TOWARDS RIGHTS-DUTIES CONGRUENCE:
EXTRATERRITORIAL APPLICATION OF
THE HUMAN RIGHT TO WATER IN THE
AFRICAN HUMAN RIGHTS SYSTEM

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Abstract

Since 85 per cent of African freshwater comes from international rivers, the realisation of the newly emerging human right to water depends on the volume and quality of shared water resources. Each continental African State shares a river with at least one other State. Thus, a State has the capacity to hamper the realisation of the right in other co-riparian States by reducing the volume or polluting the shared river unless they are legally prevented from jeopardising the right abroad. The right would prove an empty promise for the right holders unless they are given legal avenues to hold third States accountable for their (in)actions that produce extraterritorial consequences. This article examines the extraterritorial reach of States’ human rights duties in the African human rights system in the light of the regional case law and comparative jurisprudence.

Keywords: African Charter; African Commission; CEDAW; CESCR; CRC; ESCR; extraterritorial obligations; extraterritoriality; human right to water; international cooperation; international remedies; international rivers; transboundary violations

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1. INTRODUCTION

A strange justice that is bound by a river! Truth on this side of the Pyrenees, error on the other.1

Quasi-judicial recognition facilitated the emergence of the human right to water as a fully-fledged and autonomous guarantee in the African human rights system, which was largely silent about the right.2 The right to water is not given explicit expression in the main African human rights instrument, the African Charter on Human and Peoples’ Rights (‘Charter’ or ‘African Charter’).3 The Charter’s monitoring and enforcement mechanism, the African Commission on Human and Peoples’ Rights (‘Commission’ or ‘African Commission’), has yet to define comprehensively the legal basis and scope of the human right to water and attendant State obligations under the Charter. It has, however, ruled that the right to water is implicitly guaranteed under the Charter’s Articles 5 (the right to dignity), Article 16 (the right to physical and mental health) and Article 24 (the right to a healthy environment).4 Nonetheless, the normative content of the right to water has yet to be defined in the African Commission’s case law.5 The current understanding of the right follows the approach of the United Nations (UN) Committee on Economic, Social and Culture Rights (CESCR). The CESCR defined the right as entitling ‘everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’.6

This article goes a step ahead of the current controversy surrounding the normative basis of the human right to water and analyses the immediate implementation problems triggered by a declaration of the right given the shared nature of scarce

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2 A qualified recognition of the human right to water has been made in other regional treaties, but the normative status of the right remains auxiliary to other related but more explicit rights. See Bulto, T., Rights, Wrongs and the River Between: Extraterritorial Application of the Human Right to Water in Africa (PhD Thesis, Melbourne Law School, the University of Melbourne, 2011), unpublished, on file with the author. A detailed analysis of the legal basis of the right in the African human rights system is beyond the scope and purpose of this work.
3 Adopted by the eighteenth Assembly of Heads of State and Government, June 1981 – Nairobi, Kenya; came into force 21 October 1986. It has now been universally ratified by all the 53 member States of the African Union.
5 Similarly, the normative terrain underlying the human right to water at the global level generally is still muddied. See Takele Soboka Bulto, ‘The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?’, Melbourne Journal of International Law, Vol. 12, No.2, p. 201 (forthcoming).
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Water resources of international rivers in Africa on which the fate of the human right to water so heavily depends. Unlike or beyond the necessities of implementing other socio-economic rights, the human right to water often depends primarily on a uniquely international resource for its realisation. This article, thus, examines the immediate implementation challenges triggered by the declaration of the human right to water in Africa. It addresses the problems posed by water scarcity and the internationally shared nature of water resources on which the rights’ domestic realisation often depends in the African continent. In other words, the fate of the right to water is usually dependent on the (in)actions of third States, as they can influence the quality and/or quantity of water available to rights holders in other States. The article, therefore, explores the imperatives of extraterritorial application of the human right to water and correlative States’ obligations in relation to the manner and scope of States’ uses of waters from shared international river basins, with a special focus on the African situation. It gauges the adequacy of the regional human rights system to deal with situations of relative scarcity when a right’s realisation depends on internationally shared resources.

Section 2 introduces factors and figures that necessitate extraterritorial application of the human right to water in the world generally and in the African continent specifically. Section 3 gives an overview of the current literature on the extraterritorial application of human rights, and the specific challenges that need to be addressed in the context of the human right to water. Section 4 analyses the text of the Charter and emerging case law of the Commission on the question of the extraterritorial application of human rights and its implications for the realisation of the human right to water in a continent where every State depends on international rivers for the domestic realisation of the right. Section 5 tracks the ‘cross-reference’ provisions of the African Charter and analyses the inspirational value of the approaches of the CESCRe, the Inter-American Human Rights Commission (‘Inter-American Commission) and the European Court of Human Rights (ECtHR) in relation to the extraterritorial reach of human rights and related States’ duties. Section 6 seeks to analyse the question of extraterritoriality in the more concrete framework of the tripartite State’s human rights obligations – respect, protect, promote and fulfil – before drawing some conclusions in Section 7.

2. TRIPLE IMPERATIVES FOR EXTRATERRITORIALITY

Apart from normative paucity, the realisation of the human right to water in Africa and elsewhere needs to grapple with the triple barriers of relative scarcity, State incapacity and dependence on extraterritorial actors for its realisation. Indeed, the
right was born into, and has continued to live through, an implementation crisis. As at 2002, over 1.1 billion persons lacked access to a basic water supply, while over 2.2 billion did not have access to adequate sanitation. By the time the UN General Assembly issued a Declaration to recognise the human right to water in July 2010, this figure remained almost the same, as some 884 million people were without access to safe drinking water and more than 2.6 billion lacked access to basic sanitation. The UN Millennium Development Goals (MDGs) resolved merely to ‘halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation’. In order to achieve this goal, an additional 784 million people worldwide must gain access to improved drinking water. This can be achieved only if an additional 260,000 people per day gain access to improved water sources, a target that has already been adjudged unfeasible at the current rate of progress. Of those without access to adequate water for drinking and personal uses, 84 per cent live in rural areas. Indeed, African countries – alongside their Asian counterparts – are facing ‘steep challenges’ to meet the MDGs.

The degree of fresh water shortages across the world, a major cause of the prevailing non-realisation of the human right to water, has already been dubbed a ‘global water crisis’.

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7 Id, para. 1.
8 The Human Right to Water and Sanitation, GA Res 64/292, UN GAOR, 64th sess, 108th plen mtg, Agned Item 48, UN Doc A/RES/64/292 (recent3 August 2010) (‘Resolution 64/292’).
9 UN Millennium Development Goals (Effective date 15 January 2008) Goal 7, Target 7.C. The Millennium Development Goals and targets come from the Millennium Declaration, signed by 189 countries, including 147 heads of State and Government, in September 2000, and from further agreement by member states at the 2005 World Summit (Resolution adopted by the General Assembly – A/RES/60/1). The goals and targets are interrelated and should be seen as a whole. They represent a partnership between the developed countries and the developing countries to create an environment – at the national and global levels alike – which is conducive to development and the elimination of poverty.
11 Ibid.
13 See, the UN Millennium Development Goals Report 2009, p. 46.
absolute lack of water resources. There is an amount of water in the earth’s ecosphere that is adequate for all conceivable human needs. The total amount of water in the earth’s ecosphere is estimated to be 1.4 billion cubic kilometres out of which 97 per cent is in the oceans. Only three per cent of water available on earth is fresh water. If the fresh and seawaters were spread evenly they would cover the globe to a height of 2700 meters. Notwithstanding all the transformations and recycling it has gone through, the absolute total amount of water in the earth’s ecosphere has remained the same over millennia. Leopold and Davis noted that:

‘the total supply [of water] neither grows nor diminishes. It is believed to be almost precisely the same now as it was 3 billion years ago. Endlessly recycled, water is used, disposed of, purified and used again. Last night’s potatoes may have boiled in what was, ages ago, the bath water of Archimedes.’

