

L. Chenwi and T. Soboka Bulta (eds.): Extraterritorial Human Rights Obligations from an African Perspective



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Abstract In an era in which doubt has been cast over the international legal discipline's internationalist credentials, scholarship which addresses alternative perceptions and conceptions of international law in the non-West deserves our full attention. In this context, we welcome Lilian Chenwi and Takele Soboka Bulto's collection on 'Extraterritorial Human Rights Obligations from an African Perspective', which highlights the destructive human rights impacts of states' acts, decisions, and omissions outside their territory, and makes a convincing doctrinal case that extraterritorial obligations (ETOs) can legally be based on the African Charter on Human and People's Rights (ACHPR). This is a carefully edited collection which forms a coherent whole. The individual contributions are well-written and contain a wealth of doctrinal insights and empirical information. The editors and contributors deserve particular credit for highlighting the ETO potential of the ACHPR, the refined reasoning of the African Commission (largely unknown outside Africa), and the extant and potential interactions between the African human rights system and other regional or universal systems. The voices of the new generation of African (and Africa-minded) scholars who have contributed to this volume deserve a wide audience.

In an era in which doubt has been cast over the international legal discipline's internationalist credentials,¹ scholarship which addresses alternative perceptions and conceptions of international law in the non-West deserves our full attention. In this context, we welcome Lilian Chenwi and Takele Soboka Bulto's collection on 'Extraterritorial Human Rights Obligations from an African Perspective', which highlights the destructive human rights impacts of states' acts, decisions, and

¹See for a critique: Roberts (2017).

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omissions outside their territory, and makes a convincing doctrinal case that extraterritorial obligations (ETOs) can legally be based on the African Charter on Human and People's Rights (ACHPR).

The collection starts out with a sizable chapter by the editors on extraterritoriality in the African system from a comparative perspective, followed by a number of case-studies running the entire gamut of ETOs. These case-studies range from ETOs in the area of economic and social rights (*e.g.*, the right to education, the right to water, the right to food) to ETOs in the context of international security (*e.g.*, extraordinary renditions in the fight against terrorism and military ventures abroad). Most chapters are written by African scholars and practitioners, who are based in Africa. This surely lends additional force and legitimacy to the arguments presented.

All scholars interested in ETOs—this reviewer is one of them—will, in principle, have little difficulty connecting with the African perspective set out in this book. Just like the International Covenant on Economic and Social Rights (ICESCR), the ACHPR lacks a (limiting) jurisdiction clause, which, in the context of duties of cooperation, can ground extraterritorial obligations (p. 21). Also, the African Commission uses the familiar tripartite typology of human rights obligations (the obligation to respect, the obligation to protect and the obligation to fulfil/promote).² Moreover, *per* Article 60 and 61 ACHPR, the African Commission can rely on cases and materials that have been developed elsewhere.³ This enables the Commission—as well as States Parties to the Convention—to productively draw on the rich case-law and scholarly endeavours regarding ETOs.

This begs the question, however, whether there is, or can be something specifically *African* about ETOs. Or are ETOs instead conceptualised *elsewhere* and only *applied* in the African context, bearing in mind that the African Commission has not yet explicitly engaged with ETOs? In their opening substantive chapter, the editors imply that African culture provides particularly fertile ground for ETOs. This raises the prospect that African states could provide an innovative contribution to the larger debate on ETOs. This is not entirely seen through in the collection, however. Possibly, general concluding observations by the editors could have had added value in this respect. But what about these intriguing notions grounding the relevance of cooperative ETOs: that Africans are 'community, or group oriented rather than individualistic' (p. 17), and have a 'sense of cooperation and collective responsibility' (p. 18)? This link between the duty of cooperation and extraterritorial obligations has earlier been drawn in respect of Article 2(1) ICESCR, which provides that '[e]ach 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

²ACHPR, *SERAC v Nigeria*, Communication No 155/96 (2001) AHRLR 60, paras. 45–47.

³These articles provide that the Commission shall draw inspiration from other instruments (provided that African Charter parties are also parties to these instruments), and 'shall also take into consideration, as subsidiary measures to determine the principles of law', *inter alia*, 'legal precedents and doctrine'.

