Abstract

The lack of works for educational and cultural literacy purposes in their own languages threatens the cultural survival of many vulnerable minority and indigenous groups worldwide. Translation could satisfy related access needs. A strict reading of international copyright law, however, does not facilitate the translation of works into other languages. Yet, it is often forgotten that, in accordance with the integration rule of treaty interpretation, the Berne Convention, and other relevant international intellectual property instruments, would have to be read in the light of internationally protected linguistic human rights in education and for cultural literacy. This mechanism could go some way towards assisting the easier translation of (parts of) works for the stated purposes into other languages. The argument made in this article, however, is that a harmonious reading of existing international copyright law with international human rights law cannot go as far as to sufficiently resolve the access needs of vulnerable groups speaking an endangered language, insofar as translated texts are concerned. In fact, it is contended that the existing regulation of translation under international copyright law is so inimical to the survival of vulnerable groups and their languages that it must be held to promote cultural or linguistic genocide. For that reason, the relevant copyright rules must be considered to conflict with ius cogens, that is, peremptory norms of international law, and to be void in their application to neglected languages. The article makes suggestions as to how countries could design national copyright law regulating translation rights and limitations and exceptions in a way that facilitates translation generally, and into neglected languages specifically. These suggestions are based on a reappraisal of the true character of translation, which must be seen to be highly transformative in nature and resulting in the creation of autonomous new works.

Keywords

Berne Convention; copyright; translation; languages rights; linguistic human rights in education; cultural rights; minorities; indigenous peoples; endangered/neglected languages; genocide; cultural genocide; linguistic genocide; persecution; ius cogens; fair use; decolonisation
If you talk to a man in a language he understands, that goes to his head. If you talk to him in his language, that goes to his heart.”

1 Cultural survival through translation?

Our language is dying, that is the first sign of deterioration. Our native style of life has to be based on four elements – heritage, culture, values, language – and if you take one away it begins to break down. Then we have the symptoms of this breakdown, alcoholism and abuse.¹

Language is an element of cultural enrichment, but it is much more than that – it is key to the cultural survival of any nation or group. As the Inter-American Court of Human Rights emphasised in López-Álvarez v Honduras, language is "one of the most important elements of identity of any people, precisely because it guarantees the expression, diffusion, and transmission of their culture".² Addressing "Endangered Languages", the United Nations Educational, Scientific and Cultural Organization (UNESCO) explains that it measures language vitality and endangerment by nine criteria. One of these is "availability of materials for language education and literacy",³ and it is here that copyright becomes an obstacle. In the same way that patents do not create an incentive to develop medicines for "neglected" tropical diseases, copyright does not incentivise publication in "neglected" languages because the relevant

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¹ Randy Councillor, Ojibway, director of a detoxification centre in Ontario, Canada, himself an earlier "street-drunk", as quoted in Skutnabb-Kangas Linguistic Genocide in Education 139.

² López-Álvarez v Honduras (Merits, Reparations, Costs) IACtHR Ser C No 141 (1 Feb 2006) para 171.

markets are too small and speakers of the languages are poor. As Shaheed,⁴
as (a former) UN Special Rapporteur in the Field of Cultural Rights, has pointed
out in her 2014 report to the Human Rights Council, while speakers of the
world's major languages could choose from among "millions of books",
speakers of local languages had access to "very few".

But, that is not all – translation into these languages is also not adequately
catered for by international copyright law. This would be crucial, because,
where no works in the original languages are published, translations into these
languages are important to satisfy educational and all other cultural literacy
needs. The literature widely acknowledges that translation is of eminent
importance to facilitating access to knowledge, especially in developing
countries.⁵ The essential purpose of this article is to demonstrate the
inadequacy of existing copyright law towards facilitating translation into
neglected languages, the devastating consequences thereof for vulnerable
cultural or linguistic groups, and how copyright reform could address this crisis.
The relevant copyright rules of the Berne Convention will thus be referred to
(Section 2) and juxtaposed with the protective standards of language rights
under international human rights law (Section 3). While the international rules
on treaty interpretation mandate an endeavour of reading conflicting rules of
international law "harmoniously" (presently, Berne in the light of international
human rights law), the analysis here proceeds to pose the more fundamental
question whether the existing copyright rules regulating translation do not, as
it were, contribute to "linguistic" genocide, and, therefore, violate an ius cogens
or peremptory norm of international law (Section 4). As the copyright rules
concerned would be void in this case, this would open the door to newly
regulating international copyright law applicable to translation into endangered
languages. The discussion will assess various reform options available at the

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⁴ Report of the Special Rapporteur in the Field of Cultural Rights, Copyright Policy and

⁵ See, eg, Basalamah and Sadek 2014 The Translator 407 (“[T]ranslation’s mandate is
the dissemination of knowledge and the promotion of the sharing of information and
cultural difference”); Edwards and Ngwaru 2011 Int J Biling Educ & Biling 589 (holding
that translation may help solve the problem of the dearth of educational materials in
African languages); Kelly The True Interpreter 1 (remarking that Western Europe owes
its civilisation, rooted in the Roman Empire, to translation); Ketzan 2007 Tul J Tech &
Intell Prop 221-222 (in the context of addressing the potential of machine translation,
pointing out its importance to the survival of minority languages); Talagala Copyright
Law and Translation 13 (“[D]eveloping countries need to translate these materials into
the local languages. Translation facilitates access to knowledge.”). There are, however,
also certain dangers in naively viewing translation as being able to facilely solve all
access needs in developing countries. In this regard, see Section 6, fns 131-133 and
accompanying text, below.
national level, but do this adopting a wider perspective of how copyright law could, generally, facilitate translation into any language, and thus afford enhanced protection to recognised linguistic human rights (Section 5). Crucially, this part of the discussion incorporates insights from the field of translation studies. These insights necessitate a reappraisal of copyright's orthodox understanding that a translation is a reproduction or, at most, a close adaptation of an existing work. Finally, the importance of translation – and accordingly a reform of relevant copyright law – is emphasised from the viewpoint of achieving a decolonisation of the educational curriculum and cultural life in Africa (Section 6).

2 Copyright law under the Berne Convention

Article 8 of the Berne Convention for the Protection of Literary and Artistic Works of 1971 (hereinafter Berne Convention or Berne) accords authors the exclusive right to translate their works, but no express limitations and exceptions (L&Es) to their translation rights have been laid down. Yet, in their famous commentary on the Berne Convention, Ricketson and Ginsburg hold that Berne's travaux préparatoires show that there are implied L&Es allowing translation within the respective limits of the reproduction, quotation, and teaching (etc) L&Es. They say, one could see translation as a form of

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6 Article 8 of the Berne Convention for the Protection of Literary and Artistic Works (1971) (the Berne Convention). For analyses of the complicated history of the author's translation right in Art 8, and generally translation rights and limitations and exceptions in international copyright law, see Bannerman International Copyright and Access to Knowledge 100-113; Hemmungs Wirtén Cosmopolitan Copyright 17-67; Talagala Copyright Law and Translation 126-155.

7 Ricketson and Ginsburg International Copyright and Neighbouring Rights para 13.83.

8 Article 9(2) of the Berne Convention states, "It shall be a matter for legislation ... to permit the reproduction of ... works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author" (reproduction L&E). Art 10(1) states, "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose..." (quotation L&E). Art 10(2) states, "It shall be a matter for legislation ... to 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" (teaching L&E). Arts 9(2), 10(1) and (2) of the Berne Convention. The Agreement on Trade-Related Aspects of Intellectual Property Rights (1995) (TRIPS) incorporates most substantive provisions of Berne, thus also the above L&Es, and also the Berne Appendix (discussed below). See Art 9(1) of TRIPS. Neither TRIPS nor the WIPO (World Intellectual Property Organization) Copyright Treaty (1996), the latter adopted to prepare copyright for the digital age, changes the "language and translation" regime created under Berne.
reproducing a work. Alternatively, not to read such translation L&Es into Berne would lead to an absurd result, reducing the effectiveness of the L&Es. Nevertheless, in terms of orthodox copyright law, these L&Es hardly permit the unencumbered translation of whole works (and subsequently the bulk distribution of cheap copies), even though this is exactly what is needed in respect of vulnerable cultural groups and their languages. There exist, however, also more enlightened, generous ways of reading these L&Es that would support more extensive user rights, including as regards translation. More will be said on this later. However, even these ways of reading might not permit the far-reaching use that is referred to as necessary here, to satisfy the access needs of speakers of neglected languages.

Obtaining voluntary translation licences is difficult practically, and also beyond the resources of many of the language groups concerned. There is an Appendix to the Berne Convention of 1971, providing for a compulsory licensing scheme for developing countries that envisages translation (and reproduction) licences for whole works. Under a translation licence, a work may be translated, and copies of the translation be published. However, compulsory licensing under the Appendix has been regulated in a highly

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9 Ricketson and Ginsburg *International Copyright and Neighbouring Rights* paras 11.35 ff, 13.83. Considering translations to be mere reproductions of the original works is problematic, however. In this regard, see Section 5, fns 85-97 and accompanying text, below.