The problem of fresh water scarcity rather owes its causes primarily to the fact that there is not always enough water of the right quality in the right place at the right time. As McCaffrey noted, ‘Water is often found where people are scarce, and people often live where water is scarce.’ Thus, of the total fresh water available on the earth’s surface, about 77 per cent is stored in ice caps and glaciers, 22.4 per cent is in ground water and soil moisture and only 0.35 per cent is in lakes and marshes. Allowing for 0.04 per cent in the atmosphere, there is a bare 0.01 per cent of the world’s freshwater supplies in rivers.

Yet, it is rivers, carrying a mere 0.000003 per cent of all the water in the planet, that provide human beings with about 80 per cent of their freshwater needs. The

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19 Tafesse (n 17 above) *op. cit.* p. 1.
22 McCaffrey (n 20 above) *op. cit.* p. 8.
23 Elhance (n 18 above) *op. cit.* p. 8.
realisation of the human right to water, thus, primarily depends on freshwater from rivers. Being what they are, rivers do not respect national boundaries. The great majority of rivers of the world are successive rivers or boundary rivers and they are shared among States. An international river is either successive river, traversing the territories of two or more states, or boundary river (also called contiguous river), if it is one that separates the territories of two or more states. Thus, an international river can be both successive, in its segments that traverse, for instance, the territories of riparian states A and B, and boundary river, separating for instance riparian states B and C. See Jerome Lipper, ‘Equitable Utilization’ in: A. H. Garretson, Hayton, R.D. and Olmstead, C. J. (eds.), The Law of International Drainage Basins (1967) 15, 16.

States often treat that segment of a river that flows in their territories as any other resource at their sovereign disposal. Of the average global annual runoff of 40–47 cubic kilometres, more than half is found on the Asian and South American continents, while 40 per cent flows in Africa, Australia, Europe and North America combined. In Africa, 75 per cent of the total continental water resources are concentrated in eight major river basins: the Congo, the Niger, the Ogadugne (Gabon), the Zambezi, the Nile, the Sanga, the Chari-Lagone and the Volta. Put otherwise, most freshwater resources are concentrated in Western and Central Africa, whereas Northern and Southern Africa as well as the Horn of Africa are experiencing water scarcity. Ninety-five per cent of total freshwater, most of which is shared, emerges from Central and West Africa, while the arid and semiarid parts of the Continent produce a mere five per cent. The consequence of the uneven distributional pattern of freshwater resources has direct impacts on States’ capacity in realising the human right to water in their territories. An over-utilisation or pollution by a co-riparian State of the shared waters would inevitably influence the capacity of the other co-riparian States to control and use the waters for the realisation of the human right to water in their domestic sphere. Accordingly, the fact that rivers traverse international boundaries may impact upon the fate of the human right to water in co-riparian States’ territories.

Granted that 60–65 per cent of each of the continents of Africa, Asia and South America are dependent upon shared (transboundary) rivers, as is 40 per cent of North and Central America, recognising the human right to water and the consequent

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26 An international river is either successive river, traversing the territories of two or more states, or boundary river (also called contiguous river), if it is one that separates the territories of two or more states. Thus, an international river can be both successive, in its segments that traverse, for instance, the territories of riparian states A and B, and boundary river, separating for instance riparian states B and C. See Jerome Lipper, ‘Equitable Utilization’ in: A. H. Garretson, Hayton, R.D. and Olmstead, C. J. (eds.), The Law of International Drainage Basins (1967) 15, 16.

27 It is no surprise therefore that the major theories on international water law have state sovereignty as their starting point of enquiry. See McCaffrey (n 20 above) 111–170; Godana, B. A., Africa’s Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems, Lynne Rienner Publications Inc, Boulder, 1985, pp. 32–49.

28 White (n 24 above) loc.cit. p. 739.


31 Ibidem, at p. 15.

32 Elhance (n 18 above) op.cit., p. 5.

33 Tafesse (n 17 above) op.cit., p. 3.
correlative State obligations to realise the same raises questions of implementation that transcend a single State’s capacity. An increase in the use of shared water in one State may result in scarcity of water in a co-riparian country, leading to the non-realisation of the human right to water in the latter’s territory. The human right to water in one State could also be violated or threatened through pollution of the shared water resource or other injurious acts committed in other co-riparian States’ territories. Some 145 countries, accounting for 90 percent of the world’s population, are at least partly in shared basins, 30 of which are entirely within shared basins.\textsuperscript{34} Moreover, the number of shared rivers and countries depending on them has been rising over the past decades due to the disintegration of some and the formation of other (new) States. A report showed that there were 214 international basins in the world in 1978; this has risen to 263 as at 2006.\textsuperscript{35}

The situation is nowhere more acute than in Africa, where, with the exception of the few island States, every single country has at least one river to share with at least one neighbour.\textsuperscript{36} In other words, all continental African States depend on international water resources to fulfil their domestic water demands. Some 85 percent of Africa’s freshwater resources are found in shared river basins.\textsuperscript{37} At least 34 rivers are shared by two countries and 28 are shared by three or more States.\textsuperscript{38} Put differently, ten river basins – Congo, Limpopo, Niger, Nile, Ogooue, Okavango, Orange, Senegal, Volta, and Zambezi – are shared by four or more African States.\textsuperscript{39} Every country in continental Africa has at least one international river within its territory, with 41 of the 54 States having two or more and 15 States having five or more.\textsuperscript{40} Guinea has 14 international rivers, while both Cote D’Ivoire and Mozambique have 9 such rivers each in their territories.\textsuperscript{41}

The implication of the uneven distribution and relative scarcity of water resources in some States means that, perhaps more than any other right in the current catalogue of human rights, the fate of the human right to water is inextricably tied directly to the (in)action of foreign actors, thereby undermining the role of a domestic State acting alone. In Egypt, for example, not only the human right to water but ‘all of life and human activities’ depends on the waters of the Nile River that traverse nine

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\bibitem{34} UNDP (n 16 above) loc.cit. p. 205.
\bibitem{35} Idem.
\bibitem{36} The only exceptions are the few island states like Madagascar and Cape Verde. See The African Transboundary Water Law page at www.africanwaterlaw.org/html/background.asp (last accessed 20 June 2011).
\bibitem{39} Idem.
\bibitem{40} Idem.
\bibitem{41} Idem.
\end{thebibliography}
States before reaching Egypt.\textsuperscript{42} Similarly, elsewhere in Africa, not less than 94 per cent of Botswana’s total river flows originate outside the country.\textsuperscript{43} Indeed, there are some 33 countries in the world that receive 95 per cent or more of their fresh water from sources outside their territories; thus, they are heavily dependent for survival on transboundary water resources.\textsuperscript{44}

In such situations, a domestic State’s abstention from violating the human right to water (\textit{duty to respect}) is little consolation if the right is already violated due to scarcity or pollution of water resources caused by (in)action of a co-riparian State. The home State cannot control what another co-riparian State can do to the shared river within the latter’s territory. A State’s capacity to protect the human right to water in its territory is thereby undermined. As a result, its efforts to realise the duty to fulfil the right in its own jurisdiction may be hampered by the possible increase of the use made of the shared water in another State’s territory which diminishes the river’s flow downstream.

The conflation of these duties exposes the incommensurability of right-holders’ entitlements, on the one hand, and a willing State’s ability to realise the human right to water, on the other. The non-realisation of the human right to water in one State may be caused by more uses in other co-riparian States for agricultural, industrial and other purposes. It could also be caused by avertable pollutions, thereby affecting the quality of water flowing into other States’ territories. In all of these cases, the capacity of the State at the receiving end of the river is diminished, thereby holding back the realisation of the right to water in its territory. Actions and/or omissions in a co-riparian State related to the use of shared resources will, thus, be felt along the continuum of a given river.

