

# The human right to water in the *corpus* and jurisprudence of the African human rights system

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## Abstract

*The effects of the absence of an explicit and comprehensive protection of the human right to water in the African Charter on Human and Peoples' Rights have been somewhat mitigated by the African Commission on Human and Peoples' Rights' purposive approach to the interpretation of other guarantees of the African Charter in a manner that envelopes the right to water. The African Commission grounded the legal basis of the right in provisions guaranteeing the right to health, the right to a healthy environment and the right to dignity. Yet, the Commission has failed to fully explain the normative status and content of the right. There also remains doubt as to whether the right is an autonomous entitlement per se or is an auxiliary guarantee that is used to ensure the realisation of other rights of the Charter. Besides, the legal basis of the right is rendered diffuse as the African Commission has located it in differing rights on a case by case basis. This has left the right to water on shifting and amorphous legal bases and entailed normative problems for the right holders as well as duty bearers. The article argues that the Commission has grounded the right on a narrowly-defined legal basis. It also contends that the Commission should follow the approach of the United Nations Committee on*

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*Economic, Social and Cultural Rights' General Comment 15 (2002), which declared an autonomous right to water and defined its normative content and related states' obligations.*

## 1 Introduction

[M]ay you live, and all your people. I too will live with all my people. But life alone is not enough. May we have the things with which to live it well. For there is a kind of slow and weary life which is worse than death.<sup>1</sup>

A great deal of scholarship on socio-economic rights in the African human rights system has focused on the analysis of problems of enforcement and justiciability of this group of rights. Consensus has emerged that the justiciability and enforcement of socio-economic rights guarantees of the African Charter on Human and Peoples' Rights (African Charter)<sup>2</sup> have for the most part played second fiddle to their civil and political counterparts enshrined in the African Charter.<sup>3</sup> However, the marginalisation of socio-economic rights of the Charter is also characterised by the brevity of the catalogue of this group of rights that have found an explicit expression in the regional instrument. The Charter has given recognition only to a select list of socio-economic rights.<sup>4</sup> It has also omitted to explicitly provide for a few crucial socio-economic guarantees.<sup>5</sup> In short, its catalogue of socio-economic rights is modest.<sup>6</sup>

One of the crucial guarantees to have eluded the list of African Charter socio-economic rights is the right to drinking water and water for sanitation. Lacking a comprehensive legal protection in the main regional instrument, the human right to water creates a hierarchy within a hierarchy, as it sits on the lowest rung of the already-marginalised socio-economic rights. The right has found its way into regional jurisprudence only by dint of innovative interpretation of the Charter

1 Prayer of Ezeulu (Ulu's chief priest) in C Achebe *Arrow of God* (1964) 95.

2 African Charter on Human and Peoples' Rights, adopted 27 June 1981; entered into force 21 October 1986, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29.

3 TS Bulto 'The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights' (2010) 29 *The University of Tasmania Law Review* 142; C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 137; CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327.

4 See, eg, 'the right to work under equitable and satisfactory conditions' (art 15); 'the right to enjoy the best attainable state of physical and mental health' (art 16); and 'the right to education' (art 17).

5 See Bulto (n 3 above) 143.

6 C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Penn State Law Review* 679 690.

by its monitoring and enforcement mechanism, the African Commission on Human and Peoples' Rights (African Commission). While this is a step in the right direction, the African Commission approached the right from an overly narrow normative basis and failed to elaborate its normative content. Even so, the Commission has yet to define comprehensively the legal basis and scope of the human right to water and attendant state obligations under the Charter.<sup>7</sup>

The article explores the case law of the African Commission on the human right to water and analyses it in light of developments elsewhere. It seeks to demonstrate that, despite its innovative approach to locating the human right to water in the African Charter's *corpus*, the Commission has conspicuously failed to elaborate its normative basis and content and turned a deaf ear when victims of the right's violations sought remedies before it. It also suggests that the Commission grounded the human right to water on a narrowly-defined and usually shifting legal basis, ignoring the fertile normative sources of the right in related African Union (AU) treaties. The article argues that the human right to water in Africa should be grounded not only in the implicit terms of the African Charter, but also in the more explicit provisions of the usually neglected African Convention on the Conservation of Nature and Natural Resources (African Nature Convention).<sup>8</sup> It seeks to examine the right and its normative content through the analysis of the broader African regional instruments and their 'inspirational sources' in the universal treaties.

The next section discusses the textual basis of the right to water in mainstream regional human rights treaties and analyses the case law of the African Commission and the potential utility of other continental treaties, the primary focus of which is not on human rights. In section 3, the analysis focuses on the inspirational value of the approach of the global human rights bodies in carving the right to water from similarly obscure normative sources. Section 4 relies on these non-African approaches to the normative scope of the human right to water, and argues that a similar approach may be adopted by the African Commission. Section 5 draws the analysis together to conclude the study.

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7 In 2009, the African Commission had drafted and circulated for comment a 'Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' which contained a specific section on the 'right to water and sanitation'. The draft guidelines devoted paras 71-75 to the analysis of the legal basis and normative content of the right to water and sanitation. However, at the date of writing, the final version has not been made public. Thus, as the analysis of a draft document would not add much value to the debate, it is not discussed here.