10 Ricketson and Ginsburg *International Copyright and Neighbouring Rights* para 13.83. The very formulation of the L&Es (see fn 8 above) could be seen as making it clear that the scope of respective user rights is clearly limited. Furthermore, international copyright law now postulates the so-called three-step test, as first contained in Art 9(2) of the *Berne Convention*, as a general measure against which the legitimacy of all L&Es in national law must be assessed, to guard against the erosion of the rights of copyright holders. Hence, L&Es must (1) be confined to "certain special cases", which (2) "do not conflict with a normal exploitation of the work", and (3) "do not unreasonably prejudice the legitimate interests of the right holder". See Art 13 of *TRIPS*. The fact that the test is interpreted notoriously restrictively (see Geiger, Griffiths and Hilty 2008 *IIC* 711 (Preamble of the Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law)) does not make the argument in favour of the translation of whole works easier. As has been observed, it is a typical feature of L&Es that they are "rarely ... sufficient to meet the development-related challenges – such as bulk access to educational works – facing many least-developed and developing countries". Okediji 2018 *NYU J Int L & Pol* 34. "Bulk access" means many (cheap) copies of whole works, including in translation.

11 These interpretations are based on an alternative way of reading the three-step test of international copyright law. See Section 5, fns 116-120 and accompanying text, below.

12 See Section 5 below.

13 Article II of the Appendix to the Berne Convention regulates translation licences. Reproduction licences are directed at the supply of reasonably priced copies of a work in a country. Art III of the Appendix regulates reproduction licences.
restrictive manner. Licences can thus be obtained for purposes of organised education, but not for informal education or broader cultural literacy purposes. It is important, however, that neglected languages would also be protected beyond the formal education context. Reproduction licences cannot be granted in respect of translations made under a translation licence. Hence, the existence of any such translation produced under a compulsory licence in one country would be of little relevance in another, where the translation might be needed too, and easily reproduced. A separate translation licence would have to be applied for here (and the work translated again). Neither compulsory licence extends to the export of copies. This precludes the publication or reproduction of a translation in one country, that may have better capacities to produce or reproduce such a translation, and subsequent supply in another country lacking such capacities. Adopted in 1971, it is also unclear whether the Berne Appendix applies to digital works. Compulsory licences still require "just" compensation to right holders. Moreover, the administrative procedures to be followed to obtain a licence are complex and burdensome. The Appendix imposes waiting periods of three years (one year for any language "not in general use in one or more developed countries") in the case of translation licences, and, depending on the type of work, of three, five, or seven years in the case of reproduction licences, before a licence can be obtained. An attempt must first be made to notify copyright holders and seek their authorisation. Where authorisation cannot be secured, copyright holders are then afforded a further grace period within which they may supply a translation or reasonably priced copies of a work. Only if they fail to do so, can the compulsory licence be granted. For all these reasons, the Appendix has never worked. In fact, developed countries probably never wanted it to work.

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15 For detailed accounts of this restrictive regulation, see, eg, Basalamah 2000 IDEA: J L & Tech 511-522; Silva 2013 J Copyright Soc'y USA 589-612; Talagala Copyright Law and Translation 150-155.
16 Arts II(5) and III(2)(a) of the Appendix to the Berne Convention.
17 Art III(5)(i) of the Appendix to the Berne Convention.
18 Art IV(4) of the Appendix to the Berne Convention.
19 See, eg, Silva 2013 J Copyright Soc'y USA 607-612.
20 Art IV(6)(a)(i) of the Appendix to the Berne Convention.
21 Arts II(2)(a), (3) and III(3) of the Appendix to the Berne Convention. A reproduction licence might thus be relevant, where a translation published by the copyright holder or with his or her authorisation is sought to be made available in a certain country where it is not so available (at a reasonable price).
22 Art IV(1) and (2) of the Appendix to the Berne Convention.
23 Arts II(4)(a), III(4)(a) and (b) of the Appendix to the Berne Convention.
24 Arts II(4)(b) and III(4)(c) of the Appendix to the Berne Convention.
There is widespread scholarly consensus that the Appendix has been a gross failure.\(^\text{25}\)

Now that the relevant rules on language and translation of one international legal regime, international copyright law, have been described, the rules on language rights of international human rights law, the other crucial regime of international law at stake here, will be identified.

### 3 Linguistic human rights, in education, and for cultural literacy

According to the United Nations (UN), about 6,700 languages are believed to exist today. Of these, over 3,000 are in serious danger of disappearance. Indigenous peoples' languages represent at least 4,000 languages and most of these are seriously endangered.\(^\text{26}\) Close to 40% of the world’s population do not have access to education in their mother tongue.\(^\text{27}\) Just 7% of languages — including the "global" or known languages — are used in education, 93% are not!\(^\text{28}\) Copyright clearly constitutes an aggravating factor. As for Africa, far more than 90% of the literature currently available is in the colonial languages.\(^\text{29}\) In South Africa, for example, most locally-produced books are in English or Afrikaans.\(^\text{30}\) Only about 9% of revenue from book sales derives from books in all (nine official) African languages combined.\(^\text{31}\) School textbooks in African languages account for roughly 15% of books sales in the education books

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\(^{25}\) See, eg, Chon 2007 *UC Davis L Rev* 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 USA); Okediji *Limitations, Exceptions and Public Interest Considerations* 15 ("By all accounts, ... the Berne Appendix ... has been a failure."); Silva 2013 *J Copyright Soc’y USA* 590 ("[T]he Appendix comes across as an obsolete, inappropriate, bureaucratic, and extremely limited attempt to provide an air valve for developing countries.").


\(^{27}\) Walter and Benson "Language Policy and Medium of Instruction" 282.

\(^{28}\) Walter and Benson "Language Policy and Medium of Instruction" 283.

\(^{29}\) Prah "The Difficulties of Publishing in Africa" 302.


\(^{31}\) Le Roux, Tshuma and Harvett *South African Book Publishing Industry Survey 2021-2022* 7. With Afrikaans and English, there are eleven official spoken languages in South Africa.
sector. General adult and child fiction and non-fiction published in African languages accounts for less than 1% of book sales in the "general reader" books sector.

It is well known today that the duration of teaching in (not only of) the mother tongue is the most important factor for the educational and life success of students. As Skutnabb-Kangas, one of the world's most renowned linguists, explains, the ideal is multilingual education, with mastery of the mother tongue at its heart. In a 2008 study to the UN's Permanent Forum on Indigenous Issues, Dunbar and Skutnabb-Kangas elucidate that, while there should be "additive" education, where children "learn their mother tongues well, in addition to learning a dominant language (and other languages) well too", in practice, we often witness "subtractive" education, where children "learn a dominant language at the cost of the mother tongue which is displaced, and later often replaced by the dominant language. Children undergoing subtractive education, or at least their children, are effectively transferred to the dominant group linguistically and culturally". In Africa, for instance, most children start school in a foreign language. UNESCO has adopted a Convention for the

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34 See, eg, UNESCO The Use of Vernacular Languages in Education 11 (already in 1953 pointing out that, psychologically and sociologically speaking, "the best medium for teaching a child is his mother tongue"); Language Rights of Linguistic Minorities: A Practical Guide for Implementation (UN Special Rapporteur on Minority Issues, 2017) 7 ("When the mother tongue is used as the medium of instruction for at least 6-8 years, the results are impressive: enhanced self-confidence, self-esteem and classroom participation by minority children, lower dropout rates, higher levels of academic achievement, longer periods in school, better performance in tests and greater fluency and literacy abilities for minority (and indigenous) children in both the mother tongue and the official or dominant language" (footnotes omitted)). Generally, for an account of the research demonstrating the importance of mother tongue education for the educational and life success of children, see, eg, Baker Foundations of Bilingual Education and Bilingualism; Cummins Language, Power and Pedagogy; Skutnabb-Kangas Linguistic Genocide in Education.


Safeguarding of the Intangible Cultural Heritage in 2003, and a Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005. Yet, these have very isolated protective or only broadly promotional measures in mind, respectively, but do not "actually impose any legal obligation on governments to take concrete steps for indigenous languages on their own territory".

However, international human rights law does protect linguistic human rights. Article 14 of the *UN Declaration on the Rights of Indigenous Peoples* of 2007 protects the right to education in the mother tongue for indigenous children in public and private schools, within and outside indigenous communities. The Organization for Security and Co-operation in Europe’s (OSCE) *Hague Recommendations Regarding the Education Rights of National Minorities* of 1996, purporting to be a consolidation of international legal obligations relating to the education rights of national minorities, protect the right to mother tongue education of persons belonging to national minorities. Apart from teaching the mother tongue and other languages as subjects, in primary education the curriculum should essentially or mostly be taught in the minority language, in secondary education a substantial part of the curriculum should be taught in the minority language, and in tertiary education there should be access to teaching in minority languages in accordance with need and student numbers. If these instruments are considered "just" soft law, Article 30 of the

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41 Article 14(1) states, "Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning." Art 14(3) states, "States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language." Art 14(1) and (3) of the *UN Declaration on the Rights of Indigenous Peoples* (2007).

42 Recommendations 12, 13 and 17 of the OSCE’s *Hague Recommendations Regarding the Education Rights of National Minorities* (1996). International instruments protecting the rights of (members of) minorities usually (seem to) offer states a choice to either offer teaching in or of the mother tongue. See, eg, Art 4(3) of the UN’s *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities* (1992) ("States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue."); Art 14(2) of the Council of Europe's *Framework Convention for the Protection of National Minorities* (1995) ("[T]he Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to … minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language."). However, in
UN Convention on the Rights of the Child of 1989 guarantees the right of minority and indigenous children "not to be denied" the right, in community with other members of their group, to use their own language. In a General Comment on the rights of indigenous children, the Committee on the Rights of the Child, the independent expert treaty body supervising implementation of the Convention, has held that, to implement this right, "education in the child's own language is essential".