achieving progressively the full realisation of the rights recognised in the present Covenant.⁴ Arguably, the penchant of Africans—possibly unlike other people—for cooperation further strengthens the case for ETOs. However, doubts could be cast over the anthropological reality of the characterisation of Africans as ‘group oriented’: such a characterisation has an essentialist flavour and may fail to account for the variety of the African approaches to life, including ones that emphasise the individual.⁵ Yet more importantly, to make the case for ETOs, it does not suffice to highlight group orientation. Instead, it should be established that solidarity extends *beyond the immediate group* to which one belongs. If the perspective is limited to Africa, this means that Africans belong to one single community, and on that ground have obligations towards fellow Africans, regardless of ethnicity, language, and geographical location. It is not certain whether, sociologically speaking, such pan-African solidarity truly exists, in spite of the valiant efforts of the pan-African movement,⁶ one of the products of which is obviously the African Union. Furthermore it is unclear whether, in a general sense, Africans necessarily identify more with, and share more characteristics with fellow Africans than they do with non-Africans.⁷ Ultimately, however, even if pan-African solidarity were indeed to exist, and, accordingly, Africans would have heightened ETOs towards fellow Africans (individuals, communities, states), this would not say much about—or even worse, would detract from—*genuine* ETOs. Genuine ETOs are not regionally restricted. Instead, they have a cosmopolitan, non-ethnic, and non-national/-regional dimension. This means ‘we’ have obligations towards ‘distant others’ regardless of whether the latter belong to our group or have a shared history and geography, so as to realise ‘global justice’.⁸ In this reading of ETOs, Africans also have obligations towards those based *outside* Africa. This is a perspective which is not fully developed in the book—for obvious reasons, given current world power relations. Still, Bulto interestingly tackles aspects of this problem when discussing extraordinary

⁴The emphasis in this provision on international cooperation, in conjunction with the aforementioned absence of a limiting jurisdictional clause, has indeed been construed as grounding ETOs. See more at length: Langford et al. (2013).

⁵Compare Agulanna (2010), p. 296 (arguing that ‘while in the Nazi and Stalinist societies the life of the individual only added instrumental value in the sense that people were seen as tools to be used and discarded, in Africa, the life of the individual is seen as possessing great value and worth’—although proceeding to state that ‘in Africa that the individual can only be defined by reference to the enviroing community’).

⁶See, e.g., one of the early doubters: Emerson (1962), pp. 275–290, and for a recent discussion: Kasanda (2016), pp. 179–195.

⁷Verve Search, a London-based agency, has developed an interesting quiz for the BBC on the discrepancy between one’s nation of birth and one’s true home (‘When it comes to your personality, your nation of birth may not be your true home. Where in the world are people most like you?’). See <http://www.bbc.com/future/story/20180409-whats-your-secret-nationality> (last consulted on 16 July 2018). The author, who is Belgian by birth, lives in the Netherlands, and has never lived in Africa, participated in the quiz and was quite surprised to find out that his true home is ... Ethiopia!

⁸See, e.g., Langford et al. (2013).

rendition of non-Africans by an African state to the CIA, which then goes on to torture them.

In more important practical terms, the cosmopolitan nature of ETOs implies that not only African states, but also *non-African states*—*i.e.* Western states as well as emerging powers such as China and the Gulf countries—have obligations toward Africans. In an economic context, this requires non-African states to ensure that their trade and investment relationships with African states do not result in human rights violations. In fact, quite a number of contributors address the adverse impact of non-African states and ‘their’ companies (*i.e.*, companies incorporated in those states) on the enjoyment of human rights in Africa. Coomans, for instance, calls on foreign (especially French and UK) public and private actors to apply a human rights impact assessment when they plan to support and offer private educational services in Africa. In three separate contributions, Lambek, Debuquois, Jegede and Mbazira denounce land deals (*e.g.*, for biofuels purposes), or even plain land-grabbing involving non-African states, insofar as these deals lead to evictions and adversely affect Africans’ enjoyment of the right to food. Moyo, for his part, highlights how subsidiaries of multinational corporations domiciled in the Global North contribute to violations of the right to water, thereby engaging the international responsibility of their home states. As Viljoen notes in his foreword (p. ix), such violations cannot be captured by African human rights instruments, as they are committed by states which are not parties to these instruments. To tackle these violations, faith should be put into global (UN) instruments or non-African regional instruments, such as the European Convention on Human Rights. Fortunately, bodies monitoring compliance with these instruments have already drawn attention to their extraterritorial application, even if practice leaves a lot to be desired. Most recently—and most relevantly in the context of corporate activities in Africa—the UN Committee on Economic, Social and Cultural Rights has adopted a General Comment (No. 24) on State obligations in the context of business activities, including extraterritorial obligations.⁹

Highlighting the Global North/Global South divide is however not to minimise the relevance of extraterritorial obligations resting on *African states themselves*, especially in an *intra*-African context. The African Commission (which supervises those African states’ compliance with the ACHPR) has not tackled the concept of extraterritorial obligations head-on. Still, it has engaged with it, albeit somewhat obliquely, in a number of cases, as discussed notably by Chenwi and Bulto. In the *Burundi Embargo* case, the Commission held that states, when taking economic sanctions, must ensure basic rights,¹⁰ while in the *DRC Invasion* case, it held a number of states neighbouring the DRC responsible for violations of individual and group rights committed during those states’ occupation of parts of DRC territory.¹¹ Other contributions, on the basis of rich empirical information, draw attention to

⁹Committee on Economic, Social and Cultural Rights (2017). See Part C on extraterritorial obligations.