8 African Convention on the Conservation of Nature and Natural Resources, adopted on 15 September 1968, entered into force on 16 June 1969. According to the publicly available data on the website of the AU, as at 30 August 2011, the African Nature Convention was ratified or acceded to by 30 of the 53 member states of the AU. See status of ratifications [http://au.int/en/sites/default/files/Nature\\_and\\_Natural\\_Resources.pdf](http://au.int/en/sites/default/files/Nature_and_Natural_Resources.pdf) (accessed 20 June 2011).

## 2 Normative basis of the human right to water in the African Charter

The absence of a comprehensive guarantee of the human right to water in the universal human rights treaties has variously been dubbed 'odd, at best'<sup>9</sup> and 'startling'.<sup>10</sup> Its analogous absence in the African Charter<sup>11</sup> is disquieting, given the degree of water scarcity on the continent. Humans can survive more than a month without food, but only about a week without water, as their bodies are between 60 and 80 per cent water by weight, depending upon the individual.<sup>12</sup> In the Millennium Development Goals, countries of the world could promise merely to halve the number of people without access to drinking water and water for sanitation.<sup>13</sup> Africa faces 'steep challenges' just to meet this minimalist yet seemingly ambitious undertaking,<sup>14</sup> a fact that lends urgency to an examination of the legal basis of the human right to water on the continent.

### 2.1 Right to water in the mainstream African human rights instruments

In contrast to the total absence of any mention of the right to water under the African Charter, the African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>15</sup> provides that state parties are required to take measures to 'ensure the provision of adequate nutrition and safe drinking water'.<sup>16</sup> The ambit of the provision in the African Children's Charter is so limited that it merely regulates the quality (safety) of available water and applies only to children.

It is silent on the (adequacy of the) amount of water that states have to provide to children. Similarly, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African

9 SC McCaffrey 'The basic right to water' in EB Weiss *et al* (eds) *Fresh water and international economic law* (2005) 93-94.

10 M Craven 'Some thoughts on the emergent right to water' in E Riedel & P Rothen (eds) *The human right to water* (2006) 37-39.

11 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 TS Bulto 'Rights, wrongs and the river between: Extraterritorial application of the human right to water in Africa' unpublished PhD thesis, Melbourne Law School, University of Melbourne, 2011 (on file with author).

12 SC McCaffrey *The law of international watercourses: Non-navigational uses* (2001) 3.

13 See the UN Millennium Development Goals Report 2009 46.

14 UN Millennium Development Goals Report 2009 (n 13 above) 45-46.

15 African Charter on the Rights and Welfare of the Child, adopted 11 July 1990, entered into force 29 November 1999, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 77.

16 Art 14(2)(c) African Children's Charter.

Women's Protocol)<sup>17</sup> provides that state parties shall take 'appropriate measures to ... provide women with access to clean drinking water'.<sup>18</sup> This instrument also says nothing about the quantity of water that is to be provided by states to the beneficiaries of the right.

Accordingly, the normative content and legal basis of a free-standing and comprehensive right to water are ambiguously situated in the mainstream regional human rights instruments. However, there are additional legal bases upon which the African Commission can rely to 'discover' the human right to water. There is room for interpreting the African Charter's provisions in a way that allows the 'reading-in' of an independent human right to water. Besides, there is a potential to use other African treaties, that are not specifically human rights instruments but have relevance thereto, in order to give legal protection to the right. However, the potential for explicating the human right to water from the relevant regional treaties depends heavily upon how the African Commission approaches claims and complaints related to the human right to water. As discussed below, the human right to water in the case law of the Commission has had a troubled history.

## 2.2 Approach of the African Commission

The recognition of the human right to water in the African human rights system – to the extent that it exists at all – owes its roots to a quasi-judicial innovation of the African Commission. The Commission read the right to water into or from other rights that have been clearly provided for in the regional instruments. The promotional mandate of the Commission enunciated under article 45 of the African Charter empowers the regional body to set standards and formulate principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms. This has enabled the Commission to read aspects of the right to water into other guarantees of the African Charter.

So far, the African Commission has mainly interpreted the right to water as a sub-set of the right to dignity (article 5), the right to health (article 16) and the right to a healthy environment (article 24). In *Free Legal Assistance Group and Others v Zaire*, the Commission held that the 'failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine ... constitutes a violation of article 16 [right to health]'.<sup>19</sup> Similarly, in a landmark case against Nigeria, the Commission decided that contamination of sources of drinking water by state or non-state actors is a violation of

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17 Adopted 13 September 2000, entered into force 25 November 2005, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 61.

18 Art 15(a) African Women's Protocol.

19 *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 47.

article 16 (the right to health) and article 24 (the right to a satisfactory environment).<sup>20</sup> In a case against Sudan, there was a complaint that Sudan was complicit in poisoning wells and denying access to water sources in the Darfur region.<sup>21</sup> Here, too, the African Commission ruled that ‘the poisoning of water sources, such as wells, exposed the victims to serious health risks and amounts to a violation of article 16 of the Charter’.<sup>22</sup> Despite a clear and emphatic request from the complainants to declare the existence of an independent right to water under the African Charter (and the violations thereof in the instant case), the Commission evaded the request without any reasoning whatsoever. Indeed, the Commission itself stated that ‘[t]he complainant invites the Commission to develop further its reasoning in the *SERAC* case by holding that the right to water is also guaranteed by reading together articles 4, 16 and 22 of the African Charter’.<sup>23</sup> For a quasi-judicial body such as the African Commission to bypass a clear prayer of the complainants without an apparent reason in a case involving such massive and serious violations of vital human rights, including the human right to water, is anomalous, to say the least. Despite a golden opportunity to rule on the status and legal basis of the human right to water, the African Commission neglected to do this.