If the language model of the Hague Recommendations has essentially been devised for minority (or indigenous) children and young adults, its logic applies more generally to all persons in education, also those speaking the state or dominant language at home or choosing it in education. The Explanatory Note to the Hague Recommendations makes it clear that neither teaching in the state language nor in the minority language only is in accordance with international law – an appropriate mix of languages is required. Bilingual or multilingual education is needed for all at all levels. UNESCO thus emphasises that it "supports bilingual and/or multilingual education at all levels of education as a means of promoting both social and gender equality and as a key element of linguistically diverse societies". The organisation holds that, on leaving school, students should have "a working knowledge of three languages", namely, the mother tongue, the official/national language, and one or more foreign languages. This constitutes "the normal range of practical linguistic skills in the twenty-first century".

the light of today's knowledge of the importance of mother tongue education for any person's success in education and life (see fns 34-35 and accompanying text above), "[t]eaching in and of the mother tongue must be offered. The principle of the effective protection of human rights justifies the more comprehensive interpretation" of provisions such as the above. Beiter 2023 Int J Hum Rts 443.


OSCE "Explanatory Note – Hague Recommendations" 14. This mix should even be reflected at individual subject level. The latest research on language of instruction shows that "translanguaging" – the judicious use (dynamic "mix") of the home language with the target language – not only helps learning a second language, but also creates "a more emotionally grounded learning environment" for students. See, eg, Back, Han and Weng 2020 Lang & Educ 387-406 (furnishing evidence of how translanguaging plays a key role in reducing anxiety and improving acquisition of content); Patterson and Gardyne 2022 Environ Sci Proc 1-9 (similarly providing evidence of how translanguaging helps teachers connect with the culture of students, ensure the latter's emotional well-being, explain abstract concepts in an inclusive way, and enhance engagement in learning).

Education in minority or indigenous languages requires textbooks in those languages. Many studies have shown that the availability of books is particularly consistently associated with higher levels of achievement, when compared with other potential correlates of school achievement.\textsuperscript{48} Moreover, textbooks must be in a language understood by students and teachers for them to be effective.\textsuperscript{49}

However, language rights are also relevant for cultural literacy purposes beyond education. Article 15(1)(a) of the \textit{International Covenant on Economic, Social and Cultural Rights} of 1966 protects the right to take part in cultural life.\textsuperscript{50} In a General Comment on this provision, the Committee on Economic, Social and Cultural Rights, the UN's independent expert body supervising implementation of this instrument, holds that this covers access to a way of life associated with the use of one's language. Culture includes literature and other information in one's language.\textsuperscript{51} Along the same lines, Shaver\textsuperscript{52} argues that there is a "human right to read" which also encompasses the availability of reading materials in minority languages.

The next section examines the interaction of the relevant rules on language and translation of international copyright law, on the one hand, with the rules on language rights of international human rights law, on the other, further contemplating the consequences of the fact that some rules of international law protecting vulnerable cultural groups enjoy a superior status as \textit{ius cogens} under international law.

4 Harmonious reading, \textit{ius cogens}, and linguistic genocide

International copyright law needs to be read in the light of international human rights law. This follows from the principle of systemic integration applicable to

\textsuperscript{48} See Read Where Have All the Textbooks Gone? 33 (referring to this fact).
\textsuperscript{49} Read Where Have All the Textbooks Gone? 33. See also, eg, Advisory Committee on the Framework Convention for the Protection of National Minorities, Thematic Commentary No 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention Doc ACFC/44DOC(2012)001 rev (2012) para 77 ("The Advisory Committee considers the availability of textbooks in minority languages ... an indispensable element for providing quality education."); Principle I(II) of the \textit{UNESCO Guidelines on Language and Education} (2003) ("The production and distribution of teaching materials and learning resources and any other reading materials in mother tongues should be promoted.").
\textsuperscript{50} Article 15(1)(a) of the \textit{International Covenant on Economic, Social and Cultural Rights} (1966).
\textsuperscript{51} \textit{CESCR}, General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15(1)(a) of the ICESCR) UN Doc E/C.12/GC/21 (2009) paras 13, 15(b), 16(a), (b) and 49(b).
\textsuperscript{52} Shaver 2015 \textit{Colum J Transnatl L} 1.
the interpretation of treaties in international law.\textsuperscript{53} In this sense, linguistic human rights could go some way towards tempering the harsh effects of Article 8 of Berne through "ameliorative" construction – definitely supporting a reading à la Ricketson and Ginsburg,\textsuperscript{54} in terms of which the reproduction, quotation, and teaching (etc) L&Es would cover the right to use the work either in its original or in a different language – potentially even to a significant extent. But international law does not know any formal hierarchy of norms. Although a "harmonious reading" of different rules of international law must accord "weight" to various norms in accordance with their respective normative force,\textsuperscript{55} copyright law (including the three-step test)\textsuperscript{56} cannot simply be displaced by human rights norms. In consequence, satisfying bulk access needs of minority and indigenous groups – as here, distributing multiple (and affordable) copies of whole works in translation – would, if not still impermissible, at any rate be subject to a heavy and continuous burden of justification.

However, the author wishes to make another point here. There is an exception to the rule of the absence of formal hierarchy in international law: a treaty (provision) (but also, for example, an obligation created by an act of an international organisation) may not conflict with a peremptory, an \textit{ius cogens} norm of international law. These are norms of general (usually customary) international law,\textsuperscript{57} which, because they "reflect and protect fundamental values of the international community,"\textsuperscript{58} are regarded by the international community of states to be of such importance that no derogation from these is

\textsuperscript{53} See Art 31(3)(c) of the \textit{Vienna Convention on the Law of Treaties} (1969) (When interpreting a treaty, "[t]here shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties").

\textsuperscript{54} For the view of Ricketson and Ginsburg, see Section 2, fns 7 and 9-10 and accompanying text, above.

\textsuperscript{55} \textit{Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law}, Report of the Study Group of the International Law Commission UN Doc A/CN.4/L.682 (2006) paras 473-474. Ultimately, there do exist "relations of superiority and inferiority" between norms of international law (para 407). For instance, obligations \textit{erga omnes} (ie, obligations owed to the international community as a whole) should be accorded significant weight, as they are "undoubtedly important obligations" (para 380). It has been said of human rights obligations generally that they constitute obligations \textit{erga omnes}. Seiderman \textit{Hierarchy in International Law} 145.

\textsuperscript{56} On the three-step test of international copyright law and strict and generous interpretations thereof, see Section 2, fns 8 and 11 and accompanying text, above, and Section 5, fns 116-120 and accompanying text, below.

\textsuperscript{57} \textit{ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law} (\textit{Jus Cogens}), \textit{with Commentaries} (2002) (hereinafter \textit{ILC Draft Conclusions on Jus Cogens}) Conclusions 4(a) and 5(1).

\textsuperscript{58} ILC Draft Conclusions on \textit{Jus Cogens} Conclusion 2.
permitted. They "are universally applicable and are hierarchically superior to other rules of international law". Under the Vienna Convention on the Law of Treaties of 1969 such a conflicting treaty (provision) is void. Does ius cogens have any relevance in the field of international copyright law? Ius cogens is a fairly restricted category, covering notably the prohibition of aggression, of crimes against humanity, of racial discrimination and Apartheid, of slavery, of torture, the basic rules of international humanitarian law, and the right of self-determination.

The prohibition of genocide also constitutes ius cogens. Now, a cultural group is not only destroyed by its physical extinction – the denial of cultural rights, including linguistic human rights, may destroy a group as well. This could be termed "cultural genocide" or "ethnocide". The terms "genocide" and "ethnocide" are not new, having been coined in 1944 by Raphael Lemkin, the Jewish-Polish lawyer who "initiated" the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Under Article II(e) of the Genocide Convention, genocide includes the "forced transfer" of children of one ethnic or cultural group to another, if done with the "intent to destroy" the group. This could be read to include a forced cultural or linguistic transfer intended to destroy the group "socially". While the concept of cultural genocide was contemplated at the time of drafting the Genocide Convention, it was deliberately decided not to incorporate it (expressly) in the Convention because some "advanced" countries feared this might render them targets of related

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60 ILC Draft Conclusions on Jus Cogens Conclusion 2.
61 Article 53 of the Vienna Convention on the Law of Treaties (1969); ILC Draft Conclusions on Jus Cogens Conclusions 10 and 11. Similarly, rules of customary law, unilateral acts of states, or resolutions, decisions, or other acts of international organisations purporting to establish obligations under international law, but conflicting with ius cogens, do not, in fact, create the respective obligations. ILC Draft Conclusions on Jus Cogens Conclusions 14-16.
62 ILC Draft Conclusions on Jus Cogens Conclusion 23, Annex, (a), (c)-(h).
63 ILC Draft Conclusions on Jus Cogens Conclusion 23, Annex, (b).
64 Article II of the Genocide Convention states in full: "[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (1948).
Yet, Schabas, a renowned scholar of international criminal and human rights law, supports a reading of the genocide definition to cover cultural genocide, for instance, in the form of prohibiting a group's language. A literal reading of the genocide definition does allow for alternative or broader interpretations, he argues. Also the German Constitutional Court has held, in the Nikola Jorgić case, in 2000, that the destruction of a group extends beyond its physical-biological destruction. The prohibition of genocide also protects "the social existence of a group". Similarly, Skutnabb-Kangas and Dunbar argue that assimilationist approaches in education in the form of weak or absent bilingual education often amount to intentionally applying force to ensure children "will transfer" to the dominant language group of a society – such approaches amount to "linguistic genocide". The force applied assumes the form of a "use of ideas". The dominant language is glorified, the minority language stigmatised as being "traditional", "backward", and not fit for a postmodern technological information society. The dominant group promotes the idea of it – the dominant group – "helping" the minority to become "civilised", even "democratised", through

Schabas "Cultural Genocide and the Protection of the Right of Existence" 123-124. This notwithstanding, "even after the cultural genocide provisions had been voted out of the Convention, many drafters expressed their belief that the Convention continued to protect a group's cultural existence". Mundorff A Cultural Interpretation of the Genocide Convention 249.

