), respectively. On minimum core obligations and deliberately retrogressive measures, see also *supra* notes 125 & 126.

¹⁷⁷ General Comment No. 13, *supra* note 124, ¶ 56.

transfers competences to, or participates in, an international organization must take all reasonable steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State.¹⁷⁸

The first sentence points out that a state, as a member of an international organization, such as WIPO or the WTO, must do “what it reasonably can” to ensure that the organization as a whole acts in compliance with any human rights obligations of that state. Hence, that state’s conduct, within the organization, will be measured against human rights standards. The second sentence makes it clear that a state cannot relinquish any human rights obligations it has accepted by establishing, or by becoming a member of, an international organization that exercises competences formerly exercised by the state individually. Hence, the state must ensure that the international organization is set up and functions in accordance with the human rights obligations of that state. The CESCR, it may be noted, has stated specifically with regard to the right to education in Article 13 that “[s]tates parties have an obligation to ensure that their actions as members of international organizations . . . take due account of the right to education.”¹⁷⁹

Principle 17 provides that “States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations.”¹⁸⁰ In other words, states would have to ascertain, for example, whether copyright treaties to be adopted by WIPO, or any FTAs regulating copyright they are to become a party to, are consistent with their human rights obligations and do not jeopardize human rights domestically or abroad. WIPO treaties, TRIPS, and FTAs would have to be interpreted and applied in accordance with states’ human rights obligations. If need be, treaties must be amended. This applies to both Berne and TRIPS as well. In the context of discussing states parties’ assistance and co-operation obligations under the ICESCR in relation to the right to education, the CESCR states that, “[i]n relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education.”¹⁸¹

Principle 29 stipulates:

States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment,

¹⁷⁸ MAASTRICHT PRINCIPLES, *supra* note 167, Principle 15 (Obligations of States as members of international organizations). For commentary on Principle 15, see De Schutter et al., *supra* note 167, at 1118–20.

¹⁷⁹ General Comment No. 13, *supra* note 124, ¶ 56.

¹⁸⁰ MAASTRICHT PRINCIPLES, *supra* note 167, Principle 17 (International agreements). For commentary on Principle 17, see De Schutter et al., *supra* note 167, at 1122–24.

¹⁸¹ General Comment No. 13, *supra* note 124, ¶ 56.

taxation, finance, environmental protection, and development cooperation.

The compliance with this obligation is to be achieved through, *inter alia*:

- a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards;
- b) measures and policies by each State in respect of its foreign relations, including actions within international organizations, and its domestic measures and policies that can contribute to the fulfilment of economic, social and cultural rights extraterritorially.¹⁸²

Principle 29 describes what have been termed ETOs to *facilitate* above. Compliance with this specimen of ETOs to fulfill “does not necessarily require resources or international aid.”¹⁸³ There is, therefore, no easy defense for states not to comply with these ETOs. In the context of global copyright regulation and access to textbooks, ETOs to facilitate play, as the next section will show, an important role.¹⁸⁴ Letter (a) reiterates ideas found in Principle 17, but also introduces the notion of states elaborating joint safeguard policies that buttress interpretations of the law supporting human rights, or of states adopting soft or hard law instruments that strengthen existing, or create new, standards protective of human rights. Letter (b) recognizes “humanitarian internationalism” as the legal duty of each state. Each state must, in its foreign relations, follow “a pattern of persistent principled politics” aimed at “implant[ing] a slowly emerging legitimacy norm—universal human rights.”¹⁸⁵ Relevant unilateral domestic measures and policies must also be adopted to promote human rights extraterritorially.

Finally, Principle 14 requires that “States must conduct prior assessment . . . of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights.”¹⁸⁶ Although also applicable to, for example, Berne or TRIPS, this principle assumes specific significance in relation to FTAs, which often regulate copyright and other IP matters. FTAs should, prior and subsequent to their conclusion, be subjected to human rights impact assessments, also with respect to their extraterritorial effects, to ensure

¹⁸² MAASTRICHT PRINCIPLES, *supra* note 167, Principle 29 (Obligation to create an international enabling environment). For commentary on Principle 29, see De Schutter et al., *supra* note 167, at 1146–49.

¹⁸³ Ziegler, *supra* note 169, ¶ 57.

¹⁸⁴ See *infra* Section VII.

¹⁸⁵ ALISON BRYSK, GLOBAL GOOD SAMARITANS: HUMAN RIGHTS AS FOREIGN POLICY Ch. 1 (2009).

¹⁸⁶ MAASTRICHT PRINCIPLES, *supra* note 167, Principle 14 (Impact assessment and prevention). For commentary on Principle 14, see De Schutter et al., *supra* note 167, at 1115–18.

human rights, including the right to education, are observed.¹⁸⁷ These assessments will indicate whether provisions need to be modified or deleted. Appropriate safeguard clauses may have to be included. A concluded FTA may even have to be terminated.¹⁸⁸

Concluding this part of the discussion, it may be noted that the (then) U.N. Commission on Human Rights in 2005 had appointed an Independent Expert on Human Rights and International Solidarity, notably tasked with preparing a draft declaration on the right of peoples and individuals to international solidarity, for ultimate adoption by the U.N. General Assembly. In 2017, Virginia Dandan, as the second expert in office, submitted a final draft to the Human Rights Council.¹⁸⁹ This is very interesting to read—and, in many ways, confirms the ETOs concept as elucidated here. Article 4(1) postulates a right to international solidarity. It states:

The right to international solidarity is a human right by which individuals and peoples are entitled, on the basis of equality and non-discrimination, to participate meaningfully in, contribute to and enjoy a social and international order in which all human rights and fundamental freedoms can be fully realized.¹⁹⁰

This right is said to be grounded in the *acquis* of human rights protected in international human rights treaties, covering civil and political rights, economic, social, and cultural rights, and also the right to development.¹⁹¹ The linkage to the right to development, defined earlier on,¹⁹² is striking. International solidarity is held to “consist[] of preventive solidarity, reactive solidarity and international cooperation.”¹⁹³ The latter, international cooperation,

rests on the premise that some States may not possess the resources or capacity necessary for the full realization of the rights set forth in international human rights treaties. *States in a position*

¹⁸⁷ For an examination of methodologies for human rights impact assessments of IP rights in FTAs, see Lisa Forman & Gillian MacNaughton, *Moving Theory into Practice: Human Rights Impact Assessment of Intellectual Property Rights in Trade Agreements*, 7 J. HUM. RTS. PRAC. 109 (2015). In a prominent instance, the CESCR has clearly called upon a state party to undertake a human rights impact assessment of TRIPS-plus provisions that could adversely affect human rights in partner countries. U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], Concluding Observations on the Second and Third Periodic Reports of Switzerland, ¶ 24, U.N. Doc. E/C.12/CHE/CO/2-3 (Nov. 26, 2010).

¹⁸⁸ See Olivier De Schutter, *Report of the Special Rapporteur on the Right to Food, Addendum, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, Guiding Principle 3, ¶ 3.3, U.N. Doc. A/HRC/19/59/Add.5 (Dec. 19, 2011) (right of denunciation or withdrawal implied in any trade agreement where this is necessary to comply with human rights obligations).

¹⁸⁹ Virginia Dandan, *Report of the Independent Expert on Human Rights and International Solidarity*, Annex, Draft Declaration on the Right to International Solidarity, at 15, U.N. Doc. A/HRC/35/35 (Apr. 25, 2017).

¹⁹⁰ *Id.* Art. 4(1).

¹⁹¹ *Id.* Art. 4(2).

¹⁹² See *supra* notes 111–14 and accompanying text.

¹⁹³ Draft Declaration, *supra* note 189, Art. 2(a), (b), (c).

*to do so should provide international assistance, acting separately or jointly, to contribute to the fulfilment of human rights in other States in a manner consistent with the fundamental principles of international law and international human rights law.*¹⁹⁴

Principal duty bearers are states. Article 6(1) accordingly stipulates:

All States, whether acting individually or collectively, including through international or regional organizations of which they are members, have the primary duty to realize the right to international solidarity.¹⁹⁵

These provisions visibly allude to Article 2(1) of the ICESCR and its interpretation by the CESCR in its General Comments Nos. 3 and 13. As is known, General Assembly (human rights) declarations not only make a clear moral statement, but often constitute a first step in the evolution of binding (for example, customary) law. The preceding exposition should, however, have made it quite clear that ETOs under existing human rights treaties, in a large measure, already reflect “hard law” obligations.

VII. IDENTIFYING TYPICAL ETOs UNDER THE RIGHT TO EDUCATION IN THE INTERNATIONAL COPYRIGHT CONTEXT THAT SAFEGUARD ACCESS TO TEXTBOOKS

ETOs to *respect, protect, and fulfill* (covering obligations to *facilitate and provide*) the right to education under IHRL in the Berne, TRIPS, and FTA context, directed at safeguarding access to textbooks, include, inter alia, the obligations set out in this section. Although the obligations are presented as twenty separate ETOs here, there may be a measure of overlap between them in practice. Alternatively, fulfilling a certain obligation, may modify the nature of fulfillment for another. For the sake of easier reading, the twenty ETOs have been grouped into five clusters. The formulation of isolated ETOs (or “sub” ETOs) has been highlighted in each instance.

A. *Respecting and Protecting the Right to Education*

1. **Respect: WIPO members should not** engage in any conduct in WIPO nullifying or impairing the enjoyment of the right to education in any member, or impairing that member’s ability to respect, protect, and fulfill the right to education. They must refrain from supporting policies or measures, or agreeing to provisions in (or adopting) copyright treaties, that have any such consequences.

In this sense, IP experts have called for a moratorium on new or extended IP, including copyright protection, for example by way of WIPO

¹⁹⁴ *Id.* Art. 2(c) (emphasis added).

¹⁹⁵ *Id.* Art. 6(1). Article 6(2) identifies international organizations and non-state actors as further duty-bearers in certain respects. *Id.* Art. 6(2).

treaties.¹⁹⁶ As Keith Maskus and Jerome Reichman explain, IP rights are structured around decisions on how to allocate public and private interests in knowledge goods. Because we are as yet lacking a sound understanding, based on actual evidence, of where to draw that line in different developmental contexts, taking into account genuine creative incentives generated and sustained by, and the anti-commons effects of such rights, we should not create new IP rights or extend existing ones. Ultimately, IP rights, by their very nature, restrict access to knowledge as a public good.¹⁹⁷ The authors state:

The time has come . . . to take intellectual property off the international law-making agenda and to foster measures that better enabled developing countries to adapt to the challenges that prior rounds of harmonization had already bred. . . . A moratorium on stronger international intellectual property standards would especially help developing countries shift their attention and limited resources away from compliance-driven initiatives toward programs to potentiate their national and regional systems of innovation.¹⁹⁸

The example of the moratorium captures the essence of the duty to respect as a negative obligation not to infringe human rights. Here it is the obligation not to do anything that increases levels of protection, in this case for copyright in learning materials, thereby (likely) violating the right to education. The moratorium, it should be noted, would be one not to enhance protection levels, not, however, one not to lower protection levels

¹⁹⁶ See, e.g., the Geneva Declaration on the Future of the World Intellectual Property Organization, adopted by experts, NGOs, and many others representing civil society at a meeting on the “Future of WIPO” in Geneva in September 2004, <http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf> (urging that “[t]here must be a moratorium on new treaties and harmonization of standards that expand and strengthen monopolies and further restrict access to knowledge”); the Washington Declaration on Intellectual Property and the Public Interest, adopted by experts at the Global Congress on Intellectual Property and the Public Interest, held at the American University in Washington, D.C., Aug. 25–27, 2011: *The Washington Declaration on Intellectual Property and the Public Interest*, 28 AM. U. INT’L L. REV. 19, 22 (2012) (under the heading “Valuing Openness and the Public Domain,” appealing to the IP community to “[a]dvocate for a permanent moratorium on further extensions of copyright, related rights and patent terms”); the RSA Adelphi Charter on Creativity, Innovation and Intellectual Property, adopted by the (U.K.) Royal Society for the Encouragement of Arts, Manufactures and Commerce (RSA) in 2006: PROMOTING INNOVATION AND REWARDING CREATIVITY: A BALANCED INTELLECTUAL PROPERTY FRAMEWORK FOR THE DIGITAL AGE 4, 5 (RSA, 2006) (“There must be an automatic presumption against creating new areas of intellectual property protection, extending existing privileges or extending the duration of rights. . . . Change must be allowed only if a rigorous analysis clearly demonstrates that it will promote people’s basic rights and economic well-being.”).

¹⁹⁷ Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 3, 36–39 (Keith E. Maskus & Jerome H. Reichman eds., 2005). While the authors’ argument has a basis in economic thinking, public goods-reasoning is in many ways mirrored normatively in human rights-reasoning.

¹⁹⁸ *Id.* at 37–38 (footnote omitted).

in accordance with the demands of human rights. In addition, there should also be a restraint on the adoption of soft law documents addressing IP standards, especially where instruments espouse a protectionist vision of IP. Instruments may, for instance, be recommendations and resolutions of WIPO committees. The various soft law documents “are already difficult to assess from a transparency standpoint, and yet they exert important influence on copyright law, sometimes as much as the treaty provisions.”¹⁹⁹

Likewise, **WTO members should not** engage in any actions in the WTO—and they must refrain from supporting WTO-TRIPS policies or measures—that infringe the right to education.