Similarly, in a case against Angola, in which the present author was one of the legal counsel for the complainants, it was proven that Angola carried out massive arrests of foreign nationals (in which over 126 247 individuals were arbitrarily arrested *en masse*) and put them in detention centres before deporting them. In these detention camps – some of which were initially used to house animals and contained a plethora of animal waste, thus far from suitable for human habitation – complainants were provided with bathroom facilities consisting solely of two buckets of water per day for over 500 detainees. Worse, the bathroom was located in the same room where all detainees were compelled to eat and sleep. Yet, the African Commission could only find the respondent state in violation of the right to dignity and the protection against inhuman and degrading treatment. It ruled that the situation is ‘clearly a violation of article 5 of the African Charter since such treatment cannot be called anything but degrading and inhuman’.<sup>24</sup> There was no attempt by the African Commission to explicate the right to water and no mention of the manifestly gross violations of the right that were committed by the respondent state.

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20 See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria (SERAC case)* (2001) AHRLR 60 (ACHPR 2001) paras 49, 50-54, 57 & 66.

21 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Sudan*) para 207.

22 *Sudan* (n 21 above) para 212.

23 *Sudan* (n 21 above) para 126.

24 *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) para 51.

The African Commission's approach to the human right to water has therefore consistently been to treat it as an auxiliary right that attracts protection as a component of other more explicit rights. This has been the case not only in the Commission's jurisprudence, but also in the Pretoria Statement on socio-economic rights of the Charter, where the right to health (article 16) was taken to entail 'access to basic ... sanitation and adequate supply of safe and potable water'.<sup>25</sup> While this approach is not entirely wrong, it represents a mixed blessing for the progressive development of the human right to water under the Charter. The derivative approach to explicating the right is a double-edged sword, as it carries potentially contradictory implications about the legal basis of the right.

On the positive side, the Commission stated the obvious stance that the right to water is a necessary and inherent element, *inter alia*, of the rights to health, life, dignity and housing. Since the more explicit (parent) rights cannot be realised without access to adequate quality and quantity of water, the human right to water would be treated as part and parcel of such rights.<sup>26</sup> Thus, the right to water springs out of the necessity for the realisation of other explicitly-guaranteed rights.

The negative repercussions of the approach arise from the positive implication. Critics of the derivative approach argued that the right to water, as derived from such rights as the right to health and the right to life, lacks an autonomous existence and is limited in scope. For example, it is argued, it cannot be claimed except when its parent rights are jeopardised due to a lack of an adequate quantity or quality of water.<sup>27</sup> That is meant to imply that the right to water is a derivative or ancillary right, available only in the context of the other more explicit rights of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In this sense, the right to water is an auxiliary entitlement that is subservient to other explicitly-protected guarantees, and is dependent on the main right in the interest of which the right to water is protected.<sup>28</sup> It thus lacks an independent or free-standing status, and its realisation *per se* cannot be demanded by right holders.

In terms of this argument, the right to drinking water and water for sanitation remains in the 'shadows' of such rights as the right to health

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25 See 'Statement from seminar on Social, Economic and Cultural Rights in the African Charter' adopted in Pretoria, 13-17 September 2004 (2005) 5 *African Human Rights Law Journal* (182 186 para 7.

26 A Cahill 'The human right to water – A right of unique status': The legal status and normative content of the right to water' (2005) 9 *International Journal of Human Rights* 389 394.

27 As above.

28 A Cahill 'Protecting rights in the face of scarcity: The right to water' in M Gibney & S Skogly (eds) *Universal human rights and extraterritorial obligations* (2010) 194.

and the right to dignity.<sup>29</sup> Claims to water should thus be 'enveloped' therewith and claimed as such. Because the human right to water is protected through other rights, the human right to water is a derivative or subordinate right, the violation of which can only be complained of when the parent rights are violated. In this sense, the relationship between the human right to water and its source (parent right) is such that the former is a small subset of the latter.<sup>30</sup> Its violation thus arises only when the parent right is violated in situations that involve the victims' access to adequate quantity and quality of water. Consequently, the right to water can only be guaranteed to the extent of its utility to and overlapping with the source from which it springs.

The implications of the human right to water for the duty of states are equally problematic: The obligations it creates vary depending on whether the right is subsumed under other human rights or is recognised as a stand-alone right.<sup>31</sup> As Cahill observed, in this sense, 'surely only certain aspects of the right to water will be protected and implemented'.<sup>32</sup>

This leaves the status of the right on shaky ground where it is neither fully recognised nor fully excluded from the ambit of the protection of the African Charter's guarantees. Unlike its jurisprudence on the right to housing and the right to food in which it unambiguously affirmed the existence of free-standing rights, the African Commission left the normative status of the right to water in doubt.

