

Introduction

Watersheds come in families; nested levels of intimacy. On the grandest scale the hydrologic web is like all humanity – Serbs, Russians, Koyukon, Indians, Amish, the billion lives in the People’s Republic of China – it’s broadly troubled, but it’s hard to know how to help. As you work upstream toward home, you’re more closely related. The big river is like your nation, a little out of hand. The lake is your cousin. The creek is your sister. The pond is her child. And, for better or worse, in sickness and in health, you are married to your sink.¹

1.1 Introduction

Water is the lifeblood of every living being. With no equivalent or substitute, it is an indispensable constituent of all life. Given its quality as a bearer of life and universal necessity, it is axiomatic that individuals’ and groups’ access to water for drinking and sanitation be legally guaranteed. However, international human rights law did not explicitly recognise access to drinking and sanitation water as an autonomous human right until after the turn of the new millennium.² Currently defined as an entitlement to ‘sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’,³ a fully fledged human right to water has found no explicit mention in the

¹ Michael Parfit, quoted in Maude Barlow and Tony Clarke, *Blue Gold: The Battle against Corporate Theft of the World’s Water* (The New Press, 2002) xi.

² There has, however, been a qualified recognition of (aspects of) the right as a constituent element of other rights such as the right to health. Such an approach narrows down the scope of the right such that it can only be invoked in specifically limited circumstances and benefits only a defined group of people protected under some human rights treaty regimes. Detailed analysis of this topic is presented in Chapter 2.

³ CESCR, ‘General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (Adopted 11–29 November 2002)’ (UN Committee on Economic, Social and Cultural Rights, 11–29 November 2002), para. 2.

Cambridge University Press

978-1-107-03108-1 - The Extraterritorial Application of the Human Right to Water in Africa
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major United Nations (UN) treaties.⁴ Similarly, it has not been mentioned in the main African human rights instrument, the African Charter on Human and Peoples' Rights ('Charter' or 'African Charter').⁵ Fresh attempts to establish the human right to water have therefore been plagued by legal paucity.⁶ However, due to the increasing scarcity of fresh water resources, and the growing number of people without basic access to the same,⁷ the right has recently received growing recognition as a free-standing human right, albeit mainly in the form of soft laws.⁸

Alongside the problem of recognition and the difficulty associated with establishing its legal basis, the implementation of the human right to water faces particularly intractable challenges due to water scarcity and the internationally shared nature of water resources on which its realisation often depends. This book explores the legal basis of the human right to water and the immediate implementation problems triggered by the declaration of the human right to water in Africa. It analyses the extraterritorial application of the human right to water and correlative states' obligations in international human rights law

⁴ Amanda Cahill, 'The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water', 9(3) *International Journal of Human Rights* 390 (2005) 389–410; Stephen C. McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds.), *Fresh Water and International Economic Law* (Oxford University Press, 2005) 93, 93.

⁵ Adopted by the eighteenth Assembly of Heads of State and Government, June 1981, Nairobi, Kenya; entered into force 21 October 1986. It is now binding on all the fifty-four member states of the African Union.

⁶ United Nations Office of the High Commissioner for Human Rights, 'The Right to Water: Fact Sheet No. 35' (United Nations Office of the High Commissioner for Human Rights, UN-Habitat, and WHO, 2010) 3. See also Ling-Yee Huang, 'Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water', 20 *Florida Journal of International Law* (2008) 353–70, 353; Vrinda Narain, 'Water as a Fundamental Right: A Perspective from India', 34 *Vermont Law Review* (2010) 917–25.

⁷ Currently, some 884 million people do not have access to improved sources of drinking water, while 2.5 billion lack access to improved sanitation facilities. Worse, these figures do not tell the whole truth, as millions of poor people living in informal settlements are simply missing from the statistics. See OHCHR (note 6 above) 1.