As Parfit wrote, ‘The big river is like your nation, a little out of hand.’\textsuperscript{45} In other words, some segments of a shared river are always beyond the control of a state. This may affect the State’s capacity to discharge the duties entailed by its recognition of the human right to water by causing water resource constraints. Unless States’ uses of Africa’s international rivers are regulated in such a way that is sensitive to all those who share the bounty of the common river, the declaration of the human right to water by the African Commission may promise what it cannot deliver – a scenario


\textsuperscript{45} This phrase is borrowed from Michael Parfit, as quoted in Barlow, M., and Clarke, T., \textit{Blue Gold: The Battle against Corporate Theft of the World’s Water}, The New Press, New York, 2002, p. xi.
sometimes referred to as ‘rights inflation’. Right-holders would then find it difficult to seek and obtain redress for such violations. O’Neill’s questions emphasise this:

What is the point of having a right? More specifically what is the point of having an abstract right, unless you also have a way of securing whatever it is that you have a right to? Why should we prize natural or abstract rights if there is no way of ensuring their delivery?

The human rights regime, thus, needs to adapt to the hydrological and hydropolitical imperatives that necessitate a legal framework that obliges States to shoulder the duty of sharing such waters for the benefit of all populations inhabiting the particular river basin. This calls for extraterritorial application of the right to water.

3. EXTRATERRITORIAL SCOPE OF HUMAN RIGHTS: THE SPECIAL CASE OF THE RIGHT TO WATER

The need for the extraterritorial application of human rights and of related States’ duties has heretofore been justified primarily with reference to the forces of globalisation. The increasingly globalising world has seen the shrinking role of States’ borders, fewer trade barriers and the development of new weapons that enabled some States to cause harm to individuals and groups situated in third States with little or no difficulty. In particular, economic globalisation impinges upon the fate of socio-economic rights, including the right to water. On the other hand, States have so far been held responsible primarily for human rights violations they caused abroad mainly when they exercised control over foreign territory or on individuals situated in another State’s jurisdiction. These scenarios are relevant to the right to water, but they do not provide a comprehensive protection of the right to water in its extraterritorial sense.

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50 In the case of Loizidou v Turkey, the applicant complained to the European Court of Human Rights that she was prevented from accessing her own plots of land in Northern Cyprus by the occupying Turkish authorities. See Loizidou v Turkey (Preliminary Objections) Application No 40/1993/435/514, ECtHR 23 March 1995.
51 In the Lopez Burgos case, the complaint concerned the abduction and torture of Lopez Burgoes by Uruguayan security forces in Argentina, on foreign soil, without controlling the Argentinean
The human right to water can be violated without any need for the foreign State
to control the territory of the victim’s home State or the person of the victim. All
that is needed for a State to violate the human right to water in third States is – in the
language of the Trail Smelter decision – ‘to use or permit the use of its territory in
such a manner as to cause injury […] in or to the territory of another or the properties
or persons therein’.\footnote{ Trail Smelter case (U.S v Canada), 3 R.I.I.A (1941) para. 49.} If a State reduces the water volume or quality of a shared river
within its own borders it can cause the violation of the human right to water in a co-
riparian State without necessarily occupying another State’s territory or controlling
individuals therein. This is especially so when such reductions and pollution occur in
relation to fully used rivers and where there is an existing water scarcity in the basin.

As each non-island African State depends on water originating in shared rivers,
albeit to varying degrees, Africa has already been ‘globalised’ through its international
rivers. States’ residents have long been potentially susceptible to extraterritorial harm
with respect to their human right to water. As Waterbury noted, States have ‘a perverse
habit of treating whatever portion of the flows within their borders as national resource
at their sovereign disposal’.\footnote{ Waterbury, J., Hydropolitics of the Nile Valley, Syracuse University Press, New York, 1979, p. 2.} Such an approach opens room for unilateral actions and
inactions that would impact on the rights of foreign residents in relation to their right
to water. A State’s (in)actions could therefore directly jeopardise the right of access to
drinking and sanitation water in other co-riparian States.

This is exacerbated by the increasingly debilitating effects of climate change which
is a text-book example of a State’s use of its territory in a manner that causes harm to
territories of and persons in third States. States’ contribution to climate change would
pp. 785–788.} According to the UN
Independent Expert on the Human Right to Water and Sanitation:

Climate change presents a serious obstacle to the realisation of the rights to water and
sanitation. Water is a key medium through which climate change impacts upon human
populations and ecosystems, particularly due to predicted changes in water quality and
quantity. The impacts of climate change need to be seen in light of its direct effects on water
resources as well as its indirect influence on other external drivers of change, in particular
increasing population pressures and changing consumption patterns.\footnote{ De Albuquerque, C., ‘Climate Change and the Human Rights to Water and Sanitation’ (Position
Safe Drinking Water and Sanitation, 2010); ibidem, para. 2.}
There have been warnings of severe consequences of the effect of climate change on the availability of water in Africa. By 2020, an estimated 75 million to 250 million people in Africa will be under situations of water stress due to climate change.\(^\text{56}\) In the Nile basin, for instance, it has been projected that global climatic changes will reduce the Nile’s flow by as much as 25 per cent in the not too distant future by substantially altering the established pattern of precipitation and evaporation in the basin.\(^\text{57}\) It also contributes to or exacerbates water scarcity though its drastic effects on water quality, thereby making it difficult for States to make effective use of the often scarce water quantity that is available to them for the purposes of realising their residents’ human right to water. It leads to an increased intensity and frequency of heavy rainfall events, causing, among other things, more polluted runoff, more flooding, more water quality impairment and more waterborne diseases.\(^\text{58}\)

Whether it is through pollution, over-utilisation or contribution to water shortage caused by climate change, a State could use or allow the use of its territory in a manner that facilities the violation of the human right to water in other States. The ensuing harm could materialise without the author of the violation occupying a foreign State’s territory or a person situated therein. The effects of (in)action by one State could easily spill beyond its national borders or be exported to another State’s territory where they cause violations of the human right to water.

The violation of the right to water in one State by a co-riparian State raises different sets of issues for international human rights law than those attributable to the right holder’s home State. In cases where the cause for the non-realisation of the human right to water is attributable to the home State, individual and group right holders would have recourse against the same, which would be held responsible for any failure to meet its duties to realise the right. A State’s recognition of the human right to water gives rise to individuals’ and groups’ rights to complain against its violation by seeking and obtaining remedies thereto from the home State.\(^\text{59}\) But such a course of action may prove to be of little avail when the relevant home State is willing but demonstrably unable to realise the right due to resource constraints caused by an (in)action of a co-riparian State. The home State may plead supervening impossibility to evade responsibility.\(^\text{60}\) Jennings argues that impossibility of performance of an obligation that involves, \textit{inter alia}, the disappearance or destruction of an object that


\(^{57}\) Abu-Zeid, as quoted in Elhance (n 18 above), \textit{op.cit.}, p. 58.


is essential for the fulfilment of the obligation is a justifiable ground for absolving States of responsibilities under international treaties.61 Such grounds include the drying up of a river or the destruction of a dam that is indispensable for the execution of a treaty obligation.62 Thus, legal recourse against the right holders’ home State may produce little or no results when the home State is not responsible for the violations complained of. Unless mechanisms are devised whereby foreign States are held to account for their (in)actions that cause the violation of the human right to water, right-holders in co-riparian States remain confronted by the ‘incapacity of their national governments, and hence only ever be able to represent themselves as potential claimants or aspirational rights-holders’.63

An entirely different question emerges when such violations are caused by a co-riparian State or non-State actors situated across international borders for which the co-riparian State is answerable. Defences based on, among other things, jurisdiction, locus standi and sovereignty may curtail individuals’ and groups’ rights to have a legal recourse against a foreign State. In the end, the right holders’ claims for redress may remain without a remedy and the duty bearers, if any, may evade responsibility for the extraterritorial breaches of rights and freedoms attributable to their (in)actions. The possibility of redressing victims’ rights, therefore, heavily depends upon the degree of States’ extraterritorial duties to aid the realisation of the human right to water and abstain from contributing to its non-realisation in other co-riparian States’ territories. This stance underpins the necessity of gauging the extraterritorial reach of the human right to water and attendant States’ obligations in Africa, where all States and their respective residents depend on international rivers.