Needless to state, the parent rights can be protected or violated without necessarily involving violations of the right to water. Conversely, the right to water can also be realised or violated independently of its parent rights. For instance, a state's provision of water may fall below the amount or quality needed to realise right holders' basic access to drinking and sanitation water (minimum core of the right<sup>33</sup>), thereby violating the human right to water, although the impact of such a scenario on the right to dignity, health or food of the right holders might not be visible in the short term.

Moreover, under the existing approach, the scope of the right to water varies depending on which right it is assumed to be part of, and its legal basis remains diffuse. This obscures the normative content of the right and bedevils its standardisation and progressive development

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29 TS Bulto 'The emergence of the human right to water in international human rights law: Invention or discovery?' (2011) 2 *Melbourne Journal of International Law* (forthcoming).

30 As above.

31 See A Hardberger 'Whose job is it anyway?: Governmental obligations created by the human right to water' (2006) 41 *Texas International Law Journal* 533 535.

32 Cahill (n 26 above) 394.

33 For an analysis of the minimum core of the human right to water, see section 4 below.



as an independent entitlement. Therefore, this approach to the human right to water gives a truncated and abbreviated picture of the right.

The African Commission, as a rule, has been less hesitant to read latent rights into the more explicit guarantees of the African Charter. The Commission has explicitly stated that it would consistently follow its own jurisprudence in its approach to the interpretation and application of Charter-based rights.<sup>34</sup> However, the Commission has strayed from its jurisprudence in the explication of the human right to water. Its case law on the right to water is in stark contrast to its usually purposive interpretation of the Charter that enabled the discovery of latent rights. In its decision in the *SERAC* case, the Commission took a very innovative approach by reading in fundamental rights and freedoms that were not explicit in the Charter.<sup>35</sup> Following a teleological approach to the interpretation of the provisions of the regional treaty, the Commission read in and inferred the rights to food and housing from other more explicit rights of the African Charter. The Commission stated:<sup>36</sup>

The communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (art 4), the right to health (art 16) and the right to economic, social and cultural development (art 22). By its violation of these rights, the Nigerian government trampled upon not only the explicitly-protected rights but also upon the right to food implicitly guaranteed.

In the same vein, the African Commission ruled that the human right to housing, which is one of those rights that are not explicit in African human rights treaties, is implicit in other rights that are more explicitly guaranteed. It acknowledged the lack of an explicit guarantee for the right to shelter in the African Charter, but read in the same from related guarantees in the regional treaty. It ruled:<sup>37</sup>

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated.

In effect, the African Commission has shown a willingness to explicate some of the implicit human rights from other explicitly-recognised guarantees. An analysis of the somewhat limited jurisprudence of

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34 See n 63 below and accompanying text.

35 D Shelton 'Decision regarding Communication 155/96 (*Social and Economic Rights Action Centre/Centre for Economic and Social Rights v Nigeria*)' (2002) 96 *American Journal of International Law* 937-941.

36 *SERAC* case (n 20 above) paras 64-65.

37 *SERAC* case (n 20 above) para 60.

the Commission has shown that socio-economic rights that are not explicitly recognised in the African Charter should be regarded as implicitly included. Commenting on the emerging jurisprudence of the Commission, authors have concluded that 'where content falls short of international standards, the Commission is ... interpreting the provisions of the Charter in ways that generally conform to such standards'.<sup>38</sup>

However, having been presented with numerous opportunities to elaborate the normative basis and content of the human right to water, the African Commission consistently side-stepped the question. Considered against the backdrop of the emerging trend of the African Commission's case law in which the Commission read implicit rights into those which are explicitly guaranteed, it would have been expected that the Commission would follow the same route in future cases and declare the existence of a free-standing human right to water under the African Charter.

This is a sensible approach on many scores. First, it serves the purpose and object of the African Charter, in which member states undertook the 'duty to promote and protect human and peoples' rights and freedoms'.<sup>39</sup> Secondly, it is also in line with the African Commission's duty 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation'.<sup>40</sup> Third, in discovering and explicating what is only a latent right of the Charter, the Commission would only affirm what numerous African states have already accepted elsewhere at the international level.<sup>41</sup> For instance, in the Abuja Declaration, which was adopted by 45 African and 12 South American states at the First Africa-South America Summit in 2006, states undertook to 'promote the right of our citizens to have access to clean and safe water and sanitation within our respective jurisdictions'.<sup>42</sup> This trend was repeated at the global level, particularly when a resolution unambiguously recognising the human right to water was put to the vote of the states at the UN General Assembly.<sup>43</sup> This resolution was passed with 122 votes in favour, including the votes of at least 32 African states.

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38 Heyns (n 6 above) 69; GJ Naldi 'Limitation of rights under the African Charter on Human and Peoples' Rights: The contribution of the African Commission on Human and Peoples' Rights' (2001) 17 *South African Journal on Human Rights* 109 117.

39 Preamble, para 11 African Charter.

40 Art 45(1)(b) African Charter.

41 See Bulto (n 29 above).

42 Abuja Declaration adopted at First Africa-South America Summit, 26-30 November 2006 (Abuja, Nigeria) para 18 [http://www2.mre.gov.br/deaf/asa/declaration%20of%20the%20first%20-%20\(english\).pdf](http://www2.mre.gov.br/deaf/asa/declaration%20of%20the%20first%20-%20(english).pdf) (accessed 23 June 2011).