⁸ For instance, the UN General Assembly Resolution recognises water as a human right. It was passed with 122 states (including African countries) voting in favour and 41 states abstaining. See 'General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation' (Sixty-Fourth General Assembly Plenary 108th Meeting (AM) (General Assembly GA/10967), 28 July 2010). See also Huang (note 6 above) 319; Narain (note 6 above) 917.

generally and in the African human rights system specifically in relation to the manner and scope of states' uses of waters of shared international river basins, with a special focus on the African situation.⁹ In addition, it examines the role and capacity of international human rights law in addressing possible transboundary violations of the human right to water that arise from the constraints brought to bear on states' capacities by water scarcity and the shared nature of water resources. This analysis is critical for countries in regions such as Africa where water for vital human needs cannot be met solely from domestic water sources.

Unless transboundary water resources are shared among states in a manner sensitive to the requirements of the human right to water for the benefit of the entire riparian populations inhabiting the river basins, some states would be unable to realise the right in their respective jurisdictions. It may simply prove impossible for many states to fulfil the right. This is due to the distributional pattern of water resources and the possible 'dispossession' by some states and 'deprivation' of others of the water hitherto at their sovereign disposal. Of the fifty-four African countries, for instance, fifty-one states depend on water resources of shared rivers for the realisation of the human right to water within their jurisdictions.¹⁰ Moreover, these rivers are very unevenly distributed. Most fresh water resources are concentrated in western and central Africa, whereas northern, southern and eastern Africa are experiencing acute water scarcity.¹¹ Ninety-five per cent of total fresh water emerges

⁹ According to the 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', extraterritorial obligations encompass: (a) obligations relating to the acts and omissions of a state, within or beyond its territory, that have effects on the enjoyment of human rights outside of that state's territory; and (b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realise human rights universally. See 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', adopted on 28 September 2011 at a gathering convened by Maastricht University and the International Commission of Jurists (a group of experts in international law and human rights). The document is available at <http://hrbaportal.org/archives/noticeboard/launch-of-maastricht-principles-on-the-extraterritorial-obligations-of-states-in-the-area-of-economic-social-and-cultural-rights> (accessed 7 November 2012).

¹⁰ The only exceptions are the few island states such as Madagascar and Cape Verde. See the African Transboundary Water Law page at www.africanwaterlaw.org/html (accessed 23 February 2011).

¹¹ Elli Louka, *Water Law and Policy: Governance without Frontiers* (Oxford University Press, 2008) 14–15.

Cambridge University Press

978-1-107-03108-1 - The Extraterritorial Application of the Human Right to Water in Africa

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from central and western Africa, while the arid and semi-arid parts of the continent produce a mere 5 per cent.¹² Some transboundary waters such as the Nile are already fully used,¹³ and need to be redistributed among the co-riparian states in a manner that caters for the human right to water.

In water-scarce regions such as the African continent, this requires the apportionment of shared water resources in a manner that ensures access to drinking and sanitation water for the entire population of a given river basin that is dependent on the waters of a shared river. This in turn entails that co-riparian states guarantee that their domestic actions, inactions, legislation, policies and decisions do not jeopardise the water rights of third states' populations who are dependent on shared rivers for the realisation of their own water rights.

The book contends that human rights norms require a state to utilise shared water resources in a way that ensures the continued flow of that minimum amount and quality of water needed to realise the human right to drinking and sanitation water in other co-riparian states extraterritorially. Therefore, it is argued that the realisation of the right to water calls for the need to expand relevant states' duties to cover those rights-holders situated beyond its own territorial jurisdiction who could be affected by states' domestic actions related to the use of the shared river. Without such, the right may remain an empty signifier and its declaration may flatter to deceive. Unless the relevant legal regime devises a means of ensuring right-holders' access to the necessary resource base, the right to water may promise what it cannot deliver, a scenario that is at times referred to as 'rights inflation'.¹⁴

Despite the contentious legal basis of the human right to water, the book argues that the existing corpus of international human rights law, including the African Charter, supplemented by other principles of

¹² *Ibid.*, 15.