Schabas "Cultural Genocide and the Protection of the Right of Existence" 122-125. Schabas "Cultural Genocide and the Protection of the Right of Existence" 124. An argument for an extended interpretation could also be made on other grounds, such as giving effect to the objectives of the Convention or the need for a dynamic interpretation of legal instruments that protect human rights. Schabas Genocide in International Law 272.

BVerfG, Order of the Second Senate of 12 Dec 2000 – 2 BvR 1290/99 (Nikola Jorgić) para 22. Others hold that international law has not yet developed to the point where cultural genocide is covered by the crime of genocide. It has thus been argued that the international criminal tribunals with jurisdiction over genocide so far have focused on the physical and biological dimensions of the crime. Cultural genocide could, however, in appropriate cases, amount to a crime against humanity. Nersessian "The Current Status of Cultural Genocide under International Law" 71, 74-76. It has similarly been argued that cultural genocide is not a legal concept, but that, as a paralegal concept, it could serve to add an element of seriousness to the commission of other international crimes. Novic The Concept of Cultural Genocide 238, 243-244.

education in its language.\textsuperscript{70} It is thus important to appreciate that a perversely "well-intended" motive may still constitute punishable criminal intent.\textsuperscript{71} There can also not be any question of consent to linguistic assimilation by the cultural groups concerned. The consent is a bogus or manufactured consent, a form of acquiescence to "the inevitable''.\textsuperscript{72} The destructive effects of "subtractive" education include lower achievement in education, negative socio-economic consequences (higher levels of unemployment, lower incomes, economic and social marginalisation), negative physical consequences (alcoholism, suicide), negative psychological consequences (eg, mental trauma flowing from cultural alienation), and children losing their language.\textsuperscript{73} If education does most of the damage, the post-educational marginalisation of minority languages and their speakers in all spheres of culture and life continues or completes the linguistic genocide.

It is the \textit{mens rea}, the mental element, of genocide that distinguishes it from other international crimes, such as war crimes or crimes against humanity. Genocide requires \textit{dolus specialis} or special intent, in the form of the "intent to destroy" a group, to be proven.\textsuperscript{74} There is no consensus, however, on whether the emphasis must be on the "volitional" or "cognitive" element of intent. The former enquires whether the perpetrator directed their will at destruction, the latter whether the perpetrator acted with the knowledge that destruction would be the (or, the likely, or, at even lower level, the ordinary) consequence.\textsuperscript{75} Hence, while the former focuses on individual perpetrators and their personal motives, the latter has a collective dimension, in that it requires the existence of a policy or plan of destruction of a state or group, and knowledge on the part


\textsuperscript{71} Skutnabb-Kangas \textit{Linguistic Genocide in Education} 327.


\textsuperscript{74} For analyses of the \textit{mens rea} of genocide, see, eg, Behrens "The \textit{Mens Rea} of Genocide" 70-96; Schabas \textit{Genocide in International Law} 241-306.

\textsuperscript{75} Behrens "The \textit{Mens Rea} of Genocide" 76. Schabas \textit{Genocide in International Law} 254 holds that \textit{dolus eventualis} (knowledge that destruction is a \textit{mere possible} consequence) is not sufficient, but there are also other views in this regard. See, eg, Gil Gil 2000 \textit{ZStW} 395; Triffterer 2001 \textit{Leiden J Int L} 403-406.
of perpetrators of that policy or plan, to be established.\textsuperscript{76} It has been argued that the "intent to destroy" requirement is crucial as it prevents "smoother processes of group acculturation" from qualifying as ethnocide.\textsuperscript{77} Nevertheless, the weak or absent bilingual education policies, to which Skutnabb-Kangas and Dunbar refer, should not easily be seen as indicative of "smooth processes of group acculturation", but they often constitute organised acts of violence, such acts, as explained, in the form of a "use of ideas", directed at replacing the culture or language of one group with that of another, and performed with the knowledge that such replacement is planned to, and will (likely or ordinarily) (or even, may possibly) happen.

Even in cases where the specific dolus of genocide cannot be established for acts of cultural genocide, the conduct concerned would often still constitute an international crime, namely, a crime against humanity, here in the form of "persecution".\textsuperscript{78} This exists, in this case, in the systematic, severe, and intentional deprivation of linguistic or cultural rights, based on linguistic or cultural group identity, through acts or policies entailing (social) extermination, a forcible transfer of children from one linguistic or cultural group to another, and/or knowingly causing serious injury to mental (but also physical) health.\textsuperscript{79} Rather than an "intent to destroy", it is "discriminatory intent" that forms part of the mens rea of persecution.\textsuperscript{80} Like the prohibition of genocide, the prohibition of crimes against humanity constitutes \textit{ius cogens}.\textsuperscript{81}

5 Copyright reform

International copyright law may well be considered complicit in achieving such linguistic genocide in relation to many vulnerable cultural groups. The \textit{Berne
Convention/Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) system, as seen, does not provide for L&Es specifically and adequately catering for the legitimate translation needs of such groups. The Berne Appendix, including its compulsory translation licences mechanism, is dysfunctional. Translation for those that otherwise do not have such access to educational and all other cultural literacy materials in their own language as would be necessary to ensure their survival as a cultural group has consequently been rendered impossible. This could lead one to argue that Article 8 of Berne is void for being in conflict with ius cogens, at least in its generality, because it does not take vulnerable cultural groups into account. Similarly, the Berne Appendix conflicts with ius cogens insofar as its many regulatory restrictions and complex and burdensome administrative procedures render the compulsory licences mechanism useless for endangered language groups needing bulk (and affordable) access to whole works in translation. Current copyright arrangements, and the persistent failure to reform them, could well be seen to reflect a plan, or to be part of a larger plan, directed at assimilating speakers of minority languages into the mainstream, implemented with the knowledge that assimilation will (likely or ordinarily) (or even, may possibly) occur (cultural genocide). At a minimum, however, where the "intention to destroy" cannot be proven, the scheme may yet reflect that measure of (intended) discrimination, to amount to persecution (crime against humanity).

One might contend that speakers of endangered languages do have access to works in the public domain that could be translated. Nevertheless, apart from the fact that this argument condones discrimination based on culture or language – as speakers of the world's major languages have access to "millions" of (more affordable) books (those originally written in their language as well as those translated into it from both copyrighted sources as well as sources in the public domain), but speakers of endangered languages only access to "very few" – more important, in the context of the genocide discussion, is another consideration. The public domain includes notably works

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82 Also Berne’s so-called "ten-year regime" of Article 30(2), envisaging early translation rights for users after ten years, an arrangement referred to further below, reflects the conflict with ius cogens, as that specific regime has no genuine significance today anymore. See fns 100-103 and accompanying text below.

83 See fn 4 above. Hence, the analogous disparity of access to copyright-protected works that previously prevailed for the blind, visually impaired, or otherwise print disabled was considered to be of such a discriminatory nature that states, ten years ago, adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013), to ensure equality of access to copyright-protected works for the group concerned.
whose copyright has expired after fifty or seventy years. Especially educational textbooks will be so outdated after such a period that they cannot genuinely contribute towards securing the resilience or survival of any group. Moreover, a reliance by public education systems on what are open educational resources (OER) *ab initio*, will, for a long time to come, not constitute standard practice, also because many of the leading textbooks are still "the copyrighted ones". By the time OER are more openly embraced, many indigenous groups might have ceased to exist.

Where does this leave us? It would mean that the field of translation into neglected languages is once again effectively unregulated under international copyright law. Countries could, of course, seek to fill this gap through negotiating new international rules. Against the status quo of there being no valid rules for translation into neglected languages, and premised further on an enlightened interpretation of the rules of the current *Berne/TRIPS* regime, states should newly regulate their national copyright law to achieve two goals. Firstly, their regulation of copyright should fully facilitate translation into neglected languages, notably for educational and cultural literacy purposes. Secondly and simultaneously, as a way of promoting access to knowledge more comprehensively, reregulation should be considered an opportunity to ease translation into other languages as well. Underlying any reform efforts should, moreover, be a proper understanding of the nature of the translation endeavour and of the resulting works produced, informed by the insights of linguistic or translation theory. A few words on this should be said first of all.