43 See General Assembly Adopts Resolution Recognising Access to Clean Water, Sanitation 64th General Assembly Plenary 108th Meeting (AM) (General Assembly GA/10967) 28 July 2010.

Granted, the African Commission would not create a totally new right or obligation that states have not undertaken or envisaged. As noted above, elements of the human right to water have already been provided for at the African level in the African Children's Charter, the African Women's Protocol and the Nature Convention. Finally, some member states of the African Charter have already enshrined the right to water in their domestic legislation<sup>44</sup> or recognised one through judicial decisions.<sup>45</sup> The African Commission, in addition to Charter-based grounds, may rely on African domestic legislative and judicial practices recognising the right to water as inspirational sources to ground the right in the African Charter. While article 45 of the Charter normally envisages a situation where the Commission's case law inspires domestic legal principles and judicial practices, there is nothing in the African Charter that prevents the opposite scenario, in which the Commission borrows from domestic laws and judicial practices. After all, the monitoring and promotional mandate of the Commission is designed to enable the Commission to obtain the whole picture of the human rights situation on the continent and then 'distill the wisdom of that collective experience into advice which is made available to all interested parties'.<sup>46</sup> In this sense, the rights and freedoms enshrined in the Charter are in constant dialogue with domestic legal systems and practices, influencing and at the same time being influenced by positive legislative and judicial developments at the domestic level in member states. This is not confined to the practice of the Commission or Africa as (quasi-)judicial bodies elsewhere have long followed this approach.<sup>47</sup>

### 2.3 Other regional treaties: African Nature Convention

Africa is at the forefront of adopting binding treaties (albeit not human rights norms *per se*) that provide for direct and indirect legal grounds for the normative development, protection and promotion of the human right to water. Predating the adoption of any of the African human rights treaties, the African Nature Convention was described 1985 as 'the most comprehensive multilateral treaty for the conservation of

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44 For a South African example, see A Kok & M Langford 'The right to water' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 191-197-198.

45 This has been the case in South Africa and Botswana. See *Lindiwe Mazibuko & Others v City of Johannesburg & Others* Case CCT 39/09 [2009] ZACC 28; See also *Matsipane Moselethanyane & Others v The Attorney-General of Botswana* Court of Appeal, CALB-074-10 (unreported).

46 African Commission on Human and Peoples' Rights Information Sheet 4 [http://www.achpr.org/ACHPR\\_inf\\_sheet\\_No.4.doc](http://www.achpr.org/ACHPR_inf_sheet_No.4.doc) (accessed 30 August 2011).

47 See generally A Roberts 'Comparative international law? The role of national courts in creating and enforcing international law' (2011) 60 *International and Comparative Law Quarterly* 57.

nature yet negotiated'.<sup>48</sup> Its adoption was necessitated, among other things, by the level of environmental disasters on the continent, such as droughts, desertification and the deterioration of water resources.<sup>49</sup> In terms of the impact of the Nature Convention on legislative reforms, as early as two decades ago studies have revealed that the Nature Convention 'has stimulated useful conservation measures in some countries and remains the framework on which a substantial body of legislation is based'.<sup>50</sup>

The Nature Convention contains substantive provisions that are pertinent to the promotion and protection of the human right to water. Under article II (Fundamental Principle), state parties undertake 'to adopt the measures necessary to ensure conservation, utilisation and development of soil, water ... in accordance with scientific principles and with due regard to the best interests of the people'. The Nature Convention enunciates both quantity and quality components of water provisions. The most pertinent provision, however, is found under article V(1).<sup>51</sup> It relates to the provision of water quantity, and stipulates:<sup>52</sup>

The contracting states shall establish policies for conservation, utilisation and development of underground and surface water, and *shall endeavour to guarantee for their populations a sufficient and continuous supply of suitable water.*

On the other hand, article V(1)(d) addresses the issue of water quality, and provides for the duty of 'prevention and control of water pollution'. Although the provisions are stated in the language of state duties (as opposed to subjective rights), these duties are meant to accrue to human beneficiaries and, by implication, may be claimed by individuals and groups. The cumulative reading of article II and article V of the Nature Convention leads to the conclusion that state parties are obliged to provide a sufficient and continuous supply of unpolluted water to their populations (hence individuals and groups in those states are entitled to claim this). The African Commission can also ground its analysis and interpretation of the human right to water on this Convention. Under article 61, the Commission 'shall also take into

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48 S Lyster *International wildlife law: An analysis of international treaties concerned with the conservation of wildlife* (1985) 115. See also M Prieur 'Protection of the environment' in M Bedjaoui (ed) *International law: Achievements and prospects* (1991) 1017 1035.

49 M van der Linde 'A review of the African Convention on Nature and Natural Resources' (2002) 2 *African Human Rights Law Journal* 33 35.

50 Lyster (n 48 above) 115. A study revealed that no less than 30 constitutions of the then 54 states of the continent enshrine the right to environment, and it is within the framework of this right that the human right to water is usually mentioned in Africa. See C Heyns & W Kaguongo 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673 707.