¹³ Lucius Caflisch, 'Regulation of Uses of International Watercourses' in Salman M.A. Salman and L. Boisson de Chazournes (eds.), *International Watercourses: Enhancing Cooperation and Managing Conflict: Proceedings of a World Bank Seminar* (World Bank, 1998) 3, 13; Ashok Swain, 'Managing the Nile River: The Role of Sub-Basin Co-operation' in Manas Chatterji, Saul Arlosoroff and Gauri Guha (eds.), *Conflict Management of Water Resources* (Ashgate, 2002) 145, 146–52. See generally Patrick Parenteau, 'Come Hell and High Water: Coping with the Unavoidable Consequences of Climate Disruption', 34 *Vermont Law Review* (2010) 957–73.

¹⁴ I owe this expression to Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', 33 *Yale Journal of International Law* (2008) 113–75, 114.

international law – particularly international water law – provides a firm legal basis for the right and its extraterritorial application. The book is written from the perspective of the right-holders. From this angle, the recognition of the human right to water would only be meaningful if the relevant legal regime devises ways of ensuring the availability of the necessary resource base for the right's realisation. The central concern of the book is therefore how to enable the right-holders to prevent violations of their right to access drinking and sanitation water and to have their right to water remedied when they occur. In this vein, the book demonstrates that, properly analysed and used by human rights advocates and relevant human rights tribunals, the provisions of international treaties, including the African Charter and the Charter's 'inspirational sources',¹⁵ provide adequate support to found a free-standing human right to water in Africa that is capable of extraterritorial application against other states.

1.2 The normative status of the human right to water

The birth of the human right to water was both slow and controversial. Not until after the UN Committee on Economic, Social and Cultural Rights (CESCR)¹⁶ issued its General Comment¹⁷ No. 15 on the human right to water in 2002 has access to drinking and sanitation water been authoritatively defined as a human right.¹⁸ Saving some narrow exceptions,¹⁹ the major UN treaties or the African human rights instruments do not make an explicit mention of a fully fledged human right to

¹⁵ Under Article 60 of the Charter, the African Commission on Human and Peoples' Rights, the Charter's monitoring and enforcement mechanism, has been tasked to 'draw inspiration from international law on human and peoples' rights', including African and UN instruments. As shown in Chapter 2, below, the Commission frequently refers to UN, European and Inter-American treaties and emerging case law to aid its interpretation and application of the provisions of the Charter.

¹⁶ The Committee on Economic, Social and Cultural Rights (CESCR) is a body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its states parties. The CESCR was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions previously assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.

¹⁷ General Comments are expert human rights monitoring bodies' interpretation of the content of human rights treaty provisions they are established to monitor. While highly persuasive, they are not binding in the strict sense of the term.

¹⁸ Narain (note 6 above) 919; McCaffrey (note 4 above) 101. ¹⁹ See note 2 above.

Cambridge University Press

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water.²⁰ The CESCR found the right in the implicit terms of the twin provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR)²¹ on the right to an adequate standard of living (Article 11) and on the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12). Consequently, it broke new ground by unequivocally affirming that the ICESCR contains provisions that implicitly contain an autonomous human right to water.²²

For its part, the African Charter's monitoring and enforcement body, the African Commission on Human and Peoples' Rights ('Commission' or 'African Commission'),²³ has recognised the existence of the human right to water in the Charter and found states responsible for violating the same and ordered remedies to rectify the violations of the right.²⁴ As stated above, the human right to water does not feature in the Charter in explicit terms, and the Commission has yet to define comprehensively the scope of the human right to water.²⁵ It has, however, ruled that 'the right to water [is] implicitly guaranteed under Articles 4, 16 and 22 of the Charter as informed by standards and principles of international human rights law'.²⁶ The implicit sources relied on by the Commission to found the human right to water, namely, Articles 4, 16 and 22 of the Charter, respectively provide for the right to respect for life and the integrity of a person, the right to enjoy the best attainable state of physical and mental health and the right to economic, social and cultural development.

²⁰ See generally Stephen C. McCaffrey, 'A Human Right to Water: Domestic and International Implications', 5(1) *Georgetown International Environmental Law Review* (1992) 1–24; Stephen Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15', 23 *Netherlands Quarterly of Human Rights* (2005) 35–63; Peter H. Gleick, 'The Human Right to Water', 1(5) *Water Policy* (1998) 487–503; Cahill (note 4 above).

²¹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; entered into force 3 January 1976.