¹⁰ACHPR, Communication No. 157/96, (2003) AHRLR 111.

¹¹ACHPR, *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication No. 227/1999, (2004) AHRLR 19.

contemporary intra-African situations in which ETOs (should) apply. Acirokop, for instance, finds that Uganda incurs extraterritorial obligations for its military's failure to respect and protect civilians in areas in the Central African Republic (CAR) where the Lord's Resistance Army is active. Drawing on the *Al Skeini* judgment of the European Court of Human Rights,¹² she argues that Uganda, which leads a Regional Task Force in the CAR, exercises public powers there. Other contributions foreground the responsibility of South Africa, one of Africa's economic powerhouses, in respect of its corporations' business deals which adversely impact human rights across the African continent.

Taking this last scenario of corporate abuses—of which Africa is, and has been so much at the receiving end—it is striking that the contributors writing in this field (the majority of them in fact) accept at face value the validity of the 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, a scholarly expert opinion 'restating' human rights law on extraterritorial obligations.¹³ Pursuant to the Maastricht Principles, a state has obligations to respect, protect and fulfil economic, social and cultural rights, not only in situations over which it exercises authority or effective control, but also in 'situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory', and 'situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially'.¹⁴ On this basis, states are arguably under an obligation to 'take necessary measures to ensure that non-State actors which they are in a position to regulate . . . such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights.'¹⁵ As a matter of policy, this may perhaps be defensible. However, it is questionable whether extraterritorial state obligations in respect of corporate abuse exist as a matter of law. In a recent article, Claire Methven O'Brien has rather convincingly argued that, 'on the weight of evidence . . . at present, there cannot be said to exist any positive legal basis . . . for recent claims by scholars that the responsibility of home states under human rights treaties extends to the prevention of abuses by [transnational corporations] beyond national borders'.¹⁶ Methven O'Brien did however not seek to evaluate whether home state duty to regulate transnational corporations would be normatively desirable or optimal.¹⁷

¹²ECtHR, *Al-Skeini and Others v The United Kingdom*, Judgment, (2011) App. No. 55721/07.

¹³International Commission of Jurists (2011), p. 3. On closer inspection, this acceptance may not be that surprising, as the first editor of the collection was one of the expert signatories of the Maastricht Principles.

¹⁴Maastricht Principles, para. 9.

¹⁵Maastricht Principles, para. 24.

¹⁶Methven O'Brien (2018), pp. 47–73, 72.

¹⁷*Id.*

Clearly, the contributors to this volume are of the view that such a duty is indeed called for. Given the deleterious human rights effects of transnational corporate activity which they have—sometimes first-hand—witnessed in Africa, their activist scholarship, and the attendant blurring of the lines between the *lex lata* and the *lex ferenda*, this may be understandable, and even commendable.

At a more theoretical level, this book appears to form part of the Third World Approaches to International Law (TWAIL) movement,¹⁸ even if it does not explicitly adhere to any school or legal movement. It is recalled that TWAIL seeks to critique and to change norms of international law that are viewed as serving Western interests to the detriment of the Global South. If a change of law is not immediately available, TWAIL scholars would call for a reinterpretation of the law with a view to serving the interests of the world's downtrodden. In the context of ETOs, this means in the first place abandoning jurisdictional barriers based on territory, casting doubt on the public/private divide, and construing sovereignty as giving rise to duties rather than only rights: states have ETOs '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'.¹⁹ To the editors' and authors' credit, this volume does however not seek to blame the West—the continent's former colonial masters—for the ills befalling the African continent. Rather, what transpires from a number of contributions is that African states themselves are in typical scenarios *also* to blame for the human rights violations taking place on their territory, at least for violations of economic and social rights, *e.g.*, when leasing land to foreign investors in questionable circumstances. At the end of the day, ETOs are to be conceived of as *subsidiary* obligations resting on bystander states. ETOs should not replace the primary responsibility of the states on whose territory the violations take place.²⁰

Concluding, this is a carefully edited collection which forms a coherent whole. The individual contributions are well-written and contain a wealth of doctrinal insights and empirical information. The editors and contributors deserve particular credit for highlighting the ETO potential of the ACHPR, the refined reasoning of the African Commission (largely unknown outside Africa), and the extant and potential interactions between the African human rights system and other regional or universal systems. The voices of the new generation of African (and Africa-minded) scholars who have contributed to this volume deserve a wide audience.

¹⁸See on TWAIL, *e.g.*, Gathii (2011), pp. 26–48.

¹⁹Maastricht Principles, para. 8(a).

²⁰Obviously, to the extent that foreign states exercise effective territorial or personal control to the exclusion of the territorial state, *e.g.*, in situations of occupation, these foreign states will have primary human rights obligations.

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