4. EXTRATERRITORIAL REACH OF THE AFRICAN CHARTER64

The African Charter is not unequivocal about the extraterritorial reach of its rights and freedoms or correlative States’ obligations. There is no mention of the territorial or jurisdictional reach or limitation of any categories of the Charter’s rights and freedoms or attendant States’ duties. Academic analysis of human rights and their extraterritorial application in the context of the African human rights system is

62 Idem.
almost non-existent. However, the African Commission has long adjudicated issues involving the extraterritorial reach of States’ human rights obligations and laid down some rules and dicta. As outlined in this section, there are textual bases and discernible trends in the jurisprudence of the regional system for the extraterritorial application of the Charter’s guarantees and States’ human rights duties.

4.1. ABSENCE OF JURISDICTION CLAUSE

The general ‘obligations clause’ under Article 1 of the Charter states:

The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

The Charter does not contain an explicit provision that limits the State Parties’ obligations of realising the rights and freedoms to their respective territories or jurisdictions. Indeed, there is nothing in the African Charter which has the import of ‘territoriality’ of States’ human rights duties.

Despite the conspicuous absence of a ‘jurisdiction’ or ‘territoriality’ clause in the African Charter, some scholars have asserted that a State cannot be held responsible for the realisation of Charter’s rights and freedoms beyond their own borders. According to Anyangwe:

Each state party to a human rights treaty assumes international responsibility towards its own inhabitants. A state does not assume an obligation to assist another state to fulfil its obligations to respect and to ensure the realisation of the rights of its inhabitants.

Similarly, Viljoen argues that ‘State Parties to the African Charter are in principle only responsible for violations that occur within their territory’. In this vein, the territoriality of States’ human rights obligations derives from the fact that ‘States are


67 Anyangwe (n 65 above), op.cit., p. 627.

68 Viljoen (n 65 above), op.cit., p. 78.
responsible only for actions or events under their control’. Viljoen contends that territoriality is a precondition for admissibility of a case against a State Party to the Charter, and maintains the view that a State’s extraterritorial responsibility can only be implicated for violations of the Charter’s rights by reasons of ‘an extra-territorial incident or event in cases where the State has de facto control over that incident or event’. He does not categorically deny the extraterritorial reach of States’ obligations but argues that such duties hinge upon the amount of control a State exercised over the relevant incident or event.

In the case of the right to water, the concern is the regulation of a State’s (in) actions over waters originating in and traversing its territory. Since such actions are usually under a riparian State’s de facto and de jure control, Viljoen’s argument does not necessarily exclude the possibility of holding a State responsible for violating the human right to water in third-party States’ through its territorial actions and omissions.

Nevertheless, the argument that the Charter’s spatial reach in relation to the remainder of the Charter’s provisions is territorially or jurisdictionally limited seems to lack a textual basis in the Charter. As noted above, there is nothing in the explicit wording of the Charter’s ‘obligations clause’ to suggest that the instrument was meant to apply territorially or within a State Party’s jurisdiction only. Indeed, a similar absence in the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) and the American Declaration on the Rights and Duties of Man (American Declaration) of a clause limiting the enjoyment of the rights recognised therein to persons within the territory or jurisdiction of a State Party has not precluded their respective human rights bodies from finding that both documents have extraterritorial application.

This line of interpretation is more in line with the object and purpose of the Charter, as it promotes the protective regime established by the regional instrument.

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69 Idem.
71 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976.
72 Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.
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The American Declaration and ICESCR are part of the ‘inspirational sources’ which could potentially influence or even guide the approach of the African Commission in relation to its interpretation of the Charter’s provisions.\(^\text{74}\) Arguably, therefore, the lack of a clause limiting human rights guarantees and related States’ obligations to a certain ‘territory’ or ‘jurisdiction’ implies that the Charter does not preclude the extraterritorial application of its guarantees.

4.2. SUBSTANTIVE PROVISIONS WITH EXTRATERRITORIAL DIMENSIONS

The Charter provides for some substantive extraterritorial human rights guarantees that have the effect of extending a State’s duties beyond its territory. Under Article 12(2), the Charter enshrines every individual’s right to return to the country of origin. This right protects an individual who is outside the territory (hence the jurisdiction) of the State of origin. In this sense, the protection afforded to the individual, and the duty of the State to allow the same to return home, applies extraterritorially.

Legal protections of this type are aimed at ‘insulating a state’s citizens from the consequences of the state’s actions abroad’.\(^\text{75}\) Extraterritorial application of human rights can therefore be seen as an instrument for the protection of individuals and groups abroad from the transboundary violations of their rights by their own State of origin. In the case of the right to water, a State’s violation of the right in a co-riparian State may violate the rights of its own nationals residing in the co-riparian State’s territory.

As the Charter incorporates an instance of a specific substantive rule that is designed to accrue to extraterritorial beneficiaries, arguably, it does not intend to distinguish among the rights and freedoms it enshrines in terms of their spatial reach. Once established, States’ human rights duties correspond to a wide ranging catalogue of human rights with the few exceptions of those rights that are inherently related to citizenship (and hence territorial) such as the right to vote. The African Commission stated, ‘Although some rights, like the right to vote and to stand for election are reserved for citizens of the particular state, human rights are in principle to be enjoyed by all persons’.\(^\text{76}\) As long as the Charter incorporates the principle that enjoins States form violating human rights beyond borders in relation to some rights, the same logic applies to the rest of its human and peoples’ rights’ catalogue.\(^\text{77}\) This may explain the

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\(^{74}\) See Section V, below.


\(^{77}\) Once established, states’ human rights duties correspond to a wide ranging catalogue of human rights with the few exceptions of those rights that are inherently related to citizenship (and hence territorial) such as the right to vote. See According to the African Commission, ‘[a]lthough some rights, like the right to vote and to stand for election are reserved for citizens of the particular
absence of a territoriality or jurisdiction clause in the Charter’s ‘obligations clause’. Therefore, arguably, its other guarantees, such as the right to water, would entail the extension of a State’s human rights obligations beyond its territorial jurisdiction.

4.3. THE JURISPRUDENCE OF THE AFRICAN COMMISSION

Quasi-judicial scrutiny of the extraterritorial reach of human rights and correlative States’ obligations in Africa leapfrogged related academic debate. Attempts at holding States extraterritorially responsible for violations of human rights and freedoms guaranteed under the African Charter started to come before the African Commission almost as soon as the Commission was inaugurated in 1987.78 Individuals sought to avail themselves of the regional mechanism for redressing violations of their rights by non-territorial actors. This is indicative of the prevalence, if not rampancy, of extraterritorial violations of individuals’ and groups’ rights in Africa not only by African States but even by non-African States. None of these early communications was considered on the merits as the States against whom the communications were lodged were non-African States over which the Commission does not have any jurisdiction. The communications were, thus, deemed irreceivable and dismissed at their early stages.79

However, the Commission was given other opportunities more recently to consider complaints of human rights violations by African States in other States’ territories. The case relating to the invasion of the territory of the Democratic Republic of Congo (DRC),80 which was the first ever admissible inter-State communication to the African Commission,81 involved four of the ten Nile co-riparian States. It was submitted by

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79 Ibid.
81 Under the African Charter, communications are categorised as inter-state communications (submitted by a state against another) and ‘other’ communications, referring to complaints by non-state entities against state parties to the African Charter. See Articles 47–55, African Charter.
the DRC against Burundi, Rwanda and Uganda complaining about the occupation of its territory by the armed forces of the three respondent States. More importantly, the DRC complained about the violations of its residents’ (individuals and groups) Charter-based rights by the occupying forces in the territories they forcefully occupied. The Commission found the three States to be in violation, *inter alia*, of the right to respect for life and the integrity of person (Article 4), the right to dignity (Article 5), the right to freedom of movement (Article 12), the right to property (Article 14), the right to physical and mental health (Article 16), the right to culture (Article 17), the right to unity of a family (Article 18), peoples’ right to self-determination (Article 19–20), peoples’ right to dispose of their wealth and natural resources (Article 21), and peoples’ right to economic, social and cultural development (Article 22) as guaranteed under the African Charter.  