2. *Respect*: Powerful **WTO members should not** compel developing members to subordinate to (assailable) conceptions of copyright protection that jeopardize access to textbooks. It has been noted that, given the three-step test is now part of TRIPS, an instrument with “teeth,” enacting domestic L&Es has become a risky and uncertain affair—policy-makers in developed countries will often communicate threats to their counterparts in developing countries.²⁰⁰ In the worst case, recourse to the WTO dispute settlement system may be threatened. Developing states must be held entitled to fully utilize the potential of open-ended provisions (for example, those restating the three-step test) and specific flexibilities provided for (for example, compulsory licenses or parallel imports)²⁰¹ in Berne and TRIPS to protect the public interest in education. The famous 2002 Report of the U.K. Commission on Intellectual Property Rights emphasized:

[D]eveloping countries . . . need to be allowed greater freedom to relax international copyright rules to meet their educational and research needs. . . . Developing countries should be allowed to maintain or adopt broad exemptions for educational, research and library uses in their national copyright laws.²⁰²

On the one hand, such an interpretation accords with the TRIPS objectives in Article 7 and the public interest principles of TRIPS in Article 8 of TRIPS. The overarching aim of Article 7 is to achieve balance in IP law—between IP rights as contributing to the creation *and* the dissemination of technological and other knowledge, between the rights

¹⁹⁹ Ruth L. Okediji, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME, *supra* note 197, at 142, 186.

²⁰⁰ Okediji, *supra* note 49, at 480. See also Carlos Correa, *Formulating Effective Pro-Development National Intellectual Property Policies*, in TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY 209, 211 (Christophe Bellmann, Graham Dutfield & Ricardo Meléndez-Ortiz eds., 2003) (“developing countries have been strongly lobbied or subject to political pressures to adopt IPR legislation that responds to the interests of industries from industrialized countries”).

²⁰¹ On compulsory licenses and parallel imports, see *infra* Section VII(D)(16).

²⁰² COMM’N ON INTELL. PROP. RTS., 2002 Report, *supra* note 20, at 104.

of IP right holders *and* those of users (whether subsequent producers or end users), between the rights *and* the duties of IP right holders, and so on.²⁰³ Article 8(1) states that WTO members may adopt measures necessary to promote the public interest in sectors of vital importance to socio-economic development.²⁰⁴ Peter Yu has argued that Articles 7 and 8, inter alia, have a “shielding” function, defending a member state’s use of the flexibilities built into the TRIPS Agreement,²⁰⁵ by allowing interpretation of TRIPS through a prodevelopment lens.²⁰⁶ On the other hand—reverting to the theme of this Article—such an interpretation also accords with the right to education of IHRL. To be precise, such an interpretation in favor of the freedom to use flexibilities is a more *immediate* effect of an *external* ETO norm under the right to education of IHRL.²⁰⁷

Supplementing the obligation as formulated above, powerful **WTO members should not** compel developing members to agree to terms in FTAs endorsing (assailable) conceptions of copyright protection that jeopardize access to textbooks. FTAs will, however, be commented on separately below.²⁰⁸

3. *Protect: Developed states should*, to the extent possible, ensure that publishers sufficiently linked to their sphere of control, or whose conduct they can influence, do not exploit copyright to the detriment of students, parents, and teachers in developing states, for example by charging excessive prices for textbooks.²⁰⁹ Excessive pricing is facilitated by foreign firms being dominant in local book markets. Developed states should adopt rules for differential pricing, allowing for a reasonable

²⁰³ Article 7 of TRIPS states:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

TRIPS, *supra* note 18, Art. 7.

²⁰⁴ Article 8 of TRIPS states:

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Id. Art. 8.

²⁰⁵ Peter K. Yu, *The Objectives and Principles of the Trips Agreement*, 46 HOUS. L. REV. 979, 1025 (2009).

²⁰⁶ *Id.* at 1027.

²⁰⁷ In this regard, *see further infra* Section VII(C)(11) on treaty interpretation and the parts of Section VIII on the “constitutionalization” of IP law and the aspect of human rights priority.

²⁰⁸ *See infra* Section VII(D)(17).

²⁰⁹ *See HELFER & AUSTIN, supra* note 15, at 336 (observing that “[h]igher prices may be caused by the failure of multinational publishers to engage in differential pricing”).

profit, but requiring prices to correlate to percentages of per capita GNI expended for books, thus taking into account the circumstances of the countries concerned. Anticompetitive conduct “elsewhere” is as reprehensible as anticompetitive conduct “at home,” especially if it threatens human rights. Very much in line with this, Ruth Okediji has argued in favor of home countries bearing responsibility should their firms use IP rights in developing countries in a manner that prejudices access as a matter of public interest in those countries, for instance, by contravening competition principles.²¹⁰ This is important especially where, as a result of the weakness of the local law or the absence of institutional capacity, the public interest cannot be vindicated in the host country concerned.²¹¹

B. *A Road Map, Human Rights Impact Assessments, Reforming the Berne Appendix and TRIPS, and Bulk Access*

4. *Facilitate: Each state should* adopt policies, a road-map, as it were, with respect to its actions within the WIPO or WTO context, setting out how it can contribute to protecting the right to education, and other human rights, in that context.²¹² This is not to accord a(n) (unwarranted) mandate to WIPO or the WTO to realize human rights, but rather to ensure that, where these organizations’ conduct could have an impact on human rights, it should advance these, namely by preserving each state’s ability itself to respect, protect, and fulfill human rights. The stated road-map should incorporate principles on voting or consensus behavior, regular dialogue with developing countries, proactive measures for reform or norm clarification, co-operative approaches with respect to countries struggling to comply with Berne or TRIPS, and so on.

Furthermore, **each state should** adopt relevant unilateral *domestic* measures and policies that may promote the right to education, and other human rights, extraterritorially.²¹³ By way of example, if developed states were to enact and liberally apply “fair use” provisions (covering educational uses) domestically, this could potentially facilitate the parallel importation of cheaper copyright-based educational materials that pass muster under fair use to developing states from those developed states.²¹⁴

5. *Facilitate: WIPO and WTO members should* subject WIPO treaties, such as the Berne Convention, and TRIPS to regular human rights impact assessments, to identify potential need for reform (reinterpretation or textual reform), directed at protecting the right to education or other human rights. The former U.N. Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, thus urges that international copyright

²¹⁰ Okediji, *supra* note 26, at 240.

²¹¹ *Id.*

²¹² This is in direct application of Principle 29(b), first part, of the Maastricht Principles. MAASTRICHT PRINCIPLES, *supra* note 167, Principle 29(b), 1st part. *See supra* notes 182 & 185 and accompanying text.

²¹³ This is in direct application of Principle 29(b), second part, of the Maastricht Principles. *Id.* Principle 29(b), 2d part. *See supra* note 182 and accompanying text.

²¹⁴ On “fair use,” *see infra* Section VII(D)(15), notes 297–304 and accompanying text.

instruments should be subjected to human rights impact assessments.²¹⁵ These instruments “should never impede the ability of States to adopt exceptions and limitations that reconcile copyright protection with . . . human rights, based on domestic circumstances.”²¹⁶ Article 20 of the Berne Convention reserves the right of Berne members to enter into “special agreements” among themselves—however, only “in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to [the] Convention.”²¹⁷ This automatically prevents the adoption of agreements providing for mechanisms that may enhance access. Treaties on L&Es for education and libraries, as referred to in Point 15 below,²¹⁸ are rendered structurally impossible unless Article 20 undergoes revision.²¹⁹ Accordingly, any human rights impact assessment of the Berne Convention would clearly identify Article 20 as problematic from a human rights perspective and requiring modification.

6. *Facilitate: WIPO members should* initiate, promote, and help realize a reform of the compulsory licensing scheme of the Berne Appendix to make this work for developing states: the distinction between translation and reproduction licenses should be eliminated and the simultaneous application for both licenses under the same conditions be allowed; waiting and grace periods should be abolished; seeking consent of the copyright holder should be dispensed with; licenses should be available with respect to informal education as well (stocking public libraries, community centers, and so on); licenses should be available when the author chooses to withdraw all copies of the work or the specific edition from circulation; distribution of free copies should be legitimate; just compensation to the copyright holder should be moderate and only paid to the extent that the latter loses any market opportunity; and publication should be permitted in another country for export to the country in need—even if for the benefit of a language minority as a developing community in a developed state.²²⁰ Altogether, procedures should be simplified and the reformed compulsory licensing scheme reflect “good will” on the part of developed countries. As Alberto Cerda Silva notes, “[i]f developed countries want developing countries to cooperate in the enforcement of intellectual property, it is necessary to work on an agenda that provides the latter with enough flexibility to meet their needs.”²²¹

7. *Facilitate: WTO members should* initiate, promote, and help realize a reform of TRIPS that safeguards the right to education and other

²¹⁵ Shaheed, *supra* note 63, ¶ 94.

²¹⁶ *Id.* ¶ 95.

²¹⁷ Berne Convention, *supra* note 19, Art. 20.

²¹⁸ *See infra* Section VII(D)(15).

²¹⁹ *See also* Okediji, *supra* note 199, at 183–84 (“I propose . . . structural revisions of article 20 of the Berne Convention. . . . The prospective reach of article 20 will continue to hinder efforts to legislate positive access mechanisms in subsequent agreements.”).

²²⁰ *See* Fometeu, *supra* note 103, at 43; Okediji, *supra* note 77, at 29; Silva, *supra* note 59, at 622–23, 626–29 (all making these or similar suggestions).

²²¹ Silva, *supra* note 59, at 614.

human rights.²²²

Annette Kur and others propose, for example, that Article 7 “Objectives” should include a reference to “the larger public interest . . . in education.”²²³ Better yet would be an explicit reference here to all those human rights, including education, relevant in the TRIPS context.²²⁴ The authors propose a new Article 8a, seeking “a fair balance between private economic interests and the larger public interest as well as the interests of third parties”²²⁵ and setting out a more empowering version of the three-step test for IP law, which puts the stress on what is now the third leg of the test and proceeds on the premise that users *may use* protected subject matter *provided* this “does not unreasonably prejudice the legitimate interests of the right holder.”²²⁶

According to the authors, Article 13 on L&Es in copyright law should provide for a mandatory L&E with respect to “use made for the purpose of . . . illustration for teaching . . . to the extent that this is necessary for [that] . . . purpose” (optional in Berne),²²⁷ a mandatory L&E with respect to “acts of reproduction made by publicly accessible libraries, educational establishments, . . . which are necessary for these institutions to perform their tasks” (missing in Berne),²²⁸ and an open clause permitting other enacted restrictions of copyright subject to the (redrafted) Articles 7 to 8b (also missing in Berne).²²⁹ The latter clause was to serve as a reminder that countries were entitled, even expected, to adopt “more detailed and far-reaching limitations” than those in a mandatory catalogue—as long as

²²² Graeme Dinwoodie and Rochelle Dreyfuss argue that, in so far as a modification of TRIPS is unrealistic, relevant actors should rather direct their endeavors at compiling “an international intellectual property ‘*acquis*’—a set of basic principles that form the background norms animating the intellectual property system.” Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *An International Acquis: Integrating Regimes and Restoring Balance*, in INTERNATIONAL INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 121, 122 (Daniel Gervais ed., 2015). These meta-norms would provide the matrix for (re)achieving balance in global IP law. In this author’s view, such an *acquis* certainly makes sense for its clear practical usefulness, irrespective of whether TRIPS is actually modified or not. The fact just is that states are obliged under IHRL to “reform” TRIPS. “Reform” is a broad term and may cover different (or multiple) courses of action.

²²³ ANNETTE KUR & MARIANNE LEVIN EDS., INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS 463–64 (Art. 7(a)(i)) (2011).

²²⁴ The U.N. High Commissioner for Human Rights has urged that “[i]n the event of a renegotiation of the Agreement . . . [there should be] . . . an express reference to human rights in article 7.” U.N. High Comm’r for Human Rights [UNHCHR], *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Rep. of the High Commissioner*, Sub-Comm’n on the Promotion and Protection of Human Rights, ¶ 68, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001) [hereinafter UNHCHR, *The Impact of TRIPS on Human Rights*].

²²⁵ KUR & LEVIN, *supra* note 223, at 465 (Art. 8a(1)).

²²⁶ *Id.* at 465–66 (Art. 8a(2)).

²²⁷ *Id.* at 470–71 (Art. 13(1)(c)(ii)), 559–60.

²²⁸ *Id.* at 470–71 (Art. 13(1)(d)), 562–63. As for the library L&E, “[m]embers may make reproduction dependent on payment of fair remuneration to the right holders.” *Id.*

²²⁹ *Id.* at 472 (Art. 13(3)), 565.

they were compatible with the more generous three-step test proposed.²³⁰

8. *Facilitate*: It has been stated above that the right to education has traits of the right to development.²³¹ It is vital that international IP law be designed in such a way as to allow each country to utilize whatever “policy space” it needs to address development objectives.²³² Especially in developing countries, L&Es will be necessary that can facilitate bulk access to textbooks. Explicitly worded L&Es for educational institutions that countries may rely on to achieve such access may have to be made available in “the TRIPS context.” The civil society draft Access to Knowledge Treaty of 2005 proposes as L&Es, on the one hand, the free use by educational institutions of works as *secondary readings* for enrolled students;²³³ on the other, their use of works as *primary instructional materials* in return for equitable remuneration, if these materials are not made readily available by right holders at a reasonable price.²³⁴ In a sense, these provisions seek to liberalize the Berne Appendix at the level of “ordinary” L&Es.²³⁵

Quite generally, “remuneration-based L&Es” (also termed “statutory licenses”) are a potent device in facilitating access.²³⁶ In instances where access would ordinarily affect the typical market for a product (as in the case of bulk usage of primary teaching materials), far-reaching entitlements to use, without consent, conferred by legislation could yet be considered legitimate if important welfare interests in a state are at stake and if such permission is subject to fair remuneration being paid. Such remuneration could be paid by the state directly rather than by educational institutions, as the latter, especially in developing countries, should not be intimidated or burdened negotiating modalities of use or remuneration with publishers or collecting societies. The overall arrangement might be what Ruth Okediji has in mind where she, in more or less the same breath, refers to access to knowledge in developing states, “newly designed (or

²³⁰ *Id.* at 565. More extensive yet would be an (additional) international fair use clause. On “fair use,” see *infra* Section VII(D)(15), notes 297–304 and accompanying text.