51 See D Hu *Water rights: An international and comparative study* (2006) 97.

52 Art V(1) (my emphasis).

consideration ... general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity [now the AU]'. Conversely, the member states of the African Charter have affirmed from the outset 'their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and *other instruments adopted by the Organisation of African Unity [now AU]*'.<sup>53</sup>

The Nature Convention was revised<sup>54</sup> in order to bring it in line with the principles and guidelines developed at various conferences, including the Rio Declaration.<sup>55</sup> In its Preamble,<sup>56</sup> it clearly states that the revised Nature Convention was adopted so as to respond to the 'need to continue furthering the principles of the Stockholm Declaration, to contribute to the implementation of the Rio Declaration and of Agenda 21, and to work closely together towards the implementation of global and regional instruments supporting their goals'.<sup>57</sup>

As discussed below, individuals' and groups' right to a 'sufficient' and 'continuous' supply of 'suitable' water, provided for under article V(1) of the Nature Convention, or states' duties to ensure the same, correspond to the minimum core of the human right to water. Arguably, therefore, the Nature Convention enshrines a concrete and firm normative source for states' duty to ensure the enjoyment of the human right to water in Africa. The African Commission could avail itself of the provisions of the Nature Convention in its determination and/or elaboration of cases related to the human right to water.<sup>58</sup>

53 See Preamble, para 10 African Charter (my emphasis).

54 African Convention on the Conservation of Nature and Natural Resources (revised Nature Convention), adopted in Maputo, Mozambique, on 11 July 2003. It enters into force 30 days after the deposit of the 15th instrument of ratification in accordance with its art 38. As at 12 January 2008, the Convention has been ratified or acceded to by eight states and will need a further seven more to come into operation. See Status of Ratifications <http://www.africa-union.org/root/au/Documents/Treaties/List/Revised%20Convention%20on%20Nature%20and%20Natural%20Resources.pdf> (accessed 23 May 2011).

55 As regards the human right to water, the content of relevant provisions remain intact in the revised Nature Convention. For a detailed discussion of the revised version of the Convention and changes introduced thereby, see Van der Linde (n 49 above) 49-56.

56 See para 12. For an analysis of the vital contribution of the Rio and Stockholm Declarations and of Agenda 21, see Bulto (n 29 above).

57 As Van der Linde commented, the substantive provisions of the 1968 Nature Convention are not exactly in line with the Rio instruments and other contemporary multilateral treaties and subsequent developments on the subject. See Van der Linde (n 49 above) 43.

58 See n 54 above and accompanying text.

### 3 Use of extraneous rules and the relevance of developments at the universal level

A special feature of the African Charter is the wide array of sources from which the African Commission may draw inspiration in its promotional and protective mandates.<sup>59</sup> The promotional mandate of the Commission includes setting standards and formulating principles related to human and people's rights entrusted to it under article 45 of the African Charter. The African Commission<sup>60</sup>

shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members.

The use of the phrase 'shall draw inspiration' implies that the Commission is enjoined to have recourse to international law, principles, jurisprudence and precedents of the universal and regional human rights systems and mechanisms.

The interpretive latitude provided by article 60 of the African Charter is of crucial relevance in constructing ambiguities involving such cases as the human right to water which clearly falls within the visions of the Charter, but lacks explicit protection. The Charter sought to instruct and empower the Commission to give due consideration to the wisdom, experience and emerging jurisprudence of the other regional systems and UN bodies to enrich its own promotional and protective roles. It has been remarked that article 60 of the Charter bears testimony to the fact that the Charter's provisions were inspired by universal human rights norms embedded in the UN Charter, the Universal Declaration of Human Rights (Universal Declaration) and other global human rights instruments.<sup>61</sup> The African Commission has stated its compliance with this provision:<sup>62</sup>

In interpreting the African Charter, the African Commission relies on its own jurisprudence, and as provided by articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards.

59 Under art 30 of the African Charter, the African Commission is entrusted with the duty 'to promote human and peoples' rights and ensure their protection in Africa'.

60 Art 60 African Charter.

61 GW Mugwanya *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003) 190.

62 *Institute for Human Rights and Development in Africa v Angola* (n 24 above) para 78.

Developments in the area of human and peoples' rights in other regional human rights systems, as well as within the UN system of human rights, have thus influenced the interpretation and application of the regional Charter.

Accordingly, global and regional developments in the area of human and peoples' rights will continue to have an effect on the African regional human rights jurisprudence.<sup>63</sup> Indeed, the African Commission has used the provisions of article 60 very liberally in order to bring the Charter in line with international practices.<sup>64</sup> More specifically, the African Commission has repeatedly referred to the General Comments of the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) in the interpretation of some of the controversial provisions of the African Charter. In the *SERAC* case, the Commission clearly stated that it sought to draw inspiration from General Comment 7 of the ESCR Committee on the definition of forced evictions, the meaning of which was lacking under the African Charter.<sup>65</sup> Likewise, the Commission relied on General Comment 4 of the ESCR Committee for an analysis of the right to adequate housing.<sup>66</sup>

This approach would certainly prove helpful as regards the clarification of the legal basis of the human right to water under the African Charter. In this context, General Comment 15 of the ESCR Committee is currently the single most pertinent, most comprehensive, most elaborate and firmly persuasive source of inspiration for the determination of issues relating to the legal basis, implementation and redressing violations of the human right to water in the African human rights system. General Comment 15 of the ESCR Committee employed three overlapping approaches to the discovery of the latent human right to water.