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84 Alternatively, one would have to argue that the legal situation as it prevailed prior to *Berne* 1971 would have to resume. Apart from general L&Es to copyright holders’ rights that did not specifically cater for, but might potentially have benefited, translation in a limited measure, *Berne*, since its adoption in 1886, in its various versions, had provided for the following translation regimes: a translation right limited to ten years (1886); a translation right granted for the whole period of copyright protection that would, however, be limited to ten years for a particular language if no translation into that language had been effected by the author or with his or her authorisation during the ten years (1896); a translation right granted for the whole period of copyright protection to which countries could express a reservation that would make the 1886 or 1896 arrangement applicable (1908); and a translation right granted for the whole period of copyright protection with regard to which previously made reservations could be carried forward or with regard to which new members to the Berne Union could declare their intention to apply the 1896 arrangement (1928, 1948, 1967). The latter also reflects the current position under *Berne* 1971. For a historical account of these arrangements, see the sources referred to in fn 6 above. Hence, even under these arrangements, translation could, at best, be effected ten years after the publication of a work. As has correctly been pointed out, this waiting period is too long, certainly for "scientific and technical books and learning materials". Talagala *Copyright Law and Translation* 135. As for the neglected languages, the conflict with *ius cogens* would essentially remain.
Ricketson and Ginsburg hold that the provisions of Berne are inconclusive as to the exact relationship between reproductions and translations under the Convention, that is, whether translating a work amounts to reproducing it. In many ways, however, the current Berne arrangements of 1971 do seem premised on the notion that a translation is a form of reproduction of a work, that is, a mere rendering of the work in another linguistic code. The notion supported by many during the early days of Berne that the translation activity is, in a way, a mechanistic process that merely alters the linguistic code to produce a faithful copy appears to survive in Berne 1971. As pointed out earlier, this may be the reason why Berne does not create L&Es specific to the author’s translation right in Article 8, Berne seemingly considering notably Article 9(2) on permitted reproductions as sufficient to cater for translation needs. Furthermore, while Berne 1971, at first sight, seems progressive insofar as it recognises the translator’s right in the translation for the first time, the treaty makes it equally clear, however, that protection is “without prejudice” to the (first) author’s copyright. Hence, translation, even though it entails a change of expression/form (and reuse significantly relates to ideas/content), remains the essential prerogative of the author of the original. As Venuti correctly points out, the conception of the translation as a replica remains steeped in – and here one may legitimately wonder as to the appropriateness thereof specifically with regard to countries of the global South – the Lockean or Romantic (Western) tradition of individualistic "original authorship" grounded in labour extended or personality rights. This superelevates the "original" and grants comprehensive protection to the "original" author. Derivative works, and also translations, even if nominally also termed "original" works, remain subordinate to the "original". A translation, therefore, "can never be more than a second-order representation: only the foreign text can be original, authentic, true to the author's psychology or intention, whereas the translation is forever

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86 See Basalamah and Sadek 2014 *The Translator* 403-404 (explaining how this historic view remains a part of Berne 1971).
87 See Section 2, fns 7-9 and accompanying text, above.
88 Article 2(3) of the *Berne Convention* states, "Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work."
89 See Basalamah and Sadek 2014 *The Translator* 404 (rendering this critical assessment of the Berne provisions). It is an accepted axiom of copyright law that copyright protection only extends to expressions, but not ideas. See, eg, Art 9(2) of *TRIPS*. In the light of this axiom, see also the discussion of the US case of *Stowe v Thomas*, Circuit Court, ED Pennsylvania, Oct 1853, 23 F Cas 201 (1853), at fn 93 and accompanying text below.
90 Venuti 1995 *The Translator* 16.
imitative, potentially contaminating or false". The rights accorded to the creators of subsequent works are more limited in nature. Hence, "original" authors are able to exercise control over royalties and the scope of rights of translators.

Interestingly, there exist historical examples demonstrating that translation can also be seen differently. In 1853, a US court, in the case of *Stowe v Thomas*, held with regard to an unauthorised German translation, published in the USA, of a popular book in English that the translation did not infringe copyright as it merely transcribed ideas. In the words of the court, "[a] translation may, in loose phraseology, be called a transcript or copy of ... thoughts or conceptions, but in no correct sense can it be called a copy of [a] book". Accordingly, a decolonial, globally inclusive, and linguistically sound understanding needs to view translation differently. It has been held that, while a translation does have a close relation with – that is, derives from – a certain work, it is yet so intimately linked to a specific cultural context that it, for that reason, yields an independent work. Basalamah goes even further, holding that, because translation involves free artistic expression, a translation cannot even be seen as, in any sense, "deriving from" another work – rather, it "complements" that other work. By adopting such an approach, translation "is liberated from its traditional shackles of servitude". What one can certainly say is that translations are

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92 Venuti 1995 *The Translator* 1-2. Copyright law following the Continental tradition moreover grants the author of the original particularly far-reaching moral rights to preserve the integrity of their work against distortions. In the translation context, this entails enormous power for the author of the original to control the translation process. Venuti 1995 *The Translator* 6-7. British law interestingly provides that the right to object to derogatory treatment of a work does not extend to translations (s 80(2)(a)(i) of the *Copyright, Designs and Patents Act, 1988 (UK)*), presumably because it is difficult to adjudge the quality of a translation. Venuti 1995 *The Translator* 6.
93 *Stowe v Thomas*, Circuit Court, ED Pennsylvania, Oct 1853, 23 F Cas 201 (1853) 208. See also the discussion of the case by Aufderheide and Jaszi *Reclaiming Fair Use* 29-30, the authors describing the court’s reasoning as "amazing".
95 Basalamah *Le droit de traduire* 406. The author here says, "if a translation is a creation, and if all artistic expression is essentially free, then it follows that a translation reflects free expression. What would that imply? That the translation a) is not subordinated to the original work, but *equal* to it in law, b) that it is not derived from, but *complementary* to the original work, c) that the original work is not superior, but *different* from each of its translations, d) that ‘the original work’ is made up of other works, namely translations and translations ... other translations and other works, and, therefore, *non-original*" (own translation from original French text).
96 Basalamah and Sadek 2014 *The Translator* 402.
highly transformative in nature. This must, in one way or another, find expression in a reduction of the rights accorded to "original" authors to control translation.

Consequently, how should copyright law provide for translation generally and for translation into endangered languages specifically? One could think of affordable translation licences for commercial and non-commercial translation into any language, automatically granted on (easy) application under a statutory collective licensing scheme where standard rates (which may be higher for commercial translations) are negotiated between a regulatory body and right holders, or determined by independent royalty judges. Such a scheme should, in all instances, provide for exemptions from fees where neglected languages are concerned, potentially remunerating right holders in these cases out of tax money.

As an alternative to such a statutory collective licensing scheme, copyright law could provide that exclusive translation rights regarding a work terminate for a specific language, if (say) five or seven years, three years in the case of educational textbooks, after the first publication of the original work, no translation into that language has been effected by the author or with his or her

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97 See Basalamah "Translation Rights and the Philosophy of Translation" 122 (stating that translation is "doubly transformative … [o]n the one hand, the language (the form) of the work changes, and, on the other, the work passes from one set of culturally-influenced potential interpretations or readings to another, thereby adding a supplementary dimension to the original"); Ketzan 2007 Tul J Tech & Intell Prop 232 ("Translation is certainly transformative, insofar as it transforms words from one language to another."); Shaver 2014 Wash U L Rev 157 ("[T]ransformative use … is generally interpreted to require altering the underlying work in a way that adds new meaning and message. … Translation has not yet been recognized as a form of transformative use under U.S. copyright law, but arguably it should be."); Venuti 1995 The Translator 18-19 ("[T]he peculiar kind of writing involved in any translation forces a distinction[,] … [the] linguistic and cultural features are sufficiently distinct to permit [original and translation] to be considered autonomous works.").

98 Making a similar suggestion, see Shaver 2014 Wash U L Rev 156 (proposing an arrangement similar to the US statutory licensing scheme for musical compositions and recordings).

99 It would be important that any such scheme avoids the errors of the compulsory licensing scheme of the Berne Appendix. Licences must be available for educational and cultural, but also all other purposes. It should be permissible to export copies produced under a licence insofar as a neglected language is concerned. The scheme must cover printed and digital works. There should be no waiting or grace periods. It should not be required that copyright holders first be notified. The installation of a system of compulsory licences, in which an adjudicator makes a reasoned decision as to whether or not to grant a licence and decides on the compensation payable, is only a second-best option, compared to one that grants the licence automatically on application.
authorisation. Historically, such an arrangement (a "ten-year regime") existed under earlier versions of Berne, and it continues to exist under Berne 1971. For many reasons, however, that specific regime has lost its significance today. Insofar as endangered languages are concerned, copyright law should, as part of this alternative, clearly provide that translations, even of whole works, into these languages are always legitimate as of right, without time-limit, even for commercial purposes.

In addition to either of the above schemes, or perhaps even as an alternative to these, copyright law should accord translated texts, or text parts, robust protection as a form of fair use or fair dealing. The reference here is to statutory L&Es that permit (mostly) unremunerated use without authorisation within legally defined bounds. Protection should be particularly robust for translations into neglected languages. (Unremunerated) fair use, as applied in the US, requires fairness to be assessed in the light of "the purpose and character of the use, including whether such use is of a commercial nature", "the nature of the copyrighted work", "the amount and substantiality of the portion used in relation to the copyrighted work as a whole", and "the effect of the use upon the potential market for or value of the copyrighted work". A "hidden fifth factor" relates to "the extent to which the claimed fair use serves the public

100 Making a similar suggestion, see Ncube "Calibrating Copyright for Creators and Consumers" 274-275 (proposing "[r]educing the duration of the translation right"). Also Venuti 1995 The Translator 19-20 approves of this idea and recommends a term of five years. If, within the term, a translation into a specific language has been effected by the author or with his or her authorisation, the duration of the translation right with regard to that language would remain that of the full duration of copyright.