²³¹ See *supra* Section V, first paragraph.

²³² See, e.g., Ahmed Abdel-Latif, *The Right to Development: What Implications for the Multilateral Intellectual Property Framework?*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 605, 614 (Christophe Geiger ed., 2015) (making this claim and ultimately grounding it in the right to development). See also Peter Drahos, “IP World”: *Made by TNC Inc.*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 197, 198–202 (Gaëlle Krikorian & Amy Kapczynski eds., 2010) (concisely and vividly explaining the fact that, from an economic perspective, the strength of IP protection will have to differ for each country in accordance with the individual development needs of that country, if social welfare is to be optimally promoted).

²³³ Treaty on Access to Knowledge, Art. 3-1(a)(iii), Draft, May 10, 2005, www.keionline.org/book/proposalfortreatyofaccesstoknowledgemay102005draft.

²³⁴ *Id.* Art. 3-1(a)(iv).

²³⁵ DUTFIELD & SUTHERSANEN, *supra* note 15, at 295.

²³⁶ Christophe Geiger refers to statutory licenses as “limitation-based remuneration rights,” this term aptly describing what the nature of these licenses is. Christophe Geiger, *Statutory Licenses as Enabler of Creative Uses*, in REMUNERATION OF COPYRIGHT OWNERS: REGULATORY CHALLENGES OF NEW BUSINESS MODELS 305, 305 (Kung-Chung Liu & Reto M. Hilty eds., 2017).

broadly applied) copyright L&Es,” and “compensation schemes for producers of educational materials.”²³⁷ Where in such circumstances of public urgency no such market would be affected (as broadly in the case of secondary teaching materials), there is no reason not to grant far-reaching entitlements to use *for free*.

Uma Suthersanen argues that in many developing countries, neither educational institutions nor students have the financial means to purchase primary or secondary teaching materials. Therefore, from the perspective of the copyright holder, there was no lost market opportunity in the case of unauthorized use.²³⁸ There is truth in this, of course. It implies, on the one hand, that, in many a developing country, “a reasonable price” for “primary instructional materials” may be “no” or a very low price, and, on the other, that remuneration (if any) would have to reflect the fact that the market opportunity lost is negligible.

Consequently, as an adjunct to the obligation in Point 7, the right to education—specifically conceived as a right to development—requires that **WTO members should** initiate, promote, and help realize a reform of TRIPS that permits recourse to L&Es that can facilitate a bulk provision of textbooks in educational institutions.

C. The World Intellectual Property Organization, the World Trade Organization, Treaty Interpretation, Development Aid, and Technical Assistance

9. *Facilitate*: **WIPO members should** initiate, promote, and help implement processes and, where necessary, reforms, that enhance conformity between WIPO structures and agendas and IHRL, the latter, of course, guaranteeing the right to education and the right to development. Previously, WIPO had been criticized for firmly advocating stronger IP protection in developing countries without paying attention to the potential adverse consequences of such protection.²³⁹ WIPO’s objectives, in terms of its founding document, do not include a development objective.²⁴⁰ Therefore, at the initiative of essentially developing states, WIPO adopted the WIPO Development Agenda in 2007, a policy framework to ensure its activities take into account the special needs of developing countries.²⁴¹

²³⁷ Okediji, *supra* note 49, at 487.

²³⁸ Uma Suthersanen, Education, IPRs and Fundamental Freedoms: The Right to Knowledge 12 (UNCTAD/ICTSD/BA Regional Arab Dialogue, Intellectual Property Rights (IPRs), Innovation, and Sustainable Development, Alexandria, Egypt, June 26–28, 2005), paper on file with the author. See also Nicole M. Thomas, *An Education: The Three-Step Test for Development*, 34 EUR. INTELL. PROP. REV. 244, 257–58 (2012).

²³⁹ See COMM’N ON INTELL. PROP. RTS., 2002 Report, *supra* note 20, at 157–59 (articulating this criticism).

²⁴⁰ See Convention Establishing the World Intellectual Property Organization, Arts. 3, 4, July 14, 1967, 828 U.N.T.S. 3 (entered into force Apr. 26, 1970), and amended Sept. 28, 1979 (referring only to the objective of the protection of IP).

²⁴¹ For some detail on the WIPO Development Agenda, see, e.g., Abdel-Latif, *supra* note 232, at 619–25.

The Agenda's 45 Recommendations emphasize the importance of a robust public domain,²⁴² access to knowledge for developing states,²⁴³ and norm-setting activities related to L&Es by WIPO backing development goals.²⁴⁴ The Development Agenda may potentially become a suitable basis for strengthening the public interest in international IP law.²⁴⁵ It is the actual implementation of the recommendations that will determine whether the Development Agenda effectively contributes to access to knowledge²⁴⁶ and other Agenda goals. WIPO is busy examining questions regarding two possible international instruments on L&Es for education and libraries.²⁴⁷ It has been observed that these relate to "longstanding proposals . . . [that] . . . languish despite years of discussion."²⁴⁸ Irritatingly, the 45 Recommendations do not refer to human rights. It has thus rightly been urged that the Agenda document should be interpreted "so as to insert human rights norms into the conversation."²⁴⁹ After all, it does appear desirable that WIPO's founding document be amended in a way that demonstrates accountability for achieving balance in global IP rights protection.²⁵⁰ It must be understood that actual changes and concrete results in WIPO are not a matter of courtesy toward developing countries, but required by ETOs under IHRL.

10. *Facilitate*: **WTO members should** initiate, promote, and help implement processes, and, where necessary, reforms, that enhance conformity between WTO structures and agendas and IHRL, the latter guaranteeing the right to education and the right to development. It is widely agreed that the WTO reveals a development deficit.²⁵¹ Sonia Rolland in her book *Development at the World Trade Organization* says

²⁴² WIPO, *The 45 Adopted Recommendations under the WIPO Development Agenda*, Recoms. 16, 20 (2007), <https://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.

²⁴³ *Id.* Recomm. 19.

²⁴⁴ *Id.* Recomm. 22(d). Specifically highlighting WIPO's potential role under the Development Agenda with regard to norm-setting activities related to L&Es to facilitate access to textbooks in developing states, see ISIKO ŠTRBA, *supra* note 3, at 179–200.

²⁴⁵ See CHRISTOPHER MAY, *THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA* 76–82 (2007) (broadly arguing that the Development Agenda will help WIPO socialize international IP law).

²⁴⁶ Ahmed Abdel-Latif, *The Emergence of the A2K Movement: Reminiscences and Reflections of a Developing-Country Delegate*, in *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY*, *supra* note 232, at 99, 119–20.

²⁴⁷ In this regard, see also *infra* note 305 and generally Section VII(D)(15).

²⁴⁸ Okediji, *supra* note 52, at 15–16.

²⁴⁹ Amanda Barratt, *The Curious Absence of Human Rights: Can the WIPO Development Agenda Transform Intellectual Property Negotiation?*, 14 L., *DEMOCRACY & DEV.* 14, 45 (2010).

²⁵⁰ Already the 2002 Report of the U.K. Commission on Intellectual Property Rights had recognized that this might be necessary if a reinterpretation of the WIPO articles in favor of balance fails. COMM'N ON INTELL. PROP. RTS., 2002 Report, *supra* note 20, at 159.

²⁵¹ See, e.g., U.N. High Comm'r for Human Rights [UNHCHR], *Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization: Rep. of the High Commissioner (prep. by Robert Howse)*, Sub-Comm'n on the Promotion and Protection of Human Rights, ¶ 38, U.N. Doc. E/CN.4/Sub.2/2004/17 (June 9, 2004) ("Understood in terms of the right to development, many of the [WTO] meta-structures leave much to be desired.") [hereinafter UNHCHR, *The Right to Development at the WTO*].

that the WTO “has been largely deaf to legal arguments grounded in any claim or right to development.”²⁵² Hence, in TRIPS, there are no substantive provisions relating to “special and differential treatment” benefiting developing countries.²⁵³ There are no “general exceptions” protecting the public interest, but only “limited exceptions.”²⁵⁴ There are mandatory provisions protecting IP right holders, but only best endeavor provisions befitting the public interest.²⁵⁵ TRIPS also does not define rights of users.²⁵⁶ Moreover, it sets out the content of IP *rights* in considerable detail, but only alludes to the *responsibilities* of IP right holders.²⁵⁷

Regarding Articles 7 and 8 of TRIPS, it has been stated that they should function, amongst others, as a “sword,” or as “offensive tools,” to promote socio-economic welfare or development goals within the WTO-TRIPS context.²⁵⁸ Relying on Articles 7 and 8 *and* ETOs under IHRL, the Council for TRIPS should thus support development on maximum standards, L&Es, and right holders’ obligations²⁵⁹—inter alia to ensure quality education for all and national development through education remain achievable goals. For example, concerning right holders’ responsibilities, Christophe Geiger proposes as a general guiding principle, a duty of right holders to disseminate as widely as possible protected works and to exploit them.²⁶⁰ As part of its monitoring mandate, the TRIPS Council should assess the impact of TRIPS rules and policies on development.²⁶¹ It should also assess whether TRIPS, in fulfillment of Article 7, does actually lead to a dissemination and transfer of technological and other knowledge.²⁶² In a report of 2004, the U.N. High Commissioner for Human Rights correctly explains that trade under the

²⁵² SONIA E. ROLLAND, *DEVELOPMENT AT THE WORLD TRADE ORGANIZATION v* (2012).

²⁵³ U.N. Conference on Trade and Development [UNCTAD], *Intellectual Property in the World Trade Organization: Turning It into Developing Countries’ Real Property*, at 7–8, UNCTAD/DITC/TNCD/2006/8 (2010).

²⁵⁴ *Id.* at 8.

²⁵⁵ *Id.* at 8–9.

²⁵⁶ *Id.* at 9.

²⁵⁷ UNHCHR, *The Impact of TRIPS on Human Rights*, *supra* note 224, ¶ 23.

²⁵⁸ Yu, *supra* note 205, at 1031, 1033.

²⁵⁹ *See id.* at 1034–37 (making the argument, or a very similar argument, in light of Articles 7 and 8 of TRIPS).

²⁶⁰ Christophe Geiger, *Copyright as an Access Right: Securing Cultural Participation through the Protection of Creators’ Interests*, in *WHAT IF WE COULD REIMAGINE COPYRIGHT?*, *supra* note 85, at 73, 93.

²⁶¹ Generally in favor of impact studies on development in the WTO context, *see* UNHCHR, *The Right to Development at the WTO*, *supra* note 251, ¶¶ 26–30; specifically addressing the WTO-TRIPS and WIPO context, *see* Yu, *supra* note 205, at 1037–38.

²⁶² In favor of such assessments, *see* UNCTAD-ICTSD, *RESOURCE BOOK ON TRIPS AND DEVELOPMENT* 132 (2005); Yu, *supra* note 205, at 1034–35. The TRIPS Council, in 2003, created a reporting mechanism, whose aim is to help assess compliance by developed WTO members with their technology transfer obligations under Article 66(2) of TRIPS. TRIPS, *supra* note 18, Art. 66(2); WTO, Decision of the Council for TRIPS of Feb. 19, 2003, Implementation of Article 66.2 of the TRIPS Agreement, IP/C/28 (Feb. 20, 2003). For comments on the mechanism and its weaknesses, *see* Suerie Moon, *Meaningful Technology Transfer to the LDCs: A Proposal for a Monitoring Mechanism for TRIPS Article 66.2* (ICTSD, Policy Brief No. 9, Apr. 2011).

WTO should not only increase aggregate national wealth, but must also contribute to human opportunities for self-realization.²⁶³ It must thus also facilitate educational opportunity. In sum, WTO members bear responsibility for ensuring that the right to education, as normatively enhanced by the right to development, is mainstreamed into WTO structure and practice.

11. *Facilitate*: **WTO members should** initiate, promote, and help adopt and implement safeguard policies (or at least promote a consistent practice) in terms of which the Council for TRIPS and WTO adjudicatory bodies are to interpret TRIPS law in conformity with WTO members' obligations under IHRL.

Articles 7 and 8 of TRIPS play a seminal role in interpreting TRIPS. On the one hand, these provisions reflect the “object and purpose” of TRIPS. In terms of the Vienna Convention on the Law of Treaties, the “object and purpose” of a treaty constitutes one of the crucial considerations for purposes of interpreting an international agreement.²⁶⁴ Express or implied references in Articles 7 and 8 to the transfer and dissemination of knowledge, the protection of the rights of users of copyrighted works, the enforcement of the duties of copyright holders, and the safeguarding of access to knowledge or textbooks, form part of the object and purpose of TRIPS. Accordingly, these aims, in an overall balancing of TRIPS aims, must guide the interpretation of especially broadly formulated provisions in TRIPS, for instance, Article 13 on the three-step test.²⁶⁵

On the other hand, the Vienna Convention also requires treaty terms to be interpreted in their context. The context includes “[a]ny relevant rules of international law applicable in the relations between the parties.”²⁶⁶ As Henning Grosse Ruse-Khan points out, Articles 7 and 8 function as integration principles.²⁶⁷ They are a tool for integrating the objectives pursued by other international agreements.²⁶⁸ Similarly, Peter Yu explains that Articles 7 and 8 are “a useful bridge” that connects

²⁶³ UNHCHR, *The Right to Development at the WTO*, *supra* note 251, at 2.