### 3.1 General Comment 15 and teleological interpretation

Teleological – also called purposive – interpretation is used, *inter alia*, to promote the objectives for which the rule of law was designed and to fill gaps in a given legal order.<sup>67</sup> The ESCR Committee's approach

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63 It has been rightly asserted that the African Commission would use only those practices and precedents which are in line with the letter and the spirit of the African Charter, and the duty to draw inspiration from non-African legal sources does not necessarily imply, perhaps obviously, a wholesale grafting of the latter in the interpretation of the Charter. However, when the Charter is silent on certain aspects or all of a right, the Commission would borrow the principles applied at the level of other regional human rights jurisdictions and the UN bodies. See Odinkalu (n 3 above) 327 352-354.

64 See Heyns (n 6 above) 688-689; F Ouguerouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 567-568.

65 *SERAC* case (n 20 above) para 63.

66 As above.

67 HG Schermers & DF Waelbroeck *Judicial protection in the European Union* (2001) 21.

in its General Comment 15 serves these two purposes. By defining the right holders' entitlements and duty bearers' obligations in the realisation of the human right to water, it expanded and promoted the human rights guaranteed under ICESCR.<sup>68</sup> More importantly, by explicating the latent content of ICESCR in relation to the human right to water, it attempted to fill the gap in its protective regime relating to the human right to water that had been missing from the explicit terms of ICESCR.

The ESCR Committee carved out a free-standing right to water from, *inter alia*, the provisions of article 11 (the right to an adequate standard of living) of ICESCR. Article 11(1) provides:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The ESCR Committee put special emphasis on the use of the word 'including' in the phrase 'including adequate food, clothing and housing'. Undeterred by the lack of any mention of the right to water in the list, the ESCR Committee viewed the manner in which the word 'including' is put in front of the list (food, clothing and housing) as indicative of the fact that the catalogue of rights guaranteed under article 11(1) of ICESCR is not exhaustive.<sup>69</sup> Since article 11 seeks to guarantee the right to an adequate standard of living to right holders, the prerequisites of which comprise food, housing and clothing, the inclusion of the right to water in the list is in consonance with the object and purpose of article 11(1). The right to water is as crucial – or, arguably, even more so – as the more explicitly-guaranteed elements of the right to an adequate standard of living listed under article 11(1).

The approach of the ESCR Committee has therefore taken care not to overstretch the ambit of article 11, as it only added a similarly essential component of the rights guaranteed under the provision. The ESCR Committee stated that '[t]he right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions of survival'.<sup>70</sup>

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68 International Covenant on Economic Social and Cultural Rights, adopted 16 December 1966; entered into force 3 January 1976.

69 See ESCR Committee, General Comment 15: Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights adopted 11-29 November 2002 para 3.

70 As above.



### 3.2 Derivative approach to the right

In addition to the teleological approach to interpretation which it applied to article 11 of ICESCR, the ESCR Committee also derived the human right to water from the other explicitly-guaranteed rights. In General Comment 15, it made use of article 12 of ICESCR, which guarantees the right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(1) stipulates: 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

The ESCR Committee has taken into account the inextricable relationship of the human right to water with other more explicit rights of ICESCR which, for their realisation, depend on the concomitant fulfilment of the right to water. The ESCR Committee stated that the human right to water should be seen in conjunction with other guarantees of ICESCR under article 12(1), namely, the right to the highest attainable standard of health, the rights to adequate housing and adequate food, and 'other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity'.<sup>71</sup>

As outlined above, the approach of carving out the human right to water – repeatedly used by the African Commission – is problematic in the establishment of a free-standing right to water. Used alongside the teleological approach of the ESCR Committee, which leads to an independent human right to water, however, the derivative approach to the human right to water offers more benefits than harm for the normative development of the right. Locating the right to water in related rights that have been accorded explicit recognition in international human rights treaties, it provides another legal basis to argue for the protection of the right to water. It also helps to emphasise the utility of the indivisibility, interdependence and interrelatedness of human rights that is embraced by the African Charter<sup>72</sup> and later proclaimed in the Vienna Declaration and Programme of Action.<sup>73</sup>

### 3.3 Recognition through state practice

Besides the teleological and derivative approaches to the discovery of the human right to water, the ESCR Committee also relied on and made reference to its own 'consistent' practice that has addressed the

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71 As above.

72 Bulto (n 3 above) 157-158.

73 It was declared as follows: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.' See Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF 157/23) para 5.

right to water in the course of consideration of state parties' reports.<sup>74</sup> Long before the adoption of General Comment 15, the ESCR Committee had criticised countries for the various shortcomings in their national implementation of the human right to water. It raised the issue of domestic implementation of the right with state parties in the context of examination of state reports. According to Riedel, the ESCR Committee addressed the human right to water in 33 of 114 concluding observations it adopted between 1993 and the adoption of General Comment 15 in 2002.<sup>75</sup> For instance, the ESCR Committee expressed its dismay regarding the violations of the right in Cameroon in its 1995 concluding observations, where it stated:<sup>76</sup>

The Committee regrets the lack of access to potable water for large sectors of society, especially in rural areas where only 27 per cent of the population have access to safe water (within reasonable reach), while 47 per cent of the urban population have such access ... The Committee calls upon the state party to make safe drinking water accessible to the entire population.