101 Article 30(2) of the Berne Convention. On the history of the provision, see the sources referred to in fn 6 above.

102 See Silva 2013 J Copyright Soc'y USA 585-586 (mentioning the reasons why the "ten-year regime" in force "is not satisfactory"). The regime's availability is or was tied to the specific commitments states had undertaken under previous versions of Berne, forfeited if not opted for at the time of ratification of, or accession to, Berne 1971, or excluded if a developing state preferred, or wished to keep open, the option of relying on the translation provisions of the Berne Appendix, as relevant. Arts 30(2) of, and V(1)(a) of the Appendix to, the Berne Convention. It seems that very few countries currently benefit from the regime. Ten years is also too long a waiting period. See fn 84 above.

103 Similar solutions might be made to apply to non-endangered, but other local or "developing" languages. See, generally, Ncube "Calibrating Copyright for Creators and Consumers" 275-276 (proposing "[[l]ocal language limitations" for "specific, local, neglected languages").

104 See Basalamah 2000 IDEA: J L & Tech 535 (arguing that translations into the languages of least developed countries should be covered by fair use); Shaver 2014 Wash U L Rev 157 ([F]air use doctrine might be developed to accord greater freedom for translations into neglected languages.").

interest”. Translations do not limit the market in the original language. In fact, they could benefit that market, as the fact that a work has been translated may indicate its value to readers in the original language. Furthermore, the market in a local, "developing", or neglected language will be weak. The fact that use occurs for a commercial purpose, or that a whole work is used (the usefulness of translation often lies in the rendering of entire texts), would tend to count against fairness. However, more decisive in the enquiry is whether use is transformative and in the public interest. Translations for educational or cultural literacy purposes, even if to some extent commercially motivated, are clearly in the public interest. The degree to which the target language is local, "developing", or neglected, certainly has a bearing on the strength of the public interest. Moreover, as Venuti explains:

A translation does not copy in the sense of repeating that text verbatim; rather, the translation enters into a mimetic relation that inevitably deviates from the foreign language by relying on target-language approximations. Even though a contemporary translation is required to imitate the entire foreign text, their linguistic and cultural features are sufficiently distinct to permit them to be considered autonomous works.

This serves to confirm the point made earlier, namely that translations are highly transformative in nature. Accordingly, the translation of whole works for educational or cultural literacy purposes, specifically if into a neglected language, even if for commercial purposes, could often be held covered by fair use. Whereas fair use means a broad open clause exemption to copyright protection, covering uses that may be considered fair, fair dealing enumerates more narrowly, notably in respect of the purposes, what may be considered fair use.

106 Reichman and Okediji 2012 Minn L Rev 1386.
107 Venuti 1995 The Translator 18.
108 Venuti 1995 The Translator 18.
109 See Basalamah 2000 IDEA: J L & Tech 535 (arguing that many developing countries have "so many languages ... that they will not constitute a significant market").
110 Venuti 1995 The Translator 19 considers that the commercial purpose would often likely mean that even translations for educational or cultural literacy purposes would not pass muster under fair use, but that translators understandably also pursued a commercial purpose with their translations. He finds this to be an unsatisfactory outcome as the authors of the original works are always free to pursue a commercial purpose. Ketzan 2007 Tul J Tech & Intell Prop 232-233 argues that, because translations are usually made of works in their entirety, a reliance on fair use might often not be successful in these cases.
111 See Campbell v Acuff-Rose Music Inc 510 US 569 (1994) 579 ("The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."); Reichman and Okediji 2012 Minn L Rev 1386 ("[T]he federal appellate courts look for transformative uses that advance the public interest").
forms of use. In principle, however, "the two terms are synonymous". Fairness is assessed by the same criteria. In drafting fair dealing provisions, care will have to be taken to ensure that the formulations used will legitimise a wide scope of permission and fee-free translation for educational or cultural literacy purposes, especially in respect of translations into neglected languages, and even if for commercial purposes.

Three further points need to be made. Firstly, the above suggestions for copyright reform may, at first sight, appear to treat commercial translations into endangered languages too benevolently. However, it should be remembered that also commercial translations can serve the public interest in education and cultural literacy. Furthermore, the markets for these languages are weak (few and/or impecunious speakers) and, without a reduction of expenses, commercial publishers will hardly be interested in producing translations for these markets if they are to keep prices low and yet be able to make a profit.

Secondly, translations into neglected languages will only be useful if they can be accessed and used or reused for free or affordably and without undue restrictions flowing from copyright law, licensing, or technical protection measures (digital locks and fences). Ncube says with regard to translations into local languages effected under schemes such as those discussed above that provision ought to be made for copyright eligibility exclusions to enable the creation of a commons. This makes sense for non-commercial translations. As for commercial translations, copyright protection will at least have to be restricted, inter alia in its duration. Additionally, to facilitate free or affordable access, states should subsidise both commercial and non-commercial translation endeavours.

Thirdly, limitations and exceptions to the exclusive rights of right holders must comply with the three-step test of international copyright law. Hence, limitations and exceptions would, firstly, have to be confined to certain "special" cases, secondly, not conflict with the normal exploitation of a work, and, thirdly, not unreasonably prejudice the legitimate interests of right holders. However, it needs to be underlined, as explained earlier, that, according to the integration rule of treaty interpretation, international copyright law, thus also the three-step

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113 Dean *Handbook of South African Copyright Law* 1–95, 1–96, para 9.2.3.
114 By way of analogy, Reichman and Okediji 2012 *Minn L Rev* 1440-1441 argue that a broad research exemption in copyright law should not distinguish between commercial and non-commercial research because "basic scientific research results are … a public … good".
115 Ncube "Calibrating Copyright for Creators and Consumers" 275-276.
116 See fns 8 and 11 above.
test, must be read in the light of international human rights law.\textsuperscript{117} Somewhat
idealistically perhaps, it has been stated that "the three-step test must \textit{perfectly mirror}
the demands of human rights[,] … [it] must permit any such use as
constitutes an entitlement under human rights".\textsuperscript{118} Certainly, however – as the
world's leading copyright scholars have held in a meanwhile famous
declaration on the three-step test, prepared under the auspices of the Max
Planck Institute for Innovation and Competition – in assessing the permissibility
of limitations and exceptions under the test, the legitimate interests of third
parties "deriving from human rights and fundamental freedoms" and "other
public interests, notably in ... cultural, social, or economic development", must
be taken into account.\textsuperscript{119} The three-step test must therefore be read in the light
of all the linguistic human rights in education and for cultural literacy that have
been enumerated earlier.\textsuperscript{120}

What then would be the implications of the three-step test for the various
schemes of translation rights and limitations and exceptions presented above?
Insofar as they address translation into languages that are \textit{not} endangered, it
is submitted that, without adjudging this in any detail here, but when duly taking
into account relevant human rights norms, the above schemes could potentially
be considered compliant with the three-step test. Insofar as they address
translation into languages that \textit{are} endangered (and for these languages far
more drastic reforms have been urged above), it is important to appreciate that
the suggested regulations cannot be considered to be subject to the three-step
test. As international copyright law, to the extent that it purports to regulate
translation into endangered languages, conflicts with \textit{ius cogens} – thus the
argument made in this article – the relevant provisions will, to that extent, be
void. This means that also the three-step test loses its applicability.

\section*{6 Language and decoloniality of knowledge and education
in Africa}

It is often said that in many developing countries there is "no reading culture"
and that, for that reason, it does not make much sense to produce books for
these markets. This argument is particularly also made for Africa, alleging that,
in African countries, the oral tradition is prevalent. However, as a publisher is reported to have stated, "People often say black people don't read. A lot of rubbish! Of course they read, but for some reason they don't buy books." Shaver presents evidence for the South African context, bearing out that all classes and ethnicities, in principle, value and enjoy reading. There are reasons why black people do not buy books. As Edwards and Ngwaru point out, the indications are that Africans would read if the content was affordable, accessible, and of interest. Hence, high prices of books and widespread poverty are a problem. The other problem is that books are not available in local languages.

The translation of works holds an enormous potential to address the dearth of reading materials in African languages. Overcoming the copyright-related impediments outlined in this article is crucial, but constitutes only one step in the endeavour of realising this potential. Other obstacles exist in the challenges of achieving good quality translations. Poor translations can have a "disastrous impact". Quality translations depend on the knowledge and skill of the translator. Translators need not only be proficient linguists but must also have specialist skills related to the specific audience for whom they translate (eg, children's books, language or science teaching, etc). It is, moreover, crucial to understand that translation can only be one of two complementary strategies that need to be followed in making works in local languages available. The other indispensable strategy is to promote original writing in local languages. Such original writing would, of course, most genuinely reflect the cultural context within which any local language thrives. One should also not forget that translating Western works into the languages of developing

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121 See Edwards and Ngwaru 2011 J Multiling & Multicult Dev 442 and Shaver 2014 Wash U L Rev 130-131 (all referring to the fact that this argument is often (falsely) made).
122 See Edwards and Ngwaru 2011 J Multiling & Multicult Dev 442 (quoting this publisher).
126 See Shaver 2014 Wash U L Rev 132 ("[T]here is a problematic mismatch between the language they speak and the language in which books are being published.").
128 Talagala Copyright Law and Translation 14.
129 Talagala Copyright Law and Translation 14.
131 See Bannerman International Copyright and Access to Knowledge 114 ("[T]ranslation ... cannot, alone, be equated with 'access', it can facilitate some forms of access"); Edwards and Ngwaru 2011 Int J Biling Educ & Biling 599 (underlining "the need to develop original writing in African languages at all levels").
countries holds a danger of remotely perpetuating dominance and colonialism, as such translations may also involve the advocacy of Western ways of thought and ways of life.\textsuperscript{132} Legitimate questions may arise about the "cultural appropriateness" of some of the books being translated into African languages.\textsuperscript{133} It is also sometimes held that translation may, in fact, be detrimental to original writing in local languages.\textsuperscript{134} Having a look at various facts and figures, however, Edwards and Ngwaru\textsuperscript{135} conclude that translation would seem not to constitute such a threat. Consequently, when considering the role of states in this context, it is clear that substantial obligations arise for governments. Beyond newly devising copyright law, states will have to actively promote conditions conducive to, and become directly engaged with, publishing in, and translating into, African languages. This calls for policies of additive multilingualism at all levels of education,\textsuperscript{136} the promotion of a reading culture in local languages, provision of subsidies to translators and publishers, training of translators, active support for original language writing, and so on.