²⁶⁴ Vienna Convention on the Law of Treaties, Art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

²⁶⁵ Broadly in this sense, *see* HENNING GROSSE RUSE-KHAN, *THE PROTECTION OF INTELLECTUAL PROPERTY IN INTERNATIONAL LAW* ¶¶ 13.28, 13.53 (2016) (Articles 7 and 8 of TRIPS, reflecting the object and purpose of TRIPS, are to assist in the interpretation of broad and open treaty language). *See also* Susy Frankel, *WTO Application of the Customary Rules of Interpretation of Public International Law to Intellectual Property*, 46 VA. J. INT'L L. 365, 397 (2006) (“if the overall object and purpose [of TRIPS] can be sidelined, then Articles 7 and 8 have no meaning”); Alison Slade, *The Objectives and Principles of the WTO TRIPS Agreement: A Detailed Anatomy*, 53 OSGOODE HALL L. J. 948, 951 (2016) (“Articles 7 and 8 . . . illuminat[e] the object and purpose of the TRIPS Agreement”); Yu, *supra* note 205, at 1020–22 (Articles 7 and 8 as “object and purpose” of TRIPS, as “guiding light,” “important [especially] in light of the many ambiguities built into the TRIPS Agreement”).

²⁶⁶ VCLT, *supra* note 264, Art. 31(3)(c).

²⁶⁷ *See* GROSSE RUSE-KHAN, *supra* note 265, ¶¶ 13.03–58 (discussing Articles 7 and 8 of TRIPS as “general principles for integration”) and ¶¶ 13.59–85 (discussing “20 years of neglect” of Articles 7 and 8 in WTO dispute settlement).

²⁶⁸ *Id.* ¶ 13.44.

TRIPS with other regimes such as IHRL.²⁶⁹ This is facilitated by terminology in Articles 7 and 8 alluding to IHRL.²⁷⁰ In this way, the right to education in Article 13 of the ICESCR—not least in its developmental dimension (policy space for educational development)—becomes relevant to interpreting TRIPS.

However, in the context of the present discussion, the notion of ETOs adds a novel aspect. The obligation of “systemic integration” flows no longer only from the rules of treaty interpretation, but *may also be said to result from ETOs under IHRL*. In the latter version of the obligation though, human rights claim priority.²⁷¹ What would be the role of Articles 7 and 8 in this scheme? By reason of their human rights-friendly language, Articles 7 and 8 yet retain their facilitative role in this process of interpretation.

12. *Provide: Developed states* that are in a position to do so, **should**, in accordance with the requests of developing states in need, make available funds to the latter as part of their ODA, to contribute toward the cost of remuneration rights of (foreign or global) copyright holders as referred to under Point 8 above,²⁷² the cost of any compulsory licenses under the Berne Appendix, and the cost of (especially imported) textbooks generally. Funds should also go toward supporting the growth of a local publishing industry. For some countries, “most of the elements of an indigenous publishing industry are missing and there is a need to build it up from scratch.”²⁷³

13. *Provide: Developed states* that are in a position to do so, **should**, in accordance with the requests of developing states in need, make available technical assistance to the latter, aiding them in setting up IP and copyright protection systems that satisfy the requirements of international IP and human rights law (for example, advising on L&Es for education that facilitate adequate access to textbooks). Relevant technical assistance should support local publishing. To a significant extent, the technical assistance obligation has become located in WIPO and the WTO. Article 67 of TRIPS, for example, provides that “developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members.”²⁷⁴ Any assistance rendered must itself observe international human rights standards. With regard to WIPO capacity building programs, it has been noted with dismay that the absence of assistance on flexibilities for developing countries is

²⁶⁹ Yu, *supra* note 205, at 1039.

²⁷⁰ See, e.g., *id.* at 1037 (“[T]he references to the ‘social and economic welfare’ and ‘a balance of rights and obligations’ in Article 7 provide a strong reminder of the many obligations imposed by the [ICESCR], such as the right[] to . . . education.”).

²⁷¹ In this regard, see further *infra* the parts of Section VIII on the “constitutionalization” of IP law and the aspect of human rights priority.

²⁷² See *supra* Section VII(B)(8).

²⁷³ Altbach, *supra* note 21, at 23.

²⁷⁴ TRIPS, *supra* note 18, Art. 67. Developed WTO members have agreed to report on these measures annually to the Council for TRIPS.

“astonishing.”²⁷⁵

*D. Three-Step Test, Limitations and Exceptions for Education,
TRIPS Flexibilities, and Free Trade Agreements*

14. *Facilitate: WIPO and WTO members should* initiate, promote, and help adopt and implement a joint WIPO/WTO policy or soft law instrument calling for a balanced interpretation of the three-step test and providing doctrinal clarity and concrete guidelines on how to apply the test in a way that protects the interests of authors, users, and the wider public, and, generally, safeguards important human rights concerns.²⁷⁶ This would be additional to any actual reformulation of the test in hard law (notably TRIPS).²⁷⁷ It has been noted that

[v]arious alternative approaches have been developed in literature and applied by national courts, including an understanding of the three-step test as a refined proportionality test, the use of its abstract criteria as factors to be weighed in a global balancing exercise and a reverse reading of the test starting with the last, most flexible criterion.²⁷⁸

The test should be understood holistically with an emphasis on the third leg. Conflict with the normal (economic) exploitation of a work (the subject of inquiry of the second leg) should be one, admittedly an important, consideration among many—these also including access to education—in assessing whether use unreasonably prejudices the legitimate interests of the right holder. Potential conflict may be “overridden” where vital economic, social, or cultural needs justify this, specifically if some form of remuneration is paid by someone. The first leg should treat use by others as a normal incidence of copyright, *unless* exclusion is legitimate. Ultimately, as Christophe Geiger highlights, there is an urgent need to re-establish copyright as *an access right*. There is

the need to rethink copyright in order to adapt its rules to its initially dual character: 1) of a right to secure and organise cultural participation and access to creative works (access aspect); and 2) of a guarantee that the creator participates fairly in the fruit of the commercial exploitation of his [or her] works (protection

²⁷⁵ Silva, *supra* note 59, at 629.

²⁷⁶ In this regard, the Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law of 2008, formulated by international copyright law experts (*see* Geiger et al., *Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law*, *supra* note 48), may serve as a tentative blueprint. Its recourse to human rights is, however, rather sparse. Christophe Geiger proposes that “this initiative should now be taken one step further and that a legal instrument should be integrated into international law.” Christophe Geiger, *Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions*, 6 INT’L REV. INTELL. PROP. & COMPETITION L. 627, 628 (2009).

²⁷⁷ In this regard, *see* the discussion *supra* in Section VII(B)(7).

²⁷⁸ Christophe Geiger, Daniel Gervais & Martin Senftleben, *The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law*, 29 AM. U. INT’L L. REV. 581, 626 (2014).

aspect).²⁷⁹

Accepting the ETO to create and read international IP law in accordance with human rights, it will be readily apparent that the three-step test must *perfectly mirror* the demands of human rights. Or, stated differently: the three-step test must permit any such use as constitutes an entitlement under human rights. Naturally, a solution that is legitimate in a developing country need not be so in an industrialized country.

15. *Facilitate*: There needs to be clarity on which L&Es for education are permissible, which are to be mandatory, and what their respective scope should be, to adequately protect the right to education. This might be addressed as part of revising, or re-enacting, Berne²⁸⁰ and/or TRIPS.²⁸¹ Increasingly, however, there are calls for a separate international instrument on L&Es,²⁸² or even specific instruments on L&Es for education and libraries. The former U.N. Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, recommends that

WIPO members should support the adoption of international instruments on copyright exceptions and limitations for libraries and education. The possibility of establishing a core list of minimum required exceptions and limitations incorporating those currently recognised by most States, and/or an international fair use provision, should also be explored.²⁸³

Yet others propose recourse to “an international intellectual property ‘*acquis*,’”²⁸⁴ which, in a sense, refers to something like a “document” of basic, “best,” or “proven” principles, and which could also address L&Es for education.

There need to be robust personal or private use, teaching and education, library and literacy, and translation L&Es (potentially remuneration-based in certain cases). In practice, learning-related *personal or private use* appears not so much of a problem. For the United States, for example, it has been noted with regard to learning-related use, that there are few litigated cases, and that “uses are certainly not fair across the board, but many are likely fair; still others have become so customary and so widely tolerated for so long as effectively to be outside

²⁷⁹ Geiger, *supra* note 260, at 75.

²⁸⁰ Daniel Gervais argues that, because it is unrealistic to achieve the unanimity required to revise the substantive part of Berne (Berne Convention, *supra* note 19, Art. 27(3)), there should rather be “a new Act of the Convention.” GERVAIS, *supra* note 35, at 295. Further, “[t]he best way to ‘impose’ exceptions and limitations is *not* . . . to have a series of sector-specific treaties on exceptions and limitations.” *Id.* at 296. Gervais’s book presents a blueprint for such a new act.

²⁸¹ For a blueprint of proposed “amendments” to TRIPS, *see* notably KUR & LEVIN, *supra* note 223.

²⁸² For a blueprint in this regard, *see* notably Hugenholtz & Okediji, *supra* note 46.

²⁸³ Shaheed, *supra* note 63, ¶ 109.

²⁸⁴ Dinwoodie & Dreyfuss, *supra* note 222, at 122. On this suggestion, *see supra* note 222.

copyright boundaries.”²⁸⁵

As for the current teaching L&E, this should mature into a comprehensive *education L&E* benefiting non-commercial educational institutions. It must cater for utilizing the whole of a work in appropriate circumstances.²⁸⁶ Interestingly, Margaret Chon has suggested with regard to Article 10(2) of the Berne Convention that developing states should, based on a principle of substantive equality, fully exhaust that provision’s potential “to create access to works for educational purposes that may counterbalance [a] lack of bulk access to textbooks.”²⁸⁷ This is possible, but requires the necessary courage to go against the grain of established copyright wisdom. In India, the High Court of Delhi delivered a remarkable judgment in 2016 in a case in which three well-known international academic publishers had sued the University of Delhi because it had copied from the plaintiffs’ publications “on a large scale,” circulating unauthorized course packs containing “substantial extracts” from the plaintiffs’ publications.²⁸⁸ However, the Court decided in favor of Delhi University. It held that “teaching” in the Indian teaching L&E covered not only the actual lecture, but also setting the syllabus, prescribing textbooks, and all reading students were required to do pre and post lecture.²⁸⁹ The Court explained:

Copyright, specially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge.²⁹⁰

The Court further argued that its interpretation complied with the Berne Convention and TRIPS.²⁹¹ In this regard, reference may be made to Point 8 above, where it was stated that some form of remuneration by, for example, the state may be apposite in instances of particularly wide usage of primary instructional materials (typical textbooks).²⁹² The education L&E must cover reproduction right, translation right, and adaptation right—perhaps even the right of communication to the public.²⁹³ It must permit utilization in distance education.²⁹⁴ *Library and literacy L&Es* should, likewise, facilitate bulk provision to serve wider,

²⁸⁵ Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2587 (2009).

²⁸⁶ CONSUMERS INT’L, *COPYRIGHT AND ACCESS TO KNOWLEDGE: POLICY RECOMMENDATIONS ON FLEXIBILITIES IN COPYRIGHT LAWS* 29 (Asia Pacific Office, 2006) [hereinafter *COPYRIGHT AND ACCESS*].

²⁸⁷ Chon, *supra* note 15, at 837–39, citation at 838.

²⁸⁸ *Univ. of Oxford v. Rameshwari Photocopy Services*, Delhi High Ct., CS(OS) 2439/2012, ¶ 1 (Sept. 16, 2016) (India).

²⁸⁹ *Id.* ¶ 72.

²⁹⁰ *Id.* ¶ 80.

²⁹¹ *Id.* ¶¶ 91–100. Approvingly discussing this case, *see also* Okediji, *supra* note 52, at 54–57.

²⁹² *See supra* Section VII(B)(8).

²⁹³ *COPYRIGHT AND ACCESS*, *supra* note 286, at 30.

²⁹⁴ *Id.*

also informal, education needs in appropriate circumstances.

It has sensibly been suggested that there should be “local *language limitations*,” generally—that is, also beyond the educational context—permitting translations into neglected local languages.²⁹⁵ There should further be a general provision in terms of which exclusive translation rights regarding a work terminate for a specific language in a country, if, let’s say, three or five years after first publication, the work has not been made available in that language in the country concerned.²⁹⁶

Moreover, a *fair use* provision makes sense. “Fair use” means a broad open clause exemption to copyright protection, covering uses that may be considered “fair.” Whether use is fair is adjudged on a case by case basis (ultimately by the courts) in light of the purpose of the use, the nature of the work, the extent of use, the potential market affected, and so on.²⁹⁷ Patricia Aufderheide and Peter Jaszi say of fair use that it is “a bold demonstration of the need to share culture in order to get more of it.”²⁹⁸ A fair use provision in national legislation should benefit access to knowledge protected by copyright.²⁹⁹ Elements of “fair use” could be combined with those of “fair dealing” (“fair dealing” enumerating more narrowly what may be considered “fair” forms of use) to facilitate access to copyrighted materials for purposes of education.³⁰⁰ With regard to fair use, it has thus been suggested that courts should perhaps presume educational use to be fair.³⁰¹ Where use does not fall within the scope of specific provisions but fulfils the requirements of the general provision, such use would be allowed, even though national legislation did not specifically contemplate such use, to benefit access to copyright-protected knowledge.³⁰² A prominent writer has argued in favor of an international fair use doctrine unfettered by the three-step test.³⁰³ Fair use, by reason of its generality, has a strained relationship with the three-step test.³⁰⁴

²⁹⁵ Ncube, *supra* note 85, at 275–76. Similarly, *see* Basalamah, *supra* note 109, at 535 (arguing that translations into the languages of least developed countries should be covered by fair use, because no significant markets are lost to publishers and because of “the need for books in the third world”).