²² CESCR, General Comment No. 15 (note 3 above), para. 2. For an in-depth discussion of the normative content of the human right to water, see Chapter 2.

²³ The Commission is established under Article 30 of the Charter to perform promotional and protective mandates assigned to it under Article 45 of the regional instrument.

²⁴ See Chapter 3.

²⁵ See Chapter 3. As the African Commission stated, 'the African Charter does not directly protect the human right to water and sanitation'. See (Draft) Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2011), para. 71.

²⁶ (Joined) Communication 279/03, *Sudan Human Rights Organization v. The Sudan* and Communication 296/05, *Centre on Housing Rights and Evictions v. The Sudan*, 28th Annual Activity Report (2010), para. 124.

Cambridge University Press

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Regardless of these authoritative statements by the CESC and the African Commission, due to the lack of an explicit and comprehensive recognition of the right, the legal basis and the existence of a free-standing human right to water have continually been called into question.²⁷

However, the increasing recognition in recent years of the human right to water by the CESC, other UN bodies and regional human rights tribunals such as the African Commission has far-reaching legal consequences for the discourse about the right to water. The declaration of the human right to water and its incorporation in the human rights discourse takes the analysis of water rights beyond its traditionally statist framework. Traditionally water rights have been regulated by the rules and principles of international water law, whose ambit has been limited to the regulation of how much of shared water resources a riparian state must forfeit in favour of other co-riparian states, or is entitled to receive from such resources, or both.²⁸ International water law treats water rights as an inter-state issue rather than as an entitlement pertaining to individuals and groups residing in those states. Within the statist framework, only states are rights-holders and duty-bearers reciprocally as against co-riparian states *qua* states. Only they may claim remedies when a right protected under international water law is violated, as the damage caused by the infringement is deemed to have been suffered by the state *qua* state.

The acceptance of individuals' and groups' access to drinking and sanitation water as a human right therefore expands the focus of analysis regarding the right-holders and the duty-bearers in relation to shared water resources. As a human right, individuals and groups are now entitled to claim access to a minimum amount and quality of water for drinking and sanitation purposes.²⁹ This right pertains to human right-holders independently and alongside inter-state water rights claims.

²⁷ Amanda Cahill, 'Protecting Rights in the Face of Scarcity: The Right to Water' in Mark Gibney and Sigrun Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010) 194, 214; Huang (note 6 above) 353–4; Narain (note 6 above) 919.

²⁸ Ellen Hey, 'Sustainable Use of Shared Water Resources: The Need for a Paradigm Shift in International Watercourses Law' in Gerald H. Blake, William Hildesley, Martin Pratt, Rebecca Ridley and Clive Schofield (eds.), *The Peaceful Management of Transboundary Resources* (Graham & Trotman, 1995) 127, 129.

²⁹ See Chapter 2.

Despite the emerging trend of progressive development of the human right to water, the establishment of its legal basis and normative content has been hampered by the apparent lack of explicit and comprehensive provisions for the right in the relevant international treaties. The right's very existence and legal status has continued to be challenged,³⁰ with consequent implications for the states' duty to implement the right domestically. In a situation where the very existence of the right continues to be contentious, raising the possibility even for the domestic state to deny that it owes any duty to realise the same, thornier problems await the analysis of its extraterritorial application in favour of the supposed right-holders. As Cahill has observed, 'compliance with extraterritorial obligations regarding water is even more difficult than that of other economic and social rights due to its relatively new and debated status as an independent right'.³¹ The obscurity surrounding the legal status of the right must therefore be clarified before its extraterritorial application is considered. This is the task of Chapter 2 of the book, which provides a detailed analysis of the legal basis and the normative content of the human right to water.

1.3 The imperatives of extraterritorial application of the human right to water in Africa

The need for the extraterritorial application of human rights and of related states' duties is generally justified with reference to the forces of globalisation.³² 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. The invention of new technologies such as unmanned drones has meant that states could cause violations of human rights abroad with relative ease. As outlined in Chapter 5, states have so far been held responsible for human rights violations they caused abroad mainly when they exercised control over

³⁰ See generally Tully (note 20 above); McCaffrey (note 4 above); Cahill (note 4 above).