The assertion that Africans do not have a reading culture and that, for that reason, African book markets can largely be ignored reveals a latent racism.\textsuperscript{137} Translation should also be seen as a way of sharing (rather than withholding) knowledge (and sharing it properly), democratising access thereto, and correcting injustices and inequality that have their roots in imperialism, colonialism, and Apartheid.\textsuperscript{138} Translation, moreover, assumes a profound significance in the context of achieving a decolonisation of the educational curriculum in African and other formerly colonised countries. Although colonialism officially ended many years ago, it persists in many ways, \textit{inter alia} in the education systems of former colonies. Teaching still follows a Western-based curriculum and continues to take place in the languages of the former colonial masters. Hence, the hegemony of the Western education model endures.\textsuperscript{139} This education model is not, as is often falsely assumed, a "universal" model, representing the ultimate goal towards which any society

\textsuperscript{132} Bannerman \textit{International Copyright and Access to Knowledge} 99.
\textsuperscript{133} Edwards and Ngwaru 2011 \textit{Int J Biling Educ & Biling} 592.
\textsuperscript{134} See Edwards and Ngwaru 2011 \textit{Int J Biling Educ & Biling} 592 (drawing attention to this concern raised by some).
\textsuperscript{135} Edwards and Ngwaru 2011 \textit{Int J Biling Educ & Biling} 593.
\textsuperscript{136} See the definition of "additive multilingualism" provided in Section 3, fns 36-37 and accompanying text, above.
\textsuperscript{137} See Shaver 2014 \textit{Wash U L Rev} 131 (remarking that there is "a thinly veiled racism lurking behind the invocation of 'culture'").
\textsuperscript{138} See Basalamah and Sadek 2014 \textit{The Translator} 407 (referring to the sensitivity of translation's sharing mandate to "the inequalities generated by current measures of legal protection" that benefit multinational corporations).
\textsuperscript{139} Manthalu and Waghid "Decoloniality as a Viable Response" 26.
should strive. It is the particularist model of a very specific type of society with very specific values.\textsuperscript{140} That model is also not applied because of its veracity (and the falseness of others), but because it was forcefully superimposed on the educational structures that were in place in the colonies at the time.\textsuperscript{141} Its continued application is premised on the continuation of a colonial mindset that views Western epistemologies as superior to others.\textsuperscript{142}

What then would a decolonisation of education entail? The goal must be the installation of an open-ended curriculum that provides room for a mix of epistemologies, in which the local epistemology enjoys prominence of place.\textsuperscript{143} While a decolonisation of education would require many things, such as a reliance on the writings of local authors, the study of indigenous knowledge, a rewriting of history incorporating the perspective of the oppressed, its most important component, it is submitted, would be education that takes place in local languages.\textsuperscript{144} The importance of multilingualism, based on mother tongue education, for any person's success in education and life, has been demonstrated above.\textsuperscript{145} Local languages facilitate the vernacularisation of knowledge, transposing knowledge to, and creating meaning within, the local context. This would emphasise local challenges, the local economy, and local values – and thus induce local knowledge appropriation.\textsuperscript{146} Taking the case of values as an example, philosophy, politics, and economics need to be understood in the light of one's "own" values. Hence, in Africa, the notion of \textit{ubuntu} is common to most cultures. This emphasises the interconnectedness of every person with all others.\textsuperscript{147} While the Western tradition is grounded in

\begin{itemize}
\item Manthalu and Waghid "Decoloniality as a Viable Response" 34.
\item Manthalu and Waghid "Decoloniality as a Viable Response" 28.
\item See Manthalu and Waghid "Decoloniality as a Viable Response" 38 ("Africa is largely on the passive receiving end of modern education. Few developed nations orchestrate the constitution of education globally.").
\item Roughly in this sense, Manthalu and Waghid "Decoloniality as a Viable Response" 35.
\item See Manthalu and Waghid "Decoloniality as a Viable Response" 42 ("Language is ... among the central pillars for achieving epistemic liberation and justice.").
\item See Sections 3 and 4 above.
\item Manthalu and Waghid "Decoloniality as a Viable Response" 30 argue that the absence of African languages in education, including in higher education, "undermines the possibility of meaningful African appropriation of knowledge". Knowledge appropriation is achievable "when problems, concepts and frameworks of thought are vernacularised". Vernacularisation refers to "linguistic processes through which universalist claims are ... contested and contextualised".
\item See, eg, the definition of the concept of \textit{ubuntu} provided by Murithi 2007 \textit{Globalisation Soc'ies \\& Educ} 281-282. Persons with \textit{ubuntu} "are generous, hospitable, friendly, caring and compassionate. They share what they have." \textit{Ubuntu} means that one person's humanity "is inextricably bound up" with that of others. A human being is a human being only through other human beings. Belonging to a greater whole, where a person diminishes others, they simultaneously diminish themselves.
\end{itemize}
the idea of individual autonomy, autonomy in Africa is always restrained by the responsibility towards others. Such a fundamental difference in perspective must have an influence on the construction of knowledge. Values such as this can only really be transported through the local language. Only once this happens, can the curriculum be said to have been decolonised. The role that translation can, and must, play in this scenario is evident. The nature of translation, ideally, is to create transformed, vernacularised versions of original texts for many different cultural contexts to facilitate local knowledge appropriation.

7 Online machine translation and the future

As we are entering the fourth industrial revolution, the translation of works will only gain traction in the future. Machine translation has been around for some time. This makes translating texts easier than ever before. As yet, it is uncertain whether machines will ever produce texts that satisfy the criteria of not only being good, but of also achieving the vernacularisation just referred to – but maybe they will. Already in 2007, Ketzan had recognised the potential of machine translation, stating that it "is socially, politically, and commercially beneficial". Online machine translation, he maintains, "has the power to revolutionize communication by eliminating language barriers, bridging the gap between different cultures, providing services to minority language speakers, and transforming global e-commerce". Machine translation, however, evidently creates a threat of copyright infringements on a massive scale as anybody using the internet or related software could effect translations with ease and without authorisation. Can and should such translations be covered by fair use? Should one, in a new world of infringing, but ubiquitous copying online, deduce implied licences that allow the making of machine

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148 Manthalu and Waghid "Decoloniality as a Viable Response" 33.
149 In this, but a broader sense, see Moyo 2003 S Afr Linguistics & Appl Lang Stud 129 ("Ex-colonial languages have become languages of power despite the fact that they are not in any of these countries spoken by the majority of the countries' populations."); Mungwini 2017 Int J Afr Renaiss Stud 13 ("[T]he most fundamental, subtle, pervasive, and intractable instrument of mental colonisation is language. If the effects of mental colonisation are to be arrested a reaffirmation of indigenous languages is a necessity."); Nkuna 2013 Int J Afr Renaiss Stud 71 ("Communication in colonial languages cannot fulfill black Africans' wishes regarding ... political, economic, social, technological, environmental and cultural [development].")
153 See Ketzan 2007 Tul J Tech & Intell Prop 232-233 (discussing whether fair use could successfully be raised as a defence in this context).
translations where right holders have not expressly reserved their copyright?154 Would any liability accrue to those creating software that can produce such translations?155 Should machine translation into a neglected language not always be permissible? What is clear, though, is that, in this type of environment, translation rights and limitations and exceptions require new or further regulation.156 One may, however, also ask whether, should machine translations ever become good enough, this would then not be the right time, subject to the “original” author retaining moral paternity rights, to sever the tie between original and translation more clearly once and for all for copyright purposes and “return” to Stowe v Thomas.157 Translation would then become everyone’s right.

However, already now, translation rights and limitations and exceptions require attention. Urgent attention is required to address facilitating translation into the neglected languages. This is necessary to ensure linguistic human rights in education and for cultural literacy, to protect linguistic and cultural diversity, and to secure the survival of vulnerable cultural groups. Many neglected languages face extinction, one such language "vanishing" every 14 days.158 Even the languages of larger, but poorer language groups may face long-term insignificance if no educational and other reading materials are made available in the languages concerned. Translation may significantly contribute to ensuring the availability of reading materials. The deplorable state of many of the world’s languages and the vulnerability of their speakers are not coincidental. They follow from evil, paternalistic, or recklessly inadequate state policies on language matters. They also have a basis in current copyright law. A Welsh saying holds that "cenedl heb iaith, cenedl heb galon" – a nation without a language is a nation without a heart. Where a cultural group is forcibly dispossessed of its language it is not just a cultural treasure that is lost. The group itself dies. It becomes a victim of linguistic genocide.