²⁹⁶ *See also* Ncube, *supra* note 85, at 274–75; Silva, *supra* note 59, at 585–86, 624–25 (making similar suggestions).

²⁹⁷ For a comprehensive discussion of the fair use doctrine as applicable in the U.S., *see* PATRICIA AUFDERHEIDE & PETER JASZI, *RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT* (2d ed. 2018).

²⁹⁸ *Id.* at 18.

²⁹⁹ *See* COPYRIGHT AND ACCESS, *supra* note 286, at 27–28 (making this recommendation).

³⁰⁰ *See* ISIKO ŠTRBA, *supra* note 3, at 111–57, 163–64 (making this recommendation).

³⁰¹ Samuelson, *supra* note 285, at 2587.

³⁰² COPYRIGHT AND ACCESS, *supra* note 286, at 27–28.

³⁰³ *See* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75 (2000). Such a doctrine (or clause) goes beyond an international open clause permitting additional, nationally enacted, specified forms of dealing with a protected work subject to the three-step test, as alluded to *supra* in Section VII(B)(7). It should be appreciated that both options could apply cumulatively.

³⁰⁴ Ruth Okediji argues that a U.S.-style fair use clause would be too indeterminate, too broad, and that it would nullify and impair benefits reasonably accruing under TRIPS

However, fair use would survive scrutiny under the test in its “compassionate,” human rights-aligned version as referred to under the previous point.

Altogether, the relevant ETO for this point might be formulated as follows: **WIPO and WTO members should** initiate, promote, and help adopt and implement an exposition of L&Es for education—as part of a revised, or re-enacted, Berne and/or TRIPS Agreement, and/or in a separate, soft or hard law general or cluster, or “basic (best) principles,” international document—that adequately protects access to educational materials as part of the right to education.³⁰⁵

16. *Facilitate*: **WTO members should** initiate, promote, and help adopt and implement a policy or soft law instrument on TRIPS and educational materials (akin to the Doha Declaration on the TRIPS Agreement and Public Health, adopted at the WTO Ministerial Conference in 2001) that encourages developing states to fully utilize the flexibilities provided for under TRIPS, notably compulsory licenses and parallel imports, to protect the right to education.³⁰⁶

Though the use of compulsory licenses³⁰⁷ in the field of copyright

(WTO Dispute Settlement Understanding, Art. 26), so as not to survive scrutiny under the three-step test of Berne or TRIPS. *Id.* at 117–21. *See, however, SENFTLEBEN, supra* note 34, at 162–68 (arguing that a qualitative approach to the first leg of the three-step test (“certain special cases”) does not require L&Es to be “exact and precise,” but merely “distinguishable from each other”—for that reason, they need not necessarily be “enacted,” but can also be discerned by a court).

³⁰⁵ In favor of a soft law modality (at any rate for now), *see, e.g., Hugenholtz & Okediji, supra* note 46, at 49; ISIKO ŠTRBA, *supra* note 3, at 198–200. WIPO’s Standing Committee on Copyright and Related Rights is at the moment examining questions regarding two possible international instruments on L&Es for educational activities and libraries. Studies have been submitted capturing L&Es used by WIPO members and attempting to provide typologies of the L&Es used (also identifying “elements for ongoing consideration”): Daniel Seng, *Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities*, World Intellectual Property Organization [WIPO], Standing Comm. on Copyright and Related Rights, SCCR/35/5 Rev. (Nov. 10, 2017); Crews, *L&Es for Libraries and Archives, supra* note 69; Daniel Seng, *Educational Activities Copyright Exceptions: Typology Analysis*, WIPO, Standing Comm. on Copyright and Related Rights, SCCR/38/8 (Mar. 29, 2019); Kenneth D. Crews, *Copyright Limitations and Exceptions for Libraries: Typology Analysis*, WIPO, Standing Comm. on Copyright and Related Rights, SCCR/38/4 (Mar. 29, 2019). For further relevant information, visit the website of the Standing Comm. at <https://www.wipo.int/policy/en/sccr>.

³⁰⁶ *See, e.g., Staudinger, supra* note 15 (making this suggestion). By way of analogy to the Doha Declaration, it should be possible to import and export textbooks published under a compulsory license where there are no publication capacities or the relevant book market is too small in a country.

³⁰⁷ “Compulsory licenses” grant IP entitlements to a certain party without the consent of the IP right holder, (typically) subject to the former paying fair remuneration to the latter, and are granted by a government, following application to a designated national agency by the interested party. Various reasons of public interest may justify the granting of such licenses. Article 31 of TRIPS, regulating compulsory licenses in the sphere of patents, mentions as possible reasons a national emergency, other circumstances of extreme urgency, public non-commercial use, or remedying anticompetitive practices. TRIPS,

beyond the Berne Appendix is not expressly dealt with in TRIPS, developing states are not prohibited from using compulsory licenses beyond the Berne Appendix.³⁰⁸ This must be considered especially true for as long as the Appendix is dysfunctional. A national body might grant licenses in cases of an abuse of copyright (for example, anticompetitive conduct involving the charging of excessive prices for specific textbooks, unreasonably refusing a translation or reproduction license, or offering it for an unreasonable fee or on other unreasonable terms) or situations of serious undersupply of textbooks, where granting such licenses would be in the public interest.³⁰⁹ Melissa Staudinger considers a lack of education in a country to constitute a circumstance of extreme urgency, justifying compulsory licenses for the reproduction and distribution of textbooks.³¹⁰ A weighty argument in support of compulsory licenses in this type of case lies in a purposive interpretation of Article 9(2) of TRIPS. In terms of that provision, copyright protection extends to expressions, but not ideas.³¹¹ This implies that in contexts of extreme textbook scarcity, where the expression *becomes* the idea, reproduction (or also translation) without consent (against fair remuneration) should be permissible to satisfy acute educational needs, as otherwise copyright protection would effectively prevent the spread of ideas.³¹² In case of default on the part of national agencies, it should be possible, in certain cases, to approach an international body—for instance, WIPO—for a compulsory license.³¹³

supra note 18, Art. 31(b), (k). Usually, right holders must first be approached for consent. *Id.* Art. 31(b). Licenses must usually also be granted predominantly for the supply of the domestic market. *Id.* Art. 31(f).

³⁰⁸ See, e.g., ISIKO ŠTRBA, *supra* note 3, at 157–64 (arguing that the use of compulsory licenses beyond the Berne Appendix is something developing countries could explore); Okediji, *supra* note 77, at 18 (holding that, as the Berne Convention provides for equitable remuneration schemes in certain areas, it also does not rule out compulsory licenses).

³⁰⁹ See Chris Armstrong et al., *Summary and Conclusions*, in ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT, *supra* note 102, at 317, 344 (a national copyright tribunal could be awarded the power to grant compulsory licenses). Under TRIPS, compulsory licenses granted pursuant to considerations of public policy beyond copyright law, specifically those of competition law, arguably are not subject to scrutiny under the three-step test. Okediji, *supra* note 77, at 14. In as far as competition law-based compulsory licenses are concerned—at any rate, this is the case in the field of patents—WTO members may provide that right holders need not be approached for consent, licenses need not be granted predominantly for the supply of the domestic market, and the award of a license may entail reduced remuneration to correct anticompetitive practices. TRIPS, *supra* note 18, Art. 31(k), (b), (f).

³¹⁰ Staudinger, *supra* note 15, at 358.

³¹¹ TRIPS, *supra* note 18, Art. 9(2).

³¹² See HELFER & AUSTIN, *supra* note 15, at 358–61 (explaining that copyright does not, and should not, grant an absolute monopoly).

³¹³ See Silva, *supra* note 59, at 623 (“An effective solution must allow [language and culture] minority members to apply for compulsory licenses directly to an international organization in order to bypass the limitations or negligence of their government.”). The installation of a mechanism of recourse to an international body might require changes to the Berne Convention and/or TRIPS Agreement.

As for parallel imports,³¹⁴ developing states should enact international exhaustion rules that would facilitate parallel imports of cheaper copyright-based educational materials, for example copies that pass muster under the provisions on fair use in other countries.³¹⁵ Developed states are likely to exert pressure on developing states to enact national exhaustion rules that safeguard the exclusive right of IP right holders to import and sell, or otherwise distribute, articles based on their IP right produced and sold abroad. The effect of Article 6 of TRIPS, however, is to leave it to WTO members to choose either regime of exhaustion for any field of IP law.³¹⁶ Developing states can, therefore, not be forbidden to opt for a regime in terms of which copyright entitlements are exhausted once textbooks have been produced and sold in another country, thus permitting parallel imports of such textbooks.

17. *Facilitate: WTO members should* elaborate, interpret, and apply FTAs regulating copyright in a manner consistent with their international human rights obligations. Prior and subsequent to their conclusion, **WTO members should** subject FTAs to human rights impact assessments, also with respect to their extraterritorial effects. These days, many FTAs provide for levels of IP protection exceeding those envisaged under TRIPS. In so doing, they may pose a threat to the right to education and other human rights. By way of example, Morocco has concluded an FTA with the United States containing TRIPS-plus provisions.³¹⁷ The term of copyright protection is seventy rather than fifty years, (unauthorized) parallel imports are not allowed, and more precise standards forbidding the circumvention of TPMs (digital works) are stipulated.³¹⁸ It has been observed that

Morocco has thus relinquished its right to use many of the copyright flexibilities granted to countries by the WTO. . . . The challenges connected to the US-Morocco FTA are numerous. In the field of knowledge/learning materials, Morocco's public education system is already fragile and sensitive to the price of foreign publications. The strengthening of copyright included in the agreement may, among other things, restrict access to these publications.³¹⁹

The trade ministries of developing states, also because of a reluctance

³¹⁴ "Parallel imports" entail the importation of IP right-based products, subsequent to their production and sale by the IP right holder, or a licensee, in one country, into another country, in order to sell or otherwise distribute them in that country, without the consent of the IP right holder.

³¹⁵ See Chon, *supra* note 15, at 839 (making this suggestion).

³¹⁶ In other words, WTO members may either endorse the doctrine of international exhaustion of IP rights (that would allow parallel imports) or that of national exhaustion of IP rights (that would not allow them). TRIPS, *supra* note 18, Art. 6.

³¹⁷ U.S.-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544 (2005) (entered into force Jan. 1, 2006).

³¹⁸ *Id.* Arts. 15.5.5, 15.5.2, 15.5.8.

³¹⁹ Saïd Aghrib, Noufissa El Moujaddidi & Abdelmalek El Ouazzani, *Morocco, in ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT*, *supra* note 102, at 126, 145.

to understand the full impact of IP rights, are willing to use these rights as “bargaining chips” to get market access in rich countries,³²⁰ making it easy for the latter to secure maximalist IP protection in FTAs. Once an FTA is in place, however, it is “a hard fact of life” and very difficult to reverse. In this sense, FTAs are “new constitutionalism” devices,³²¹ seeking to globally enshrine property protection at the cost of access, freedom, socio-economic welfare, dignity, and equality. Many FTAs, by limiting recourse to TRIPS flexibilities, erode the policy space that is provided on the multilateral level.³²² They compel countries to divert scarce resources and attention away from important international intergovernmental initiatives, such as notably the development of the international human rights system.³²³ They further lead to a fragmentation of the international regulatory system (the famous “spaghetti bowl”), with powerful states promoting such fragmentation to create “strategic inconsistencies” and putting pressure on what they consider unfavorable norms in the international human rights system.³²⁴ Consequently, many FTAs undermine human rights, including those to education and development.

However, as a result of obligations within and outside international IP law, “TRIPS . . . does not only create a ‘floor’ of minimum protection, but opens the door to ceilings which place a binding maximum level [on] the protection of IP.”³²⁵ It has been urged that Articles 7 and 8 of TRIPS should inspire models on which to base international negotiations for the conclusion of FTAs.³²⁶ This should be supported. However, states additionally bear ETOs under IHRL in this context. These similarly confirm ceilings and require the installation of access-preserving protective mechanisms.

In sum, FTAs should never impose limitations on utilizing flexibilities available under TRIPS that could be relied on to safeguard access to educational materials. L&Es for education may not be eroded. The three-

³²⁰ See Antoni Verger & Barbara van Paassen, *Human Development vis-à-vis Free Trade: Understanding Developing Countries' Positions in Trade Negotiations on Education and Intellectual Property Rights*, 20 REV. INT'L POL. ECON. 712, 735 (2013) (making this finding based on extensive primary empirical data).

³²¹ See, e.g., Stephen Gill, *New Constitutionalism, Democratisation and Global Political Economy*, 10 PACIFICA REV. 23 (1998) (describing how international trade and finance law arrangements are being put in place as global constitutional devices to “lock in” neoliberal reforms).