³¹ *Ibid.*

³² See Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009) 1; Sigrun Skogly and Mark Gibney, 'Introduction' in Mark Gibney and Sigrun Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010) 1, 2.

foreign territory³³ or on individuals situated in another state's jurisdiction.³⁴

In contrast, 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'.³⁵ Suffice for a state to reduce the water volume or quality within its own borders to 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. It is mainly through local (in)action, decisions, policies and legislation that co-riparian states cause harm to the holders of the human right to water abroad.

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. Each non-island state depends on water originating in shared waters: in Africa, '[r]ivers have a perverse habit of wandering across national borders'.³⁶ At least thirty-four rivers are shared by two countries, and twenty-eight are shared by three or more states.³⁷ Put differently, ten river basins – Congo, Limpopo, Niger, Nile, Ogooue, Okavango, Orange, Senegal, Volta and Zambezi – are shared by four or more African states.³⁸ Every country in continental Africa has at least one international river within its territory,

³³ 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.

³⁴ In the *Lopez Burgos* case, the complaint concerned the abduction and torture of Lopez Burgos by Uruguayan security forces in Argentina, on foreign soil, without having control of the Argentinean territory. See *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52 (UN Human Rights Committee), adopted by the UN Human Rights Committee on 29 July 1981.

³⁵ *Trail Smelter* case (*US v. Canada*), 3 RIAA (1941), para. 49.

³⁶ John Waterbury, *Hydropolitics of the Nile Valley* (Syracuse University Press, 1979) 2.

³⁷ Claudia W. Sadoff, Dale Whittington and David Grey, *Africa's International Rivers: An Economic Perspective* (World Bank, 2002) 7.

³⁸ *Ibid.*

forty-one of the fifty-four states of the continent have two or more and fifteen states have five or more.³⁹ Guinea has fourteen international rivers, while both Côte d'Ivoire and Mozambique have nine such rivers each in their territories.⁴⁰ An (over-)utilisation or pollution of the shared waters in one state therefore inevitably influences the capacity of other co-riparian states along the continuum of the river's flow to control and use the shared water resources for the realisation of the human right to water in their respective domestic spheres.

As Waterbury noted, states have 'a perverse habit of treating whatever portion of the flows within their borders as a national resource at their sovereign disposal'.⁴¹ Such an approach allows unilateral actions and inactions that would impact on the rights of foreign residents in relation to their right to water. Some states may tend to over-utilise shared water resources for the exclusive benefit of their own residents and to the detriment of those in co-riparian states.⁴² Their (in)actions could therefore directly jeopardise the right of access to drinking and sanitation water in other co-riparian states. In such situations, a domestic state's abstention from violating the human right to water in its jurisdiction is little consolation for the right-holders situated within its territory if the right is already threatened or violated due to scarcity or pollution of water resources caused by an (in)action of a foreign co-riparian state.

This is without mentioning 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 influence the quality and amount of water available abroad.⁴³ While a state's contribution to climate change at home may contribute to the violations of a

³⁹ *Ibid.* ⁴⁰ *Ibid.* ⁴¹ Waterbury (note 36 above) 2.

⁴² For a similar scenario in the Nile basin, see A. Dan Tarlock, 'Four Challenges of International Water Law', 23 *Tulane Environmental Law Journal* (2010) 369–408, 375. For the political debate surrounding the sharing of the Nile waters amongst Ethiopia, Egypt and Sudan, see generally Ashock Swain, 'Ethiopia, the Sudan and Egypt: The Nile River Dispute', 35(4) *Journal of Modern African Studies* (1997) 675–94; Yacob Arsano, *Ethiopia and the Nile: Dilemmas of National and Regional Hydropolitics* (Centre for Security Studies, Swiss Federal Institute of Technology, 2007); Simon A. Mason, *From Conflict to Cooperation in the Nile Basin: Interaction Between Water Availability, Water Management in Egypt and Sudan, and International Relations in the Eastern Nile Basin* (ETH Zurich, 2004).

⁴³ John H. Knox, 'Climate Change and Human Rights', 50(1) *Virginia Journal of International Law* (2009) 164, 178–80.