The acts that constituted the violations of the Charter’s provisions were committed entirely within the DRC territory, outside the boundaries of any of the respondent States. This did not hinder the Commission from attributing responsibility to the respondent States, giving rise to the assumption that States are responsible for the violations of human rights they commit abroad.  

None of the States implicated in this case raised any objections contesting the extension by the Commission of their human rights responsibilities to territories beyond their own borders. Accordingly, the respondent States were held responsible for violations of fundamental rights and freedoms that occurred within the DRC territory that they brought under their effective control at the material time. Non-objection by the respondent States to the extraterritorial application of a regional human rights treaty has similarly led the Inter-American Commission to hold that States have acquiesced to extraterritorial human rights obligations.

Another African case that has had elements of extraterritorial State responsibility once again involved, to varying degrees, seven of the ten Nile Basin States as respondents, namely, Ethiopia, Kenya, Tanzania, Rwanda, Uganda, Zaire and Zambia (the *Burundi Embargo* case). This case arose out of the imposition of an embargo by the respondent States on 31 July 1996 against the State of Burundi in expression of protest to the unconstitutional change (*coup d’état*) that toppled the democratically elected government in that country. The embargo was later endorsed by the African Union and the UN Security Council. A case was taken on behalf of the then new military government of Burundi to the Commission complaining that the embargo,
by curtailing Burundi’s access to imported goods and services, violated the right to life, right to education and related rights of Burundians. Although the Commission absolved all the respondent States of any wrong-doing, it laid down an important dictum for future cases. It decided that:

[i]t is the critical question and one which may affect the legitimacy of the action is whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose. Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of.

This dictum has far-reaching implications for the regional human rights jurisprudence concerning the extraterritoriality of human rights and related duties of States in Africa. It shows that the Commission was ready to find the States responsible for violations of the rights of residents of foreign States if, and when, they take actions that are disproportionate to the end sought or are indiscriminate or lack monitoring mechanisms to ensure that the basic rights of individuals and groups are not jeopardised. It ruled that ‘sanctions are not an end in themselves. They are not imposed for the sole purpose of causing suffering’. It, thus, commented:

We are satisfied that the sanctions imposed were not indiscriminate, that they were targeted in that a list of affected goods was made. A monitoring committee was put in place and situation was monitored regularly. As a result of these reports adjustments were made accordingly.

Both the DRC Invasion case and the Burundi Embargo case have some important common features as well as major differences. Both cases brought into focus the negative side of States’ extraterritorial duties. The violations complained of involved a breach of the extraterritorial duty to respect the relevant rights, which is a duty of abstention. Put differently, neither of the cases have had clear implications for positive duties of a State to residents of third States as none was involved in the relevant litigation. The Commission was not called upon to decide on questions of inter-State obligation for resource sharing – such as water resources. Nevertheless, in both cases, none of the States objected to the fact that they were being implicated for extraterritorial duties. If

87 Id, para. 79.
88 Id, para. 75.
90 Communication 157/96, (n 86 above) para. 77.
91 Id, para. 76.
silence or lack of objection to extraterritorial human rights duties is indicative of State practice (as has been the case in the Inter-American human rights system). The eight Nile Basin States have assented to being held extraterritorially responsible for their acts as they failed to seize more opportunities than one to raise any objections.

The ‘effective control’ element was not a requirement in the Burundi Embargo case while it was a constitutive element of State responsibility in the DRC Invasion case. In the former, the respondent States were accused of violating the rights of residents of Burundi through their decisions to impose an embargo upon the country, taken at a summit held in Arusha, Tanzania. There was no semblance of territorial control or presence of these States in Burundi (the complainant State).

Although the extraterritorial application of the African Charter has been recognised by the Commission, its implications for sharing transboundary water resources have yet to be established. The Commission has only confirmed that States have extraterritorial human rights duties to respect human rights and, as such, States have to abstain from the commission (or omission) of acts that violate the human rights of individuals and groups in third States.

However, abstention alone would offer an inadequate means for residents of water-deficient States to access water resources that emerge from beyond the boundaries of their home State or prevent reduction of water quantity or quality. Thus, the issue of whether States owe residents of other States the duty of sharing waters originating in their territories (obligation to promote and fulfil) remains vague and unsettled but holds the key to the realisation of the human right to water in Africa in general and in the Nile Basin in particular.

That said, the regional human rights jurisprudence should be understood in its own context. None of the cases that came before the Commission involved positive extraterritorial State obligations, and, as such, the Commission had to limit its rulings to the concrete dispute before it, namely the duty to respect. It has showed, however, that States are extraterritorially liable whenever their acts have the effects of jeopardising human rights in third States.

As all continental African States share water from international rivers, and given that individuals and groups in those States depend on transboundary freshwater for the realisation of their human right to water, a State can severely jeopardise the right in question from within its own borders without any need of directly controlling a co-riparian State’s territory. Consequently, many riparian States would find it either impossible or extremely arduous to fulfil their human rights obligations to their respective inhabitants unless there are ways of sharing such resources and ensuring that co-riparians account for the harm they cause to those in other co-riparian States’ territories. In the Nile Basin, for instance, the entirety of life in Egypt depends upon

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92 See Section 5.2 (B), below.
the waters of the Nile River, 93 86 per cent of which flows down from the Blue Nile originating in the Ethiopian highlands, 94 with the rest flowing from the White Nile of the Great Lakes region. 95 The available Nile waters have been fully used, 96 and the States no longer have viable alternatives to sharing the common resources in the spirit of cooperation. 97 Given the spatial distribution of water resources in Africa, a State’s extraterritorial duty to respect the human right to water is not adequate for the realisation of the human right to water in co-riparian States. It takes active cooperation in the form of equitable sharing of transboundary waters to offer a real hope of realisation of the right in all countries of the Continent.

5. THE BENEFIT OF CROSS-REFERENCE: ‘INSPIRATIONAL SOURCES’

The African Charter has granted the African Commission wide latitude under Articles 60 and 61 in which it mandated the Commission to ‘draw inspiration’ from rules of international law and international human rights law. Pursuant to these provisions, the Commission has explicitly referred to the case law and treaty provisions of other regional systems in interpreting the Charter’s provisions and rendering decisions on cases that come before it. This is not peculiar to the African Commission, just as the cross-reference to extra-African legal norms by Articles 60–61 of the Africa Charter is not novel. There has been an increasing trend among human rights tribunals to use legal rules, principles and case law extraneous to a tribunal’s main treaty. 98 Indeed, human rights courts ‘work consciously to coordinate their approaches’. 99 It is, therefore, instructive to make a brief incursion into the ICESCR as well as the case law and treaties of the other regional human rights systems as they are among the sources from which the African human rights bodies may ‘draw inspiration’ in the process of interpreting and applying the regional human rights instruments.

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95 Id, 54–56.
5.1 ARTICLE 2(1) OF ICESCR AS AN ‘EXTRATERRITORIAL CLAUSE’

Article 2(1) of the ICESCR contains phrases that support the extraterritorial application of States’ Parties obligations contained therein. It stipulates:

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

Cooperation primarily implies reciprocity by way of mutual action directed towards a common goal while assistance refers to ‘the transfer of some “good” from one state to another’. Assistance, thus, involves an obligation of a non-reciprocal nature as compared to the reciprocal obligations contained in the concept of cooperation. Kunneman similarly defines ‘cooperation’ as ‘working together in the realisation of human rights for each person’.

A close reading of Article 2(1) points to a few features of the extraterritorial aspects of States’ obligations contained therein. First, Article 2(1) does not restrict the realisation of the rights in the ICESCR, including the right to water, or the correlative State obligations to a territory or jurisdiction of a State. A jurisdiction clause similar to that of the ECHR is conspicuously absent. Arguably, this implies that a State Party’s duty to realise the rights and freedoms enshrined in the ICESCR is not confined to its territory or jurisdiction and its obligation to realise the rights in third States is not excluded.