**Bibliography**

**Literature**

Aufderheide and Jaszi *Reclaiming Fair Use*

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155 See Ketzan 2007 *Tul J Tech & Intell Prop* 227-229 (addressing the intermediary’s potential secondary liability).

156 Ketzan 2007 *Tul J Tech & Intell Prop* 234 ("We should pave the way for online MT through statutory recognition of its noninfringing nature").

157 On the Stowe v Thomas case, see Section 5, fn 93 and accompanying text, above.

158 Rymer 2012 *National Geographic* 60.

Back, Han and Weng 2020 *Lang & Educ*

Baker *Foundations of Bilingual Education and Bilingualism*
Baker C *Foundations of Bilingual Education and Bilingualism* 3rd ed (Multilingual Matters Clevedon 2001)

Bannerman *International Copyright and Access to Knowledge*
Bannerman S *International Copyright and Access to Knowledge* (Cambridge University Press Cambridge 2016)

Basalamah 2000 *IDEA: J L & Tech*
Basalamah S "Compulsory Licensing for Translation: An Instrument of Development?" 2000 *IDEA: J L & Tech* 503-547

Basalamah *Le droit de traduire*
Basalamah S *Le droit de traduire: Une politique culturelle pour la mondialisation* (University of Ottawa Press Ottawa 2009)

Basalamah "Translation Rights and the Philosophy of Translation" 

Basalamah and Sadek 2014 *The Translator*
Basalamah S and Sadek G "Copyright Law and Translation: Crossing Epistemologies" 2014 *The Translator* 396-410

Behrens "The Mens Rea of Genocide"

Beiter 2019-2020 *Buff Hum Rts L Rev*
Beiter KD "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" 2019-2020 *Buff Hum Rts L Rev* 1-79

Beiter 2021 *GRUR Int*
Beiter KD "Translation Rights and Exceptions under Berne, *lous Cogens*, and Linguistic Genocide" 2021 *GRUR Int* 729-730

Beiter 2023 *Int J Hum Rts*
Beiter KD "Why Neoliberal Ideology, Privatisation, and Other Challenges Make a Reframing of the Right to Education in International Law Necessary" 2023 *Int J Hum Rts* 425-470

Cerone "Persecution"

Chon 2007 *UC Davis L Rev*
Chon M "Intellectual Property 'from Below': Copyright and Capability for Education" 2007 *UC Davis L Rev* 803-854

Cummins *Language, Power and Pedagogy*

De Varennes and Kuzborska 2016 *Int J Minor & Group Rts*

Dean *Handbook of South African Copyright Law*

Edwards and Ngwaru 2011 *Int J Biling Educ & Biling*

Edwards and Ngwaru 2011 *J Multiling & Multicult Dev*

Geiger, Griffith and Hilty 2008 *IIC*
Geiger C, Griffiths J and Hilty RM "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" 2008 *IIC* 707-713

Gil Gil 2000 *ZStW*
Gil Gil A "Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermordes im Römischen Statut des Internationalen Gerichtshofs" 2000 ZStW 381-397

Hemmungs Wirtén Cosmopolitan Copyright
Hemmungs Wirtén E Cosmopolitan Copyright: Law and Language in the Translation Zone (Universitetstyckeriet Uppsala 2011)

Hilty et al 2021 IIC
Hilty RM et al "International Instrument on Permitted Uses in Copyright Law" 2021 IIC 62-67


Kelly The True Interpreter
Kelly LG The True Interpreter: A History of Translation Theory and Practice in the West (St Martin's New York 1979)

Ketzan 2007 Tul J Tech & Intell Prop

Knoops Mens Rea at the International Criminal Court
Knoops G-JA Mens Rea at the International Criminal Court (Brill/Nijhoff Leiden Boston 2017)

Mandela, Hatang and Venter Nelson Mandela by Himself

Manthalu and Waghid "Decoloniality as a Viable Response"
Manthalu CH and Waghid Y "Decoloniality as a Viable Response to Educational Transformation in Africa" in Manthalu CH and Waghid Y (eds) Education for Decoloniality and Decolonisation in Africa (Palgrave Macmillan Cham 2019) 25-46


Mundorff A Cultural Interpretation of the Genocide Convention
Mundorff K A *Cultural Interpretation of the Genocide Convention* (Routledge Abingdon 2021)

Mungwini 2017 *Int J Afr Renaiss Stud*
Mungwini P "'African Know Thyself': Epistemic Injustice and the Quest for Liberative Knowledge" 2017 *Int J Afr Renaiss Stud* 5-18

Murithi 2007 *Globalisation Societies & Educ*

Ncube "Calibrating Copyright for Creators and Consumers"

Nersessian "The Current Status of Cultural Genocide under International Law"

Nkuna 2013 *Int J Afr Renaiss Stud*

Novic *The Concept of Cultural Genocide*

Okediji 2018 *NYU J Int L & Pol*

Okediji *Limitations, Exceptions and Public Interest Considerations*

OSCE "Explanatory Note – Hague Recommendations"
Explanatory Note (OSCE Office of the High Commissioner on National Minorities The Hague 1996) 9-17

Ouane and Glanz Why and How Africa Should Invest in African Languages

Patterson and Gardyne 2022 Environ Sci Proc

Prah "The Difficulties of Publishing in Africa"

Read Where Have All the Textbooks Gone?
Read T Where Have All the Textbooks Gone? Toward Sustainable Provision of Teaching and Learning Materials in Sub-Saharan Africa (World Bank Washington DC 2015)

Reichman and Okediji 2012 Minn L Rev
Reichman JH and Okediji RL "When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale" 2012 Minn L Rev 1362-1480

Ricketson and Ginsburg International Copyright and Neighbouring Rights

Rymer 2012 National Geographic
Rymer R "Vanishing Voices" July 2012, 222(1) National Geographic 60-91

Schabas "Cultural Genocide and the Protection of the Right of Existence"

Schabas Genocide in International Law
Schabas WA Genocide in International Law 2nd ed (Cambridge University Press Cambridge 2009)
Seiderman *Hierarchy in International Law*
Seiderman ID *Hierarchy in International Law: The Human Rights Dimension* (Intersentia Antwerp 2001)

Shaver 2014 *Wash U L Rev*
Shaver L "Copyright and Inequality" 2014 *Wash U L Rev* 117-168

Shaver 2015 *Colum J Transnat’l L*
Shaver L "The Right to Read" 2015 *Colum J Transnat’l L* 1-58

Silva 2013 *J Copyright Soc’y USA*
Silva AJ Cerda "Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright" 2013 *J Copyright Soc’y USA* 581-633

Skutnabb-Kangas *Linguistic Genocide in Education*

Talagala *Copyright Law and Translation*
Talagala CS *Copyright Law and Translation: Access to Knowledge in Developing Economies* (Routledge Abingdon 2021)

Triffterer 2001 *Leiden J Int L*
Triffterer O "Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such" 2001 *Leiden J Int L* 399-408

UNESCO *The Use of Vernacular Languages in Education*
United Nations Educational, Scientific and Cultural Organization *The Use of Vernacular Languages in Education* (UNESCO Paris 1953)

Venuti 1995 *The Translator*
Venuti L "Translation, Authorship, Copyright" 1995 *The Translator* 1-24

Walter and Benson "Language Policy and Medium of Instruction"

**Case law**

BVerfG [Fed Const Ct Germany], Order of the Second Senate of 12 Dec 2000 – 2 BvR 1290/99 (*Nikola Jorgić*)

*Campbell v Acuff-Rose Music Inc* 510 US 569 (1994)
López-Álvarez v Honduras (Merits, Reparations, Costs) IACtHR Ser C No 141 (1 Feb 2006)

Stowe v Thomas, Circuit Court, ED Pennsylvania, Oct 1853, 23 F Cas 201 (1853)

Legislation

17 US Code (Copyright Law of the United States and Related Laws) (USA)
Copyright, Designs and Patents Act, 1988 (UK)

International law instruments

Berne Convention for the Protection of Literary and Artistic Works (1971)
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1992)
International Covenant on Economic, Social and Cultural Rights (1966)
Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013)
UN Declaration on the Rights of Indigenous Peoples (2007)
WIPO Copyright Treaty (1996)

Other international legal materials

Advisory Committee on the Framework Convention for the Protection of National Minorities, Thematic Commentary No 3: The Language Rights of

CESCR, General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15(1)(a) of the ICESCR) UN Doc E/C.12/GC/21 (21 Dec 2009)

ComRC, General Comment No 11: Indigenous Children and Their Rights under the Convention UN Doc CRC/C/GC/11 (12 Feb 2009)


ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens), with Commentaries (2002), adopted by the ILC at its 73rd Session, in 2022, and contained in Report of the International Law Commission, UN Doc A/77/10 (2022), paras 43-44.


Report of the Special Rapporteur in the Field of Cultural Rights, Copyright Policy and the Right to Science and Culture (Shaheed F) UN Doc A/HRC/28/57 (24 Dec 2014)


**List of Abbreviations**

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<tr>
<td>Buff Hum Rts L Rev</td>
<td>Buffalo Human Rights Law Review</td>
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<td>BVerfG</td>
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