³²² Henning Grosse Ruse-Khan, *The International Law Relation between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?*, 18 J. INTELL. PROP. L. 325, 364 (2011).

³²³ Peter K. Yu, *Intellectual Property and Human Rights in the Nonmultilateral Era*, 64 FLA. L. REV. 1045, 1089 (2012).

³²⁴ *Id.* at 1090–91.

³²⁵ Annette Kur & Henning Grosse Ruse-Khan, *Enough Is Enough: The Notion of Binding Ceilings in International Intellectual Property Protection* 68 (Max Planck Inst. for Innov. & Competition, Research Paper Series No. 09-01, 2008) (footnote omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326429.

³²⁶ Yu, *supra* note 205, at 1027 (making this proposition, arguing that Articles 7 and 8 of TRIPS should serve “as a response to the growing use of ‘TRIPS-plus’ bilateral and regional trade agreements”).

step test must find its most empowering application. Infringements of copyright not occurring on a commercial scale should not be criminalized.³²⁷ Where necessary, provisions in FTAs need to be modified or deleted, appropriate safeguard clauses be included, or agreements as a whole be terminated.

E. *Reporting Obligations, Obligations of Conduct and Result, and Questioning Copyright as such*

18. *Facilitate*: At the moment, TRIPS countries are only required to report on their compliance with IP protection prescribed by TRIPS to the Council for TRIPS.³²⁸ ETOs under the right to education, and other economic, social, and cultural rights, entail that **WTO members should** establish a formal reporting mechanism, requiring TRIPS countries, in regular intervals, to report on their use of L&Es and flexibilities, available under TRIPS, to safeguard the development goals of Articles 7 and 8 of TRIPS (also access to knowledge or textbooks), as normatively enhanced by IHRL (including the right to education and the right to development), for consideration by the TRIPS Council.³²⁹ Similar reporting mechanisms which oblige states to report on successes and failures toward compliance with human rights exist under the various U.N. human rights treaties. The TRIPS Council should adopt recommendations, advising members on how to optimally utilize the policy space available under TRIPS to protect development, including in the sphere of education. Such a reporting mechanism finds support also in the following consideration: It has been stated above that Articles 7 and 8 of TRIPS should be used as a “sword,” in the sense that they should become “offensive tools” in pursuing socio-economic welfare and development goals within the WTO-TRIPS context.³³⁰ The TRIPS Council should thus use them to promote development on L&Es and flexibilities.³³¹ Such development might well yield a conception in terms of which applying appropriate L&Es and flexibilities will in many cases be more of a duty than only a right. A reliance on IHRL would confirm such a conclusion.

19. *Facilitate*: Altogether, IHRL, therefore, gives rise to various ETOs to respect, protect, and fulfill (facilitate and provide) the right to education in the Berne, TRIPS, and FTA context, directed at safeguarding access to textbooks. At the level of fulfilling rights, the duty to facilitate

³²⁷ See, e.g., Ramcharan, *supra* note 15, at 69 (“[Such criminalization] in particular heralds dramatically a loss of balance in the copyright regime as there is no moral consensus on the same.”).

³²⁸ TRIPS, *supra* note 18, Art. 63(2) (“Members shall notify the[ir] laws and regulations . . . to the Council for TRIPS”) read with Art. 68. Formalized reporting procedures do, however, exist with respect to the technology transfer and technical cooperation obligations which developed WTO members assume in terms of Articles 66(2) and 67 of TRIPS, respectively. In this regard, see *supra* notes 262 & 274 and accompanying text, respectively.

³²⁹ See also Okediji, *supra* note 52, at 64–65 (likewise recommending such a reporting mechanism).

³³⁰ Yu, *supra* note 205, at 1031, 1033.

³³¹ *Id.* at 1034–35. See also *supra* Section VII(C)(10) on this point.

is prominent in the present perspective. These duties are intriguing and complex. In the above examples, they are, to use the International Law Commission's well-known distinction between obligations of conduct and result,³³² obligations of conduct linked to a broader obligation of result. The latter prescribes the *result* to be achieved: **States should** create an international enabling environment conducive to the universal fulfillment of the right of access to textbooks. The former prescribe, with varying degrees of urgency, the *specific type of conduct* to be followed, as elucidated above.³³³

Thus, for example, a reform of the Berne Appendix (or equivalent conduct) may be considered "prescribed" conduct. Achievement of the result—conditions facilitating access to textbooks—may, in general, of course, also be advanced through other forms of conduct not specifically prescribed as described above. That these are not specifically prescribed does not mean that meaningful other measures, whatever they would be, must not also be taken. To identify possible measures, thinking outside the box is desirable. Hence, one may think of the constitutive registration of copyright.³³⁴ This would eliminate the problem of orphan works. Such works would be in the public domain for free use in schools and universities. Likewise, one may see the typical textbook for what it is, an instrumentality to achieve certain learning outcomes, rather than a work of great originality.³³⁵ Consequently, copyright protection for such works might well be restricted to, let's say, three years. During that period, the publisher can materialize the larger share of anticipated profits, while, after this period, books would not yet be out of date. However, would this maintain the incentive of (private) publishers to produce textbooks? State subsidies to, or tax relief for, publishers are conceivable measures to maintain this. The right to education, per definition, requires the state to realize—that is, to pay for—the education system. In any event, the state should assume a more prominent role in textbook production and, wherever possible, retain copyright.

In sum, therefore, beyond specific conduct identified as mandatory in

³³² See *Report of the International Law Commission to the General Assembly on the Work of Its Twenty-Ninth Session*, 32 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/32/10 (1977), reprinted in [1977] 2(2) Y.B. INT'L L. COMM'N 11–30, U.N. Doc. A/CN.4/SER.A/1977/Add.1 (Part 2) (elaborating on the distinction between obligations of conduct and result; broadly, obligations of conduct expect states to undertake a specific course of conduct; obligations of result expect states to achieve a particular result through conduct, the nature of, and the means required for which, are left to state discretion).

³³³ See Section VII, Points 4–11, 14–18 (and 19–20).

³³⁴ See, e.g., Dev S. Gangjee, *Copyright Formalities: A Return to Registration?*, in WHAT IF WE COULD REIMAGINE COPYRIGHT?, *supra* note 85, at 213.

³³⁵ Very sensibly, Christophe Geiger proposes that traditionally rather lax tests for assessing whether copyright protection should arise with regard to a specific work, be replaced with a more onerous test: "Only expressions that are the result of a creational process in which the freedom of the creator has been superior to imposed necessities and which neither interfere unduly with future creation nor cause unjustified harm to legitimate public interests such as cultural participation may enjoy copyright protection." Geiger, *supra* note 260, at 101. Applying this test, most primary instructional materials would hardly qualify for any (or extensive) copyright protection.

creating an international enabling environment conducive to the universal fulfillment of the right of access to textbooks, **states should** also, separately and jointly, take all such other deliberate, concrete, and targeted steps, they deem appropriate, as would contribute to creating such an environment.

20. *Facilitate*: Daniel Gervais has recently argued in favor of a “middle way” in international IP law, a way that “make[s] the system work for all stakeholders, taking due account of the fact that each country or region needs some room to calibrate their intellectual property regime to their own situation.”³³⁶ To a large extent, the above discussion has made suggestions in line with the proposal for a middle way. It is not clear at all, however, whether the current copyright system can be made to work for all in the end. The legitimacy crisis of copyright runs deep.

Although the encouragement of learning, advancement of knowledge, and public education were supposed goals of copyright when this originated in the 18th century,³³⁷ Lockean conceptions holding that the exertion of labor leads to the acquisition of property have since cemented the view that copyright and other IP rights constitute property.³³⁸ In many ways, copyright has come to function like ownership of property. Like the latter, copyright reflects a significant power relationship between persons. It is not only a government-granted monopoly, but also gives rise to far-reaching power over others—the power to exclude others from access.³³⁹ In the 20th century, IP rights have become mere investment-protecting devices, with little social benefit.³⁴⁰ IHRL is of more recent pedigree than international IP law. IHRL protects human rights holistically. Apart from civil and political rights, it also encompasses economic, social, cultural, and group or solidarity rights. International IP law, also because of its earlier origin, has developed largely in isolation from especially the latter two groups of rights. Initially, it was considered that civil rights, such as freedom of expression, were inherently protected by the structures of copyright law. For a long time, therefore, courts were very reluctant to test the rules of copyright law against such rights to the extent that any defense did not have its foundation in copyright law itself.³⁴¹ Recently,

³³⁶ Daniel J. Gervais, *Is There a “Middle Way” in International Intellectual Property?*, 47 INT’L REV. INTEL. PROP. & COMPETITION L. 135, 136–37 (2016).

³³⁷ See HELFER & AUSTIN, *supra* note 15, at 316 (referring to some historical documents in support of this).

³³⁸ JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 2d treat., ch. V, ¶ 27 (Ian Shapiro ed., 2003).

³³⁹ See, e.g., Story, *supra* note 15, at 127 (“Copyright . . . represents not only the state’s grant of sovereignty to a private party but also power *over* other people.”) (emphasis added).

³⁴⁰ See Christophe Geiger, *Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 232, at 661, 662 (referring to “investment-protection mechanisms” often without “social value”).

³⁴¹ See Christophe Geiger & Elena Izyumenko, *Intellectual Property before the European Court of Human Rights*, in INTELLECTUAL PROPERTY AND THE JUDICIARY 43–44 n.143 (Christophe Geiger, Craig A. Nard & Xavier Seuba eds., 2018) (citing case law demonstrating this).

however, courts have shown an enhanced willingness to assess the rules of copyright law against freedom of expression more generally.³⁴² A wholesale subjection of the IP, including the copyright system—and its proprietary premise that justifies exclusion—to a review in light of economic, social, cultural, and group or solidarity rights by legislators and courts, however, has so far not taken place. An assessment in light of these rights, with their emphasis on access—facilitating health care, food security, education, cultural participation, socio-economic development, and so on—could potentially require questioning copyright, or any other domain of IP law, as an institution, and its replacement by an alternative system, altogether.³⁴³ It should be appreciated that a system that respects the moral and material interests of creators, but simultaneously facilitates access, *can* look very different from current copyright law.³⁴⁴

Copyright is premised on the notion that a reward will stimulate the creation of culture. As yet, empirical evidence to support this view is scant.³⁴⁵ It seems that most works of culture (beyond consumerist mainstream culture) are created because of the creative impulse authors feel to produce a work.³⁴⁶ Copyright is premised on the notion that authors *deserve* to be rewarded. These days, however, most authors do not benefit from copyright. Profits essentially accrue to “large, impersonal and unlovable corporations,”³⁴⁷ benefiting shareholders and a handful of “stars,” whose art (if it is that) lends itself to lucrative marketing and quick consumption. It has even been stated that the power that has become concentrated in a few market-dominating firms in conjunction with copyright enables those firms to control public communication to the detriment of democracy—democracy being based on the freedom to communicate and participate in cultural life.³⁴⁸ Copyright is premised on the notion that it will lead to a genuine flourishing of culture. In practice, linking copyright to the international trade system has served to commodify copyrighted works, making them commercial products rather than respected pieces of cultural expression, thus spurning global cultural

³⁴² See, e.g., the more recent case law of the European Court of Human Rights: *Ashby Donald v. France*, App. No. 36769/08, Eur. Ct. H.R. (Jan. 10, 2013); *Neij & Sunde Kolmisoppi v. Sweden* (dec.), App. No. 40397/12, Eur. Ct. H.R. (Feb. 19, 2013).

³⁴³ Perhaps contemplating this, see, e.g., Okediji, *supra* note 52, at 37 (“[T]he vision of human dignity reflected in . . . economic, social, and cultural rights . . . require[s] a change in the core rules and assumptions that pervade the IP system.”).

³⁴⁴ See, e.g., THE COPY/SOUTH RESEARCH GROUP, *THE COPY/SOUTH DOSSIER: ISSUES IN THE ECONOMICS, POLITICS, AND IDEOLOGY OF COPYRIGHT IN THE GLOBAL SOUTH* 53 (Alan Story, Colin Darch & Debora Halbert eds., 2006) (“[C]opyright represents one possible answer.”).

³⁴⁵ See, e.g., Sprigman, *supra* note 28, at 32 (“[T]hese scattered bits of empirical evidence suggest that the relationship between copyright and creativity is . . . complicated.”).

³⁴⁶ See, e.g., THE COPY/SOUTH RESEARCH GROUP, *supra* note 344, at 55 (noting that “many of the greatest works of literature and art were—and are being—created without any reference to copyright incentives”).

³⁴⁷ Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 62 (2002).