The second special feature of the ICESCR, which is most pertinent to the extraterritorial nature of a State’s obligations, is its requirement that steps shall be taken not only by States acting individually but also through international assistance and cooperation. This indicates that Article 2(1) foresaw not only abstention but international action. There is agreement that the illustrative list of activities under Article 23 of the ICESCR is indicative of the types of assistance and cooperation envisaged under Article 2(1). Under Article 23, State Parties agree to take:

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102 ECHR art. 1.

103 Kunnemann (n 101 above), *op.cit.* p. 203.

104 Craven (n 100 above), *op.cit.* p. 147.

international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Similarly, the obligations of international assistance and cooperation have been recognised both under Articles 11 and 12 of the Covenant. According to the General Comment (GC) No. 15 of the CESCR, these very provisions provide the normative basis for the human right to water.\textsuperscript{106} The explicit provision for international assistance and cooperation in these two provisions means that the realisation of the human right to water, among other rights guaranteed therein, entails obligations of an international character.

Third, the obligations under Article 2(1) are neutrally worded and the duties of international assistance and cooperation are attached invariably to ‘recipient’ and ‘donee’ States. The generality of the wording implies that the obligation contained therein not merely requires the recipient States to seek international assistance and cooperation but also obliges the ‘donee’ States to provide the same.\textsuperscript{107}

Fourth, there is nothing in Article 2(1) of the ICESCR to indicate that the measures taken ‘individually’ refer to territorial obligations and those ‘through international assistance and cooperation’ to extraterritorial obligations.\textsuperscript{108} Accordingly, both territorial and extraterritorial human rights obligations can be undertaken by States acting individually and/or in cooperation with others not only for the benefit of domestic right-holders of the State owing the duties, but also for the benefit of individuals and groups in third States.

Finally, the obligation of ‘international assistance and cooperation’ is a general duty corresponding to all rights in the ICESCR. As part of the general obligations clause under Article 2(1) of the ICESCR, the duties it entails correspond to each right guaranteed in the Covenant, including the human right to water. Accordingly, there are international obligations of States which require States ‘to take joint and separate action to achieve the full realisation of the right to water’.\textsuperscript{109} The international obligations comprise both the positive and negative layers of States’ duties.\textsuperscript{110} It has been argued that ‘the question should consequently be what type and scope of obligations extending beyond the territorial jurisdiction of states the ESC [socio-economic] rights can give rise to’.\textsuperscript{111}

\textsuperscript{106} See (n 6 above) para. 3.
\textsuperscript{107} Kunnemann (n 101 above), \textit{op.cit.} p. 204.
\textsuperscript{108} Idem.
\textsuperscript{109} CESCR, GC 15 (n 6 above) para. 30.
Accordingly, the CESCR has affirmed that States’ duties in the realisation of the human right to water under the ICESCR are to be understood as having the potential of extraterritorial application. It distinguished between a State’s inability and unwillingness in meeting their duties to realise the right in their domestic spheres. A State’s unwillingness is about its wilful failure or negligence in its duties to use the maximum of its available resources to realise the right and it clearly constitutes a violation of the right. However, a State’s inability to fulfil its duties does not automatically implicate the State’s responsibility but entails ‘the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, […] [its human rights] obligations’. The successful justification by the State of such shortfalls, according to the CESCR, triggers third States’ extraterritorial duty to realise the human rights of those in the resource-deficient State, if so requested. The inability of a State to realise its human rights duties calls into play its duty to seek and/or access international assistance and cooperation, and the ‘donor’ States’ duty to provide the same. Thus, from the donor State’s perspective, the CESCR considers the duty of extraterritorial assistance and cooperation to be among States’ core human rights obligations.

In terms of its ‘inspirational’ value to the African Charter and African Commission, Article 2(1) of the ICESCR could provide a template for positive as well as negative States’ duties. A similarity in the lack of a ‘territoriality’ or ‘jurisdiction’ clause in Article 2(1) of the ICESCR and Article 1 of the Charter may mean that the African Commission is allowed to interpret the Charter’s provisions in a way that entails their extraterritorial application.

5.2. EXTRATERRITORIALITY IN OTHER REGIONAL HUMAN RIGHTS SYSTEMS

5.2.1. Extraterritoriality in the European Human Rights System

Unlike the African human rights treaties, the main regional human rights instrument in Europe – the European Convention on Human Rights (‘ECHR’) – hangs the enjoyment of the rights and freedoms it enshrines and related State duties on the pegs of its jurisdiction clause. Its ‘obligations clause’ provides:

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112 GC 15 (n 106 above) para. 41.
113 Idem.
114 Idem.
115 Ibidem, para. 34.
116 Ibidem, para. 38.
117 Adopted under the auspices of the Council of Europe in Rome on 4 November 1950, and entered into force on 3 September 1953.
The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.\textsuperscript{118}

At least on its face, the provision stipulates that victims of human rights violations must show that they were within a relevant State Party’s jurisdiction at the material time for the victim to be able to mount a case against a State Party in order to successfully seek a remedy. The threshold requirement for the applicability of a State’s extraterritorial responsibility for human rights violations is the question of whether the victim or the alleged violation or the act or omission causing it falls within the jurisdiction of a State Party to the ECHR. Article 1 of the ECHR makes it clear that \textit{prima facie} questions of jurisdiction must first be settled before embarking on consideration of any State’s responsibility for extraterritorial human rights violations.\textsuperscript{119}

According to Gondek, the pattern of cases with extraterritorial elements in the European human rights regional case law came in three different forms.\textsuperscript{120} The first group arose from violations occurring from territories controlled by the implicated foreign State. In the case of \textit{Loizidou v Turkey},\textsuperscript{121} the applicant complained that she was prevented from accessing her own plots of land in Northern Cyprus by the occupying Turkish authorities. The ECHR ruled:

\textit{…} bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.\textsuperscript{122}

A few years later, the Court had another opportunity to rule on the territorial reach of the ‘jurisdiction’ clause of the ECHR. In the \textit{Cyprus v Turkey} case,\textsuperscript{123} it stated:

\textit{…} having effective overall control over northern Cyprus, [Turkey’s] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey’s “jurisdiction” must be considered to extend to securing the entire range of substantive

\textsuperscript{118} ECHR, art. 1 (emphasis added).
\textsuperscript{120} \textit{Ibidem}, 354.
\textsuperscript{122} \textit{Ibidem}, para. 62.
\textsuperscript{123} \textit{Cyprus v Turkey}, Application No. 25781/94, ECtHR 10 May 2001.
rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.\textsuperscript{124}

Thus, the jurisprudence of the ECtHR shows that territorial control by a State would bring the said territory under its jurisdiction and triggers the application of the ECHR for the purpose of States’ human rights obligations. Put otherwise, a State’s control over a territory beyond its own entails its extraterritorial responsibility where its acts or omissions cause human rights violations in those foreign States’ territories.

The second group of cases may not involve control over a foreign territory but control over individuals situated therein by State agents. In \textit{Stocke v Germany},\textsuperscript{125} a German national was lured from France to Germany by German State agents with a view to securing his arrest in his home country. The Court ruled that the jurisdiction of a State Party’s territory:

\begin{quote}

is not limited to the national territory of the High Contracting Party concerned, but extends to all persons under its actual authority and responsibility, whether this authority is exercised on its own territory or abroad. Furthermore … authorized agents of a State not only remain under its jurisdiction when abroad, but bring any other person “within the jurisdiction” of that State to the extent that they exercise authority over such persons. Insofar as the State’s acts or omissions affect such persons, the responsibility of the State is engaged.\textsuperscript{126}
\end{quote}

The third group of cases implicated the responsibility of States extraterritorially as a result of a State’s violations of obligations of \textit{non-refoulement}, expulsion or extradition of a person to another State where such an act would result in the person’s torture or cruel, inhuman or degrading treatment or publication or any other infringement of fundamental rights and freedoms.\textsuperscript{127}

In summary, the ECtHR has shown the willingness to hold States’ responsible for violating human rights abroad. Like the African human rights system, the European human rights system has yet to develop case law regarding positive extraterritorial human rights obligations. Nevertheless, the brief review of the regional jurisprudence has demonstrated that States owe extraterritorial obligations in specific circumstances. Whether these duties would include one of promoting and fulfilling extraterritorial human rights is yet to be seen. Given the emerging ECtHR’s case law that seeks to prevent States’ acts or omissions that jeopardise or undermine the realisation of human rights abroad, it could be a matter of time and opportunity for the regional Court to rule on States’ positive extraterritorial obligations.