The ESCR Committee on another occasion raised the problem of water pollution that had a negative impact on the related rights of health and food in the Russian Federation.<sup>77</sup> In its 1998 concluding observations on the state report of Israel, the ESCR Committee stated:<sup>78</sup>

Excessive emphasis upon the state as a 'Jewish state' encourages discrimination and accords a second-class status to its non-Jewish citizens. This discriminatory attitude is apparent in the lower standard of living of Israeli Arabs as a result, *inter alia*, of lack of access to housing, water ... while the government annually diverts millions of cubic meters of water from the West Bank's Eastern Aquifer Basin, the annual *per capita* consumption allocation for Palestinians is only 125 cubic meters *per capita* while settlers are allocated 1 000 cubic meters *per capita* ... That a significant proportion of Palestinian Arab citizens of Israel continue to live in unrecognised villages without access to water, electricity, sanitation and roads ... Bedouin Palestinians settled in Israel ... have no access to water, electricity and sanitation.

In spite of the fact that the human right to water is not an explicit component of ICESCR, none of the state parties that were criticised by the ESCR Committee for violating the right has denied that the right inheres in the provisions of ICESCR.<sup>79</sup> It is clear that the ESCR Committee has taken the silence on the part of ICESCR state parties in the face

74 As above.

75 E Riedel 'The human right to water and General Comment No 15 of the CESCR' in Riedel & Rothen (n 10 above) 19 25.

76 ESCR Committee Conclusions and Recommendations: Cameroon, UN Doc E/C 12/1/Add 40 (1999) paras 22 & 40.

77 ESCR Committee Conclusions and Recommendations: Russian Federation, UN Doc E/C 12/1/Add 13 (1999) para 25. See also para 38.

78 CESCR Conclusions and Recommendations: Israel, UN Doc E/C 12/1/Add 27 (1999) paras 10, 24, 26 & 28.

79 M Langford & JA King 'Committee on Economic, Social and Cultural Rights' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 477 509-514.

of its criticisms of their domestic implementation (or violation) of the human right to water as indicative of tacit assent by the states to the fact that ICESCR contains the human right to water, and consequent state obligations.

However, the reporting procedure is a non-adversarial process which is heavily reliant on 'constructive dialogue' between the reporting state and the monitoring body.<sup>80</sup> The concluding observations of the ESCR Committee might not be too intrusive, meaning that states might listen to the ESCR Committee without the need to confront it with arguments about their domestic obligations relating to the human right to water.<sup>81</sup> The argument that states' silence in the face of the ESCR Committee's concluding observations that is critical of the degree of their domestic enforcement of the human right to water as a source of binding state practice may be too slender a reef to lean against. On its own, it might prove too weak an indicator of states' acceptance of the human right to water, especially given the fact that such 'state acquiescence' in this context is not a result of an adversarial and evidence-based process where a real case is litigated at the international level.<sup>82</sup>

Put differently, the conclusion of the ESCR Committee that its own consistent practice in its dialogue with ICESCR member states is strong enough to give rise to state practice is questionable.<sup>83</sup> However, through the use of the three approaches (analytical devices) – teleological interpretation, derivative approach to the right and the acquiescence of states in the reporting procedure – the ESCR Committee has established a firm legal basis for the human right to water. The combined effect of the three approaches leads to the conclusion that there is a strong normative basis for the human right to water and attendant state obligations in ICESCR.

As demonstrated in section 2, above, the African Commission has already resorted to the approach of carving out the right to water from more explicit rights. As important as this approach might be, it will continue to have serious degrading implications for the status of the emerging human right to water. The cross-reference provisions of articles 60 and 61 of the African Charter mean that the African Commission should draw inspiration from the teleological approach of General

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80 TS Bulto 'Beyond the promises: Resuscitating the state reporting procedure under the African Charter on Human and Peoples' Rights' (2006) 12 *Buffalo Human Rights Law Review* 57.

81 Generally, the 'main teeth [of the reporting procedure] – the mobilisation of shame – have been too weak a threat to ensure compliance'; see Bulto (n 3 above) 151-152.

82 Until and unless the Optional Protocol to ICESCR comes into force, which provides for a complaints procedure, the ESCR Committee's main tool of supervision will continue to be entirely dependent upon the non-adversarial state reporting procedure. See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution A/RES/63/117 on 10 December 2008 (not yet in force).

83 See Bulto (n 29 above).

Comment 15 of the ESCR Committee, which enables the establishment of an independent human right to water. The Commission may also draw inspiration from the approach of the ESCR Committee in the course of examination of state reports where the ESCR Committee discussed the situation of the human right to water at the domestic level. This approach, if used consistently, might lead to state acquiescence and consequently to an enhanced recognition of the right. After all, this would reinforce the emerging recognition by African states of the human right to water, especially in relation to the 45 African states that have adopted the Abuja Declaration.<sup>84</sup> Besides, 32 African states affirmed the existence of an independent human right to water through their vote in favour of the UN Resolution recognising the right,<sup>85</sup> none voting against it, six African states abstaining and 14 others absent at the voting.<sup>86</sup>

#### 4 Normative content of the human right to water

While the preceding analysis led to the conclusion that there is a potential to locate a free-standing right in the African Charter and other regional instruments, it does not answer the question as to the concrete claims that would accrue from the free-standing right to the right holders. The African