³⁴⁸ JOOST SMIERS & MARIEKE VAN SCHIJNDEL, *IMAGINE THERE IS NO COPYRIGHT AND NO CULTURAL CONGLOMERATES TOO . . . BETTER FOR ARTISTS, DIVERSITY AND THE ECONOMY* 5 (trans. Rosalind Buck, 2009).

consumerism.³⁴⁹ Additionally, copyright is premised on the notion that individuals' rights should be protected.³⁵⁰ Copyright is awarded to *individual authors* with respect to types of work considered worthy of protection by the global North. Copyright fails to accord protection to songs, dances, rituals, objects, and stories produced, over time, by *communities* in the global South.³⁵¹ Yet, the North has not been reticent to use such cultural expression on a large scale for free to generate profit not benefitting those communities. In this regard, it has legitimately been asked whether it is fair that “developing countries provide a very real right to protection for foreign works . . . in their countries in return for the largely theoretical right of receiving that treatment in developed countries.”³⁵² Globally, copyright royalties and licensing fees flow essentially from the South to the North.³⁵³ On a more fundamental level, copyright may even be too alien a construct for countries of the South. Rosemary Coombe notes:

The range of Western beliefs that define intellectual and cultural property laws . . . are not universal values that express the full range of human possibility, but particular, interested fictions emergent from a history of colonialism that has disempowered many of the world's peoples.³⁵⁴

For which reason Ruth Okediji warns,

[d]eveloped countries underestimate the degree to which local institutions, traditional ideas, and social values will resist a wholesale acceptance and application of the philosophy of intellectual property rights, and consequently, the TRIPs Agreement.³⁵⁵

In light of these observations, it remains to be seen whether the suggestions made in this Article are sufficient to secure access rights. As the ETOs set out in Points 1 to 19 are complied with, **states should**, over time, monitor progress toward achievement of the access goals. Failing sufficient progress, a global obligation necessitating that **states should** undertake more drastic reforms is triggered. In this instance, **states should** reassess international copyright law and its embedment in the related world trade system in principle. As radical as it may sound, if necessary, **they should** do away with the current system altogether and substitute it

³⁴⁹ See, e.g., The Copy/South Research Group, *supra* note 344, at 54–55 (on copyright and commodification), at 56 (on copyright and consumerism).

³⁵⁰ *Id.* at 53–54 (on copyright and “individualism”).

³⁵¹ *Id.* at 56–61 (on the differing traditions of cultural creation in the South).

³⁵² Simon Butt, *Intellectual Property in Indonesia: A Problematic Legal Transplant*, 24 EUR. INTELL. PROP. REV. 429, 431 (2002).

³⁵³ See World Mapper, Map No. 99, *Royalties and License Fee Exports*, University of Sheffield, http://archive.worldmapper.org/posters/worldmapper_map99_ver5.pdf (depicting such revenue flows).

³⁵⁴ ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 247 (1998).

³⁵⁵ Ruth L. Gana, *Prospects for Developing Countries under the TRIPs Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 774 (1996).

with an alternative system. Also these are ETOs arising under the right to education, the right to development, and other international human rights.

VIII. ETOs AS CONSTITUTIONALIZATION “FROM BELOW” IN IP LAW

It is sometimes said that much of what could be achieved by human rights in IP law will be neutralized by the fact that IP rights themselves have been promoted to the rank of human rights. This has thus recently been lamented passionately by Ruth Okediji.³⁵⁶ In this writer’s view, this fear seems exaggerated. Most IP rights are held by companies, that is, juristic persons. The CESCR, in its General Comment No. 17, in which it analyses the right of everyone “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author,” as laid down in Article 15(1)(c) of the ICESCR,³⁵⁷ makes it clear that this right can be held by *natural* persons or groups of *natural* persons *as creators* only.³⁵⁸ The IP claims of natural persons or groups of natural persons attain human rights status to the extent that they relate to works that can be considered expressions of creative urges and skills intimately bound up with the human dignity and personality of the creator or creators. Juristic persons—and this includes all publishing companies—are neither natural persons nor “creators” in this sense. Regarding the latter point, their IP claims are either only acquired from natural persons (the companies being mere “holders” of copyright), alternatively, if their IP claims flow from works that are self-generated, these claims are not (as they cannot be) rooted in human dignity. The rights of juristic persons are, therefore, not protected under Article 15(1)(c). The Committee draws express attention to this truth.³⁵⁹ In addition, authors’ rights as human rights are subject to an important definitional limitation that clearly distinguishes them from typical IP rights: They only give rise to a claim to such protection of material interests as is necessary to enjoy an *adequate* standard of living.³⁶⁰ This implies a fairly *modest* level of remuneration. As for all human rights, human dignity is the point of reference. Respecting human dignity never requires—in fact, often will demand countering—material

³⁵⁶ Okediji, *supra* note 52.

³⁵⁷ ICESCR, *supra* note 115, Art. 15(1)(c). This provision gives legally binding form to the largely identically worded predecessor provision of Article 27(2) of the (non-binding) Universal Declaration of Human Rights. U.N.G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 27(2) (Dec. 10, 1948) [hereinafter UDHR].

³⁵⁸ U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], General Comment No. 17, The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art. 15(1)(c) of the ICESCR), ¶ 7, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) (“only the ‘author,’ namely the creator, whether man or woman, . . . can be the beneficiary of the protection of article 15, paragraph 1(c). . . . [A]uthors . . . [are] natural persons, . . . [or] . . . groups of individuals.”).

³⁵⁹ *Id.* ¶ 7 (“[L]egal entities are included among the holders of intellectual property rights. However, . . . their entitlements, because of their different nature, are not protected at the level of human rights.”).

³⁶⁰ *Id.* ¶ 15 (“[T]he material interests of authors . . . contribute to the enjoyment of the right to an adequate standard of living . . . [as protected in] . . . art. 11, para. 1 . . . [of the ICESCR].”).

extravagance. Alternatively, is it not possible to rely on the right to property in support of strong IP protection? The right to property, while not found in the U.N. Human Rights Covenants,³⁶¹ is protected in the various regional human rights treaties.³⁶² Under the European Convention on Human Rights, claims based on the right to property may even be raised by juristic persons.³⁶³ Yet, two things should constantly be kept in mind in this context: first, property in human rights law is always a socially constricted concept. Second, the “fundamental” rights of a company can never be “human” rights, and can, therefore, not rank on a par with actual human rights, such as the right to education. However, these are issues that should be discussed in more detail at a future point.

This said, it should be noted that the right to education may be subjected to limitations, also those resulting from copyright law. However, for this to succeed, the strict requirements of a limitation clause, such as Article 4 of the ICESCR, need to be complied with. Of the latter, the CESCR emphasizes that it “is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.”³⁶⁴ In terms of Article 4, limitations must be “determined by law,” “compatible with the nature of . . . rights,” and “solely for the purpose of promoting the general welfare in a democratic society.”³⁶⁵ What is of significance here is that non-discriminatory access to education is part of the core, the nature of the right to education.³⁶⁶ Therefore, when any copyright law has the effect of denying access to textbooks *to disadvantaged students*, the limitation will likely not be compatible with the nature of the right to education, and thus fail under Article 4.

Ignoring to add the missing dimension of ETOs under IHRL in a globalized world will render human rights largely impotent. As has been stated correctly, “[h]uman rights have been locked up behind domestic bars to prevent their universal application to globalization and its much needed regulation. Extraterritorial obligations . . . unlock human rights.”³⁶⁷ Thus unlocked, human rights can also “civilize,” or “constitutionalize,” IP law.

The fragmentation of international law is often portrayed as a dangerous, aggravating phenomenon. Some may therefore argue in favor

³⁶¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); ICESCR, *supra* note 115. The right to property is, however, protected by Article 17 of the (non-binding) Universal Declaration of Human Rights. UDHR, *supra* note 357, Art. 17.

³⁶² See Protocol to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, Mar. 20, 1952, 213 U.N.T.S. 262 (entered into force May 18, 1954) [hereinafter Protocol No. 1]; American Convention on Human Rights, Art. 21, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (entered into force July 18, 1978); African (Banjul) Charter, *supra* note 139, Art. 14.

³⁶³ See Protocol No. 1, *supra* note 362, Art. 1(1) (“Every natural or *legal* person is entitled to the peaceful enjoyment of his possessions.”) (emphasis added).

³⁶⁴ General Comment No. 13, *supra* note 124, ¶ 42.

³⁶⁵ ICESCR, *supra* note 115, Art. 4.

³⁶⁶ BEITER, *supra* note 111, at 458.

³⁶⁷ ETO CONSORTIUM, <https://www.etoconsortium.org> (last visited on May 15, 2020).

of an international court, such as the International Court of Justice, or a new “World Court of Human Rights,”³⁶⁸ exercising global constitutional or human rights jurisdiction, and enforcing a set of norms conferred express priority over all other law. This is classic constitutionalism, and entails “constitutionalization” “from above.” At the other end, some may argue in favor of the puristically unstratified nature of international law, justifying, for instance, the WTO system as a self-contained regime functioning solely according to its own rules. The latter view is hardly justifiable anymore today. The former, if (ever) realizable, is *Zukunftsmusik*—a dream of the future. For now, there is a *via media*. This is based on the ETOs concept.

There are ETOs arising in circumstances where there exists some more concrete jurisdictional link between different states. However, the emphasis in this Article has been on ETOs of a *global character*. These require states, separately, and jointly through international co-operation, to facilitate the realization of human rights universally by creating an international enabling environment toward this end—and, sometimes, to contribute to realization through concrete assistance. These ETOs have their basis in, for example, the U.N. Charter or the ICESCR.³⁶⁹ Clearly: if we say that states, when acting on the international plane—alone or together with other states, for instance in international organizations—are required by ETOs under IHRL to create, interpret, and apply IP, trade, and all other international law in consonance with their human rights obligations, this could have a “constitutionalizing” effect on the law. The same “constitutionalizing” effect would flow from the interpretation of the law, in this way, by the different international fora—all ultimately established and entrusted with interpretative competences by states. Here one is dealing with a more subtle, mediated, or “evolving” form of constitutionalization. It is perhaps a form of constitutionalization “from below”—by states through their regular conduct, or through the jurisprudence of courts or tribunals.

However, what if subsequent to the creation of IP, trade, or any other international law, its compatibility with human rights obligations is in doubt? The endeavor of interpretation or application in accordance with human rights may raise difficult questions. In 2001, the CESCR emphasized that “national and international intellectual property regimes must be consistent with the obligation of States parties to ensure the progressive realization of full enjoyment of all the rights in the Covenant.”³⁷⁰ In the same year, the U.N. Sub-Commission on the Promotion and Protection of Human Rights, as it then was, “[r]emind[ed] all Governments of the primacy of human rights obligations under

³⁶⁸ See notably Manfred Nowak, *The Need for a World Court of Human Rights*, 7 HUM. RTS. L. REV. 251 (2007).

³⁶⁹ See *supra* Section VI, where this has been discussed.

³⁷⁰ U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], Statement on Human Rights and Intellectual Property, Follow-up to the Day of General Discussion on Art. 15(1)(c), ¶ 11, U.N. Doc. E/C.12/2001/15 (Dec. 14, 2001).

international law over economic policies and agreements.”³⁷¹ The question, of course, is, what is the consequence of international IP law not complying with IHRL? Will human rights prevail? It is important to appreciate the reality of hierarchies of various sorts in international law,³⁷² which are enforced in a decentralized fashion. Hence, a treaty may not conflict with a peremptory norm of general international law (*ius cogens*).³⁷³ There are obligations *erga omnes*; obligations of such importance that they are owed to a group of states or the international community as a whole.³⁷⁴ Article 103 of the U.N. Charter provides that, in the event of a conflict between the obligations of U.N. members under the Charter and their obligations under any other international agreement, their obligations under the Charter will prevail.³⁷⁵ Human rights are associated with each of these hierarchies.³⁷⁶ This is clearly true for *ius cogens*.³⁷⁷ Regarding obligations *erga omnes*, it has been stated that “it

³⁷¹ Sub-Comm’n H.R. Res. 2001/21, Intellectual Property and Human Rights, ¶ 3 (Aug. 16, 2001).

³⁷² In this sense, see also Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, ¶ 407, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (explaining that, depending on the precise context, there exist “relations of superiority and inferiority” between norms of international law).

³⁷³ VCLT, *supra* note 264, Art. 53. Such a treaty is void. *Id.* The International Law Commission has been considering the topic of *ius cogens* since 2015. In his third report of 2018 to the Commission, which addresses the consequences and legal effects of *ius cogens* norms, the Special Rapporteur to the Commission, Dire Tladi, includes among his proposals for draft conclusions that also customary international law, unilateral acts, and binding resolutions of international organizations in conflict with *ius cogens* should be held to be invalid. Dire Tladi (Special Rapporteur), *Third Report on Peremptory Norms of General International Law (Jus Cogens)*, ¶ 160, U.N. Doc. A/CN.4/714 (Feb. 12, 2018) (Draft Conclusions 15–17).

³⁷⁴ See *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5) (introducing this concept into positive law).

³⁷⁵ U.N. Charter Art. 103.

³⁷⁶ On hierarchies in international law, and their frequent association with human rights, see Beiter, *Conformity between TRIPS and Human Rights*, *supra* note 26, at 470–75, and all the sources cited there. See also Koskenniemi, *supra* note 372, Part E of the report.