\textsuperscript{124} \textit{Ibidem}, para. 77.


\textsuperscript{126} \textit{Ibidem}, para. 166.


5.2.1. **Extraterritoriality in the Inter-American Human Rights System**

The core human rights instruments in the Inter-American system are the American Declaration and the American Convention on Human Rights (American Convention).\(^{128}\) The regional mechanism, the Inter-American Commission, unlike the African and European regional bodies which have been established by virtue of treaties, was established in 1959 by the political resolution of the Organisation of American States (OAS). It was accorded the power to hear individual complaints only in 1965. But it soon discovered that it could solely base its case law on the American Declaration, as other treaties were yet to be adopted at the time. The American Declaration was originally created as a non-binding instrument that would only serve as the regional standard of achievement in the area of human rights.\(^{129}\) While universally adopted by the OAS members, the American Declaration could only be given its binding force by the Inter-American Commission ‘by dint of pushing the jurisdiction envelop’.\(^{130}\) It has now come to be taken as a binding instrument for the Americas, and has been the normative basis of the Inter-American Commission’s jurisdiction and jurisprudence on, *inter alia*, the extraterritorial application of human rights.

The American Declaration does not provide for the jurisdictional scope or territorial limitation of human rights or State obligations. In this regard, it is different to the European system that provides for a jurisdiction clause, and is analogous to the African Charter. However, the American Convention introduced a jurisdiction clause to the Inter-American human rights system when it came into effect in 1978. Article 2(1) of the American Convention, entitled ‘General Obligations’, reads:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

However, the lack of a jurisdiction clause under the American Declaration is still pertinent as a great deal of the Inter-American Commission’s jurisprudence on the question of extraterritorial application of human rights has involved non-party States to the Convention, such as the United States of America.\(^{131}\) Cerna categorised the cases in which the Inter-American Commission held States responsible for the violation of the American Declaration extraterritorially into three distinct groups.\(^{132}\) All of the


\(^{129}\) Cerna (n 84 above), *op.cit.* p. 142.

\(^{130}\) Idem.

\(^{131}\) Idem.

\(^{132}\) Idem.
three categories of decisions have their parallels in the European and the African human rights jurisprudence.

The first category of cases implicated States’ extraterritorial human rights responsibility for extraditing or deporting individuals into foreign territories where their rights were likely to be violated. The often cited example of the Haitian Interdiction Decision is a case in point. The case was submitted by a number of NGOs on behalf of Haitians fleeing Haiti by sea to the United States, which intercepted the boats carrying them on the High Seas, giving rise to the question of whether the United States was accountable for violations of human rights outside its own territory.

The Inter-American Commission found the United States in violation of numerous human rights provisions of the American Declaration. It stated that the interdiction and repatriation of the Haitians put them at the ‘genuine and foreseeable risk of death’ in violation of the right to life under Article 1 of the American Declaration. Thus, control by the United States over persons as opposed to territory sufficed to trigger its human rights obligations beyond its borders.

The second category of cases is those in which States were held liable for violations of human rights in foreign territories that they brought under their effective control. In Coard and Others case, the United States armed forces toppled the then newly installed military Government of Grenada, of which Coard and others were leaders, arrested and held the complainants incommunicado and mistreated them before handing them over to the judiciary that was alleged to have been bribed by the United States. For all practical and legal purposes, the acts alleged to have violated the complainants’ human rights were entirely committed within Grenadian territory. While the extraterritorial application of the American Declaration was not raised by the respondent State, the Inter-American Commission sought to address the issue. It ruled:

While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination -- “without distinction as to race, nationality, creed or sex.” Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts

134 Idem.
of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.  

Similarly, the Inter-American Commission reiterated the same principles in a case in which Cuba’s extraterritorial human rights obligation was implicated. In Brothers to the Rescue Case, Cuban MIG-29 military aircraft shot down two unarmed civilian airplanes (belonging to ‘Brothers to the Rescue’, an anti-Fidel Castro organisation) flying in international airspace killing four people on board the planes. Three of the four victims were American nationals, and one was a Cuban who fled his country and was living in the United States. The ruling of the Inter-American Commission repeated the Coard and Others case almost ad verbatim.

The third group of cases are those in which neither the court nor the implicated State questioned the duty to abide by the American Declaration when acting outside its own territory. In one case, the United States was involved in the overthrow of the regime of General Manuel Noriega in 1989, conducting an operation within Panamanian territory. The petitioners, Panamanian citizens, claimed that the 24,000-member American army that ensured the downfall of Noriega regime acted in an ‘indiscriminate, manner with reckless disregard for the safety of Panamanian civilians during the US military operations in Panama’ and committed numerous violations of the rights guaranteed in the American Declaration. There was no question of the legality of the State’s extraterritorial human rights duties. The Inter-American Commission, thus, decided to consider the case, despite the fact that the material facts giving rise to the complaints were committed by American forces in Panamanian territory.

In sum, the jurisprudence of the Inter-American human rights system employs broader extraterritorial application of human rights than does the European system. As long as the State has caused human rights violations, the nationality of the victims or territory of the offence are immaterial in the attribution of responsibility. As Cassel has noted, ‘the extraterritorial reach of the American Declaration seems almost unbound within the Americas’. Among other things, this is due to the fact that – in contrast to the European and much like the African human rights systems – the text of the American Declaration ‘contains no defined – and hence – no limiting

136 Ibidem, para. 37 (emphasis added; footnotes omitted).
138 Brothers to the Rescue case, para. 23.
139 Salas and others v. the United States (’US Military Intervention in Panama’), IAHRC Report No.31/93, Case 10.573 (United States), 14 October 1993, para. 6.
140 Ibidem, para. 9.
141 Ibidem, para. 6.
142 See Cassel (n 77 above), op.cit. p. 181.
This position depicts a stark similarity to the obligation clause (Article 2(1)) of the ICESCR and the obligations clause (Article 1) of the African Charter.

The upshot of the analysis is that, in the Inter-American human rights system, a State’s duty to respect human rights extraterritorially has clearly been established, which confirms the position of the African Commission as explicated in the DRC Invasions case and the Burundi Embargo case. However, like the European system, the case law of the Inter-American system has yet to develop positive extraterritorial obligations which are more pertinent to the sharing of transboundary freshwater resources. Where it is, the case law of the Inter-American Commission offers little guidance or ‘inspiration’ for the African Commission in terms of elaborating a State’s positive extraterritorial obligations, especially the duty to fulfil, of sharing international rivers in a manner sensitive to those beyond a State’s borders.

6. EXTRATERRITORIALITY THROUGH THE LAYERS OF STATE OBLIGATIONS

The foregoing analysis of regional and global human rights jurisprudence has demonstrated that the realisation of human rights and freedoms – including the human right to water – entails State obligations of extraterritorial application. Inasmuch as the extraterritorial human rights obligations of States are grounded in the normative corpus of international treaties and regional human rights instruments, they can be explained in terms of the various layers of States’ human rights duties to respect, protect, promote and fulfil human rights, just as in the case of a State’s domestic human rights obligations. Although the State’s duties to respect, protect, promote and fulfil the human rights of individuals and groups have been developed to bind States when acting domestically, ‘there is no reason to conclude that this explanation, specifying the nature of state parties’ obligations, is limited to domestic obligations’.  