³⁷⁷ Does *ius cogens* have any relevance in the field of international copyright law? This is conceivable. To mention an example: The prohibition of genocide is usually considered to constitute *ius cogens*. See Dire Tladi (Special Rapporteur), *Fourth Report on Peremptory Norms of General International Law (Jus Cogens)*, ¶ 137, U.N. Doc. A/CN.4/727 (Jan. 31, 2019) (Draft Conclusion 24). (The other clear instances of *ius cogens* are: the prohibition of aggression, the prohibition of slavery, the prohibition of racial discrimination, the prohibition of crimes against humanity, the prohibition of torture, the right to self-determination, and the basic rules of international humanitarian law. *Id.*) Without wishing to fully argue the case here, it may be noted that one of the most renowned scholars on the topic of linguistic human rights in education, Tove Skuttnab-Kangas, has made an interesting argument to the effect that the assimilationist language policies in the sphere of education pursued by many states, realistically adjudged, amount to intentionally applying various forms of psychological pressure to ensure children “will transfer” to the dominant language of a society. This, she argues, does actually fall within the definition of genocide as set out in the U.N. Genocide Convention. Convention on the Prevention and Punishment of the Crime of Genocide, Arts. II, III, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (definition of genocide and punishable acts). She points out that, although the Convention does not

seems best to consider human rights obligations generally as a class of *erga omnes* obligations.”³⁷⁸ On this premise, also the right to education gives rise to obligations *erga omnes*. As for the U.N. Charter, this provides for respect for human rights as a U.N. goal.³⁷⁹ “Respect for human rights” could be held to include a reference to the right to education.³⁸⁰

Moreover, *lex specialis derogat legi generali*. International IP, specifically WTO law (*lex specialis*), which provides the operational effectiveness promoting the objectives of international IP/WTO law that “general” international law (*lex generalis*) lacks, prevails over the latter. However, as Bruno Simma underlines: “‘Self-contained regimes’ cannot, at least not completely, ‘contract out’ of, decouple themselves, from, the

explicitly cover cultural genocide, the deliberation of the issue when drafting the Convention has left “a definition of linguistic genocide, which most states then in the UN were prepared to accept.” See TOVE SKUTNABB-KANGAS, LINGUISTIC GENOCIDE IN EDUCATION—OR WORLDWIDE DIVERSITY AND HUMAN RIGHTS? xxxi–xxxiii, 202, 314, 316–17, 327, 369, 652 (2000) (discussing the aspect of psychological force as equivalent to physical force, (bogus) consent to linguistic assimilation, the Genocide Convention and its drafting history, the difference between (“good”) motive and (punishable) criminal intent, active “killing” and (equally reprehensible) passive “letting die,” and weak and non-forms of bilingual education as amounting to genocide by “forcibly transferring children of the group to another group” within the definition of Article II(e) of the Genocide Convention). At this point then, it may well be asked whether international copyright is not complicit in achieving such linguistic genocide in relation to many endangered and vulnerable languages and their speakers. Under the Berne/TRIPS system, the translation of literary and artistic works is the exclusive right of the copyright holder (*see supra* Section I). The stated system does not provide for special L&Es for translation (*see supra* Section III) and the Berne Appendix, including its translation mechanism, is dysfunctional, maybe even purposefully (*see supra* Section IV). Consequently, translation into the languages of those that otherwise do not have such access to educational materials in their own language as would be necessary to ensuring their survival as a cultural group has been rendered impossible. On this account, one might have to argue that Article 8 of the Berne Convention, protecting the copyright holder’s exclusive translation right—at any rate, in its generality—is void as being in conflict with *ius cogens*. Berne Convention, *supra* note 19, Art. 8.

³⁷⁸ IAN D. SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION 145 (2001).

³⁷⁹ U.N. Charter Art. 1(3) (“[t]o achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”), linked to obligations in Arts. 55(c), 56 (stating that the U.N. “shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,” and laying down the “pledge” of U.N. members “to take joint and separate action in cooperation with the Organization” for the achievement of that goal, respectively).

³⁸⁰ Specifically with regard to Article 56, it has been noted that “the obligation is far from precise . . . But does this mean that it cannot be considered a legal obligation? In view of both the history and the language of this Article, this would certainly be an extreme conclusion.” Oscar Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 650–51 (1951). Furthermore, ever since, the U.N.’s normative activities of formulating declarations and conventions in the field of human rights have given concrete content to the term “human rights” in the Charter.

system of general international law.”³⁸¹ Self-contained regimes continue to draw their legitimacy from general international law.³⁸² It has been observed that “the spirit of human rights” has meanwhile entered the area of general international law.³⁸³ Many rules of *lex generalis* embody “internationally recognized ethical positions.”³⁸⁴ Today, many human rights form part of general international law. It has thus been held with regard to economic, social, and cultural rights that “at least some elements” of the rights to work, just and favorable conditions of employment, a decent standard of living, freedom from hunger, health, and education constitute (general) customary law.³⁸⁵ Various human rights, including some of those that would not qualify as custom for lack of state practice, would further have to be considered “general principles of law recognized by civilized nations” in the sense of Article 38(1)(c) of the Statute of the International Court of Justice.³⁸⁶ Certain norms of general international law are not dispositive in nature. Self-contained regimes cannot “contract out” of *lex generalis* “if obligations of general law are of ‘integral’ or ‘interdependent’ nature, have *erga omnes* character or practice has created a legitimate expectation of non-derogation.”³⁸⁷ Apart from their status as rules of special human rights regimes, certain human rights would therefore—as they possess (for instance) *erga omnes* character—qualify as strict (“non-dispositive”) rules of general international law as well. International IP regimes cannot exclude the applicability of these human rights of *lex generalis*. Core aspects of the right to education, such as free primary education, covering also extraterritorial dimensions of that right, might be included in this rubric of norms.

Whenever the provision of a self-contained regime needs to be interpreted—and this is of special significance where that provision potentially conflicts with an “outside rule”—international law envisages that interpretation should take place in accordance with the principle of “systemic integration,” as laid down in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.³⁸⁸ Article 31(3)(c) codifies (general) customary international law and, as such, applies with regard to the international IP treaties. Essentially, there must be an attempt at a

³⁸¹ Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT’L L. 265, 275 (2009).

³⁸² See Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT’L L. 483, 510 (2006) (“In strong regimes [such as WTO law], general international law . . . serve[s] as a source of legitimacy.”).

³⁸³ *Id.* at 524.

³⁸⁴ *Id.* at 511.

³⁸⁵ ADAM MCBETH, INTERNATIONAL ECONOMIC ACTORS AND HUMAN RIGHTS 40–41 (2010).

³⁸⁶ The understanding of “general principles” here is that of consensual rules arising and recognized at the international level through their “direct and spontaneous” “expression in legal form.” Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. YBIL 82, 105 (1988–1989).

³⁸⁷ Koskenniemi, *supra* note 372, ¶ 154.

³⁸⁸ Treaty terms must be interpreted in their context. VCLT, *supra* note 264, Art. 31(1). “There shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties.” *Id.* Art. 31(3)(c).

harmonious reading, which seeks to understand the provision concerned in light of all other applicable (including potentially conflicting) norms of general international law and those of other self-contained regimes.³⁸⁹ While the consequences of non-compliance with *ius cogens* are clear, the position relating to other “superior” or “systemically crucial” norms could be held to be that, in the process of interpretation, these obligations need to be given weight in a way that takes account of their normative force.³⁹⁰

Yet, as Joost Pauwelyn points out with regard to interpretation in terms of Article 31(3)(c), external norms can only assist in giving meaning to terms used in a treaty, but cannot overrule them.³⁹¹ The treaty being interpreted retains a primary role, the external norm has a secondary role—the latter cannot displace the treaty norm, wholly or partly.³⁹² Hence, where the “outside rule” is a human rights obligation, the danger—as renowned scholars of international law note—is that “systemic integration” might compel a compromise in which the human rights norm essentially disappears.³⁹³ However, perhaps this is where ETOs to interpret (and apply) international law in consonance with human rights might prove useful. In a harmonious reading of conflicting norms, they could help keep alive the realization that the rules of any self-contained regime were supposed to have been created in conformity with human rights (as “superior” or “systemically crucial” legal norms). This might help ensure that the contours of human rights always remain clearly visible in any interpretation of the law. Better yet, of course, would be a modification of the rules of treaty interpretation within the context of self-contained regimes such as WTO law so that human rights can be taken into account more effectively. This is possible as the current rules of interpretation constitute ordinary customary law that *lex specialis* may qualify.

However, what if, after having had recourse to the instruments of interpretation that international law places at the interpreter’s disposal, an interpretation in accordance with human rights can, after all, not be achieved in any particular situation? ETOs to “create, interpret, and apply” IP, trade, and all other international law in consonance with human rights remain applicable in this case. Conceptually, ETOs claim priority—that they “exist first.” Their claim is that all subsequent norms of international law should obey and promote human rights universally. Consequently, they will expect problematic rules of a self-contained regime to be *amended*. As many ETOs will have to be seen as reflecting

³⁸⁹ Generally on “systemic integration,” see Koskenniemi, *supra* note 372, Part F of the report; JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 253–72 (2003).

³⁹⁰ See Koskenniemi, *supra* note 372, ¶¶ 473–74 (referring to “the weight” of the obligations).

³⁹¹ PAUWELYN, *supra* note 389, at 254.

³⁹² Philippe Sands, *Treaty, Custom and the Cross-Fertilization of International Law*, 1 *YALE HUM. RTS. & DEV. L.J.* 85, 102–103 (1998).

³⁹³ See Erika de Wet & Jure Vidmar, *Conclusions*, in *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* 300, 309 (Erika de Wet & Jure Vidmar eds., 2012) (Systemic integration “can also result in a reduction of the scope of human rights obligations to the point where they merely exist in name.”).

“superior” or “systemically crucial” legal norms, this claim should usually prevail.

The ETOs concept, meanwhile, enjoys considerable support among scholars and among members of the U.N. human rights treaty bodies. This Article focused on ETOs under the right to education that could harness copyright and promote access to printed textbooks in schools and universities in developing countries, notably in Africa. The analysis should be deepened and extended to include other fields of IP law in potential conflict with IHRL as well. Future analyses should give consideration to issues that could not be addressed here. The consequences for the debate of recognizing a potential basis of some IP claims themselves in human rights law must be examined, and so must be those flowing from the fact that human rights may (sometimes) be subjected to restrictions in terms of limitation clauses. ETOs for each human right need to be defined with precision. It must be explained when non-compliance amounts to a *prima facie* violation of human rights. Grounds of justification need to be elucidated. Issues of jurisdiction, remedies, relief, and fora of enforcement require further clarification.

The author of this Article was recently asked to peer review an article for a legal journal. It was clear that its writer, who was doing postgraduate research at a university in an African country, was talented. However, the sources (s)he cited did not go beyond the 1970s. It seems his or her university’s library was financially unable to acquire subsequently published books and journals. This author had then attempted to provide some of the more recent relevant literature to the writer, but could also not legally retrieve this in South Africa, where he is based. The literature can, however, be downloaded (from anywhere in the world) on Sci-Hub, the infamous illegal, but education and research-saving pirate database for academic literature founded by Alexandra Elbakyan.³⁹⁴ Students at this author’s university, many of whom are not able to afford their prescribed textbooks, actually copy whole textbooks or download them on Sci-Hub. The question that may be posed is: *Who is perverse—the African copyright pirate or the situation in which he or she lives?*³⁹⁵ The situation referred to is one of socio-economic hardship and exclusion rooted at least partially in colonialism. The situation is one in which access to textbooks, and knowledge generally, often does not exist at all, or can only be obtained by breaking the law. The situation is further one of African countries, and of developing countries in general, being exposed and succumbing to the trade pressures of affluent countries, the former

³⁹⁴ George Monbiot, *Scientific Publishing Is a Rip-Off: We Fund the Research—It Should be Free*, THE GUARDIAN (Sept. 13, 2018), <https://www.theguardian.com/commentisfree/2018/sep/13/scientific-publishing-rip-off-taxpayers-fund-research> (“Had I not used the stolen material provided by Sci-Hub, it would have cost me thousands. . . . [I]t is possible that [Elbakyan] has saved my life. . . . There might be legal justifications for [the practices of the publishing industry]. There are no ethical justifications.”).

³⁹⁵ In its formulation and meaning this question is, by way of analogy, broadly based on the aphorismic title of the German film: NICHT DER HOMOSEXUELLE IST PERVERS, SONDERN DIE SITUATION, IN DER ER LEBT [Not the Homosexual is Perverse, but the Situation in which he Lives] (Werner Kließ, 1971) (directed by Rosa von Praunheim).

consequently enacting strict copyright laws that do not take account of local access to knowledge needs. This really is new colonialism.³⁹⁶ Last, but not least, the situation is also one of governments in Africa and other parts of the developing world *reprehensibly* failing to take a firmer stand than they could to defend their own people's rights.

In 2002, Peter Drahos had provided this advice to developing countries:

Given the track record of the United States and the EU, developing countries can expect very few concessions on intellectual property issues in either a bilateral or multilateral context. They will have to look to self-help on these issues and operate on the assumption that the global intellectual property ratchet will continue to be worked by the United States and the EU in their economic interests, with only minimal consideration being given to the interests of developing countries.³⁹⁷

Now, almost twenty years later, a form of self-help promises to be fruitful—the reliance on ETOs. The ETOs concept has developed to an extent where these obligations should become part of the strategy of developing countries in asserting their development needs globally more forcefully, as a matter of human rights. Developing countries should, separately and jointly, rely on ETOs to legally enforce changes in global IP, including copyright law that protect access to knowledge and textbooks, the right to education, the right to development, and all other human rights.

³⁹⁶ Also in this sense, *see, e.g.*, Eve Gray in DOMESTIC LEGISLATION, FAIR USE (ReCreate South Africa, 2018), film available at <http://infojustice.org/archives/40384> (“The big powers realized that knowledge was very, very important, and very strategic. . . . [The endeavor] to grab hold of knowledge and control it . . . is a colonial effort.”); Peter Drahos, *Cities of Planning and Cities of Non-Planning: A Geography of Intellectual Property*, WORLD INFORMATION SPECIAL CITY EDITION TUNIS 2005 (Institute for New Culture Technologies, World-Information Institute, Nov. 14, 2005), <http://future-nonstop.org/c/c794ebdbecc0a9f8d48f2594161f2614> (“Intellectual property laws with their epicenter in Washington, New York, Brussels and Geneva travel like invisible tsunamis to developing countries. There they turn the national innovation systems of those countries into so much debris. New laws to serve old masters have to be quickly enacted.”).

³⁹⁷ Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 J. WORLD INTELL. PROP. 765, 789 (2002).