For example, the UN Special Rapporteur on the right to food has shown that each of the quartet layers of State human rights obligations could be applicable extraterritorially. He specifically refers to extraterritorial obligation to respect, protect and fulfil in his reports. The basic meaning of the layers of State obligations to extraterritorial beneficiaries remains intact, except that the right-holders are (non-)nationals residing in a third State’s territory.

143 Idem.
144 Salomon (n 110 above), op.cit. p. 190.
As demonstrated above, there is an ample normative basis for the extraterritorial duty to respect the human rights of individuals and groups in the territories of third-party States. According to Craven, this goes almost without saying. He noted, ‘[i]n so far as the international community as a whole has an obligation to take cognizance of human rights in its interactions, it is axiomatic that States parties have a similar duty to respect the realisation of the rights of other countries’. As Cahill observed, the respect-level extraterritorial States’ obligations are the least controversial. This layer of States’ duties also finds expression in ‘all international human rights treaties’. It would be a State’s violation of its extraterritorial duty for it to negatively affect the rights of individuals and groups that are being enjoyed in third-party States. A contrary interpretation would run afoul of the object and purpose of human rights treaties in general.

The CESCR’s GC No. 15 states that ‘States parties have to respect the enjoyment of the right in other countries’. According to the CESCR, the extraterritorial duty to respect requires ‘States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries’. The respect layer’ of a State’s obligation pertains not only to the human rights (of individuals and groups) per se but also to rights and duties of a State vis-à-vis another State. The CESCR emphasises that a State is responsible for ensuring that any activity, omission or commission it undertakes within its territorial jurisdiction does not deprive another State of the ability to realise the right to water for persons in its jurisdiction.

In consonance with its GC No. 8, the CESCR enjoins States from the use of water as a political and economic weapon against another State, and particularly from the imposition of embargoes or other measures that prevent the supply of water, as well as goods and services essential for securing the right to water.

At a higher and more positive level, the State’s extraterritorial duty to protect requires positive action by way of ensuring that State agents and non-State actors (including multinational companies and individuals within the State’s jurisdiction) do not infringe upon the rights and freedoms being enjoyed in third States.

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147 Craven (n 100 above), op.cit. p. 148.
149 Skogly (n 105 above) op.cit. 66–67.
150 GC 15 (n 106 above) para. 31 (emphasis added).
151 Idem.
152 Idem.
154 Ibidem, para. 32.
towards Rights-Duties Congruence

this level, States incur international responsibility for the violation of international human rights law for culpable conduct of non-State actors who, from within the jurisdiction of a State, engage in conduct that produces extraterritorially prejudicial activities.156 Among other things, it also requires States to ensure the protection of human rights when adopting bilateral and multilateral agreements.157 A State can, thus, be held liable for human rights violations in third States for its failure to take into consideration the enjoyment of the rights while taking decisions, sanctions, programmes and policies as a member of international organisations.158 Arguably, this aspect of a State’s extraterritorial duty is also an expression of the obligation not to discriminate against those beyond its borders.159

According to GC No. 15, States owe the extraterritorial duty of protecting the human right to water in other States. States have the duty ‘to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries’.160 The CESCR also declared that States owe an extraterritorial positive obligation of fulfilling the human right to water in other States. According to the CESCR:

[...depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required.161

The extraterritorial State duty to promote human rights implies that a State must take positive measures aimed at enabling the enjoyment of relevant human rights and freedoms in other States.162 This includes, for instance, provision of information and transparency regarding impending projects that have repercussions on the realisation of the human right to water in other States.

The most controversial of all extraterritorial obligations is one that requires a State to fulfil human rights in third-party States.163 In comparative terms, there is little controversy that both the domestic State and foreign States must respect and

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157 For the CESCR’s analysis of the state’s duty to protect human rights in relation to the human right to water, See GC 15 (n 6 above) paras. 23–24.
159 Coomans (n 73 above), op.cit. pp. 187–190.
160 Ibidem, para. 33.
161 GC 15 (n 106 above) para. 34.
162 Carmona (n 157 above), op.cit. p. 92.
163 Craven (n 100 above), op.cit. 149; Skogly (n 105 above), op.cit. 71; Cahill (n 148 above), op.cit. 198.
protect the human rights of individuals. However, whether States’ extraterritorial obligations, such as the duty of international assistance and cooperation, entail a State’s duty to ‘fulfil’ human rights in the jurisdiction of third States is politically and legally controversial. This layer of obligation requires the State to provide material resources, free of charge, to those who cannot afford to pay for those life sustaining resources. In its extraterritorial sense, the same meaning is retained except that the beneficiaries are based outside the duty-bearer territory. In other words, the duty to fulfil is triggered when the donee State is not in a position to provide the bare necessities of life – in this case, water for drinking and sanitation purposes – for individuals and groups within its territory. As a result, the type of extraterritorial act required at the level of the duty to fulfil falls within the realm of international assistance, which lies outside the framework of reciprocity among the States concerned. As the donee would not be expected to perform any obligation in return, the concept of international cooperation per se, which requires reciprocity, is less relevant in relation to a State’s obligation to fulfil. Thus, a State’s extraterritorial duty to fulfil the human right to water is more closely associated with the more unilateral duty of international assistance under Article 2(1) of the ICESCR and Article 21 of the African Charter.

In line with the complementary and supplementary nature of States’ extraterritorial human rights duties to ‘fulfil’, the CESCR stresses that the extraterritorial duty to fulfil aims at enabling third States to realise the minimum core of the right to water within their territories. In relation to the duty to fulfil, the international assistance and cooperation among States must be of such a nature which enables water-deficient States ‘to fulfill their core obligations’. In other words, the duty does not go any further than the provision of adequate quantity and quality of water for personal and domestic uses of population in third States. Arguably, therefore, a state’s extraterritorial duty to fulfil constitutes a minimum threshold requirement and, as such, imposes obligations that are immediate in application.

7. CONCLUSION

This article has demonstrated that the realisation of the right to water in one State in Africa is extremely dependent on the conduct of third States. Unless States’ uses of Africa’s international rivers is regulated in such a way that is sensitive to all those who share the bounty of the common river, the declaration of the human right to water by the African Commission is illusory. Unless a State’s human rights obligations are applied in a way that holds the State to account for the consequences its (in)activities

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165 Idem.

166 Ibidem, para. 38.
cause abroad, the human right to water in Africa can be violated in circumstances in which the duty bearer is allowed to evade responsibility.

In the African Charter and the ICESCR there is no textual basis to limit the spatial reach of socio-economic rights such as the right to water or correlative State obligations to a State’s territorial jurisdiction. The African Commission has established its regional jurisprudence for holding States responsible for their extraterritorial conduct which violates human rights abroad. Its approach has been accepted and applied in the case law of the other regional systems, to which the Commission may turn for the purpose of ‘drawing inspiration’ in interpreting and applying the African Charter. For its part, the Inter-American Commission has been willing to expand States’ human rights responsibilities for violating human rights abroad. The European human rights system has also gradually relaxed the meaning of the ‘jurisdiction clause’ of the ECHR, and States have now somehow come to be held responsible for some violations of human rights that they commit beyond their own borders. However, the case law of the tripartite regional systems has yet to look beyond the establishment of a State’s extraterritorial negative duties to respect human rights abroad.

This means that, as regards the human right to water, all co-riparians States are accountable for their omissions or commissions that violate the human right to water in all the territories of the co-riparian States (duty to respect). This is because they would exercise de jure or de facto control over the water in relation to which their (in) actions cause harm in other co-riparians’ territories. Put differently, individuals and groups in all co-riparian States would have direct recourse against the particular co-riparian State that violates their rights in their home State, or jeopardise or slow down the realisation of their human right to water.

In terms of discrete State obligations, the extraterritorial duties to respect and protect human rights have their bases in the jurisprudence of the regional and international human rights instruments. The more contentious layer is the duty to fulfil, according to which a State is called upon to help realise the human right to water in third States. Inasmuch as the normative basis and scope of State’s duty to fulfil remains vague, the protection afforded the human right to water in shared river basins leaves much to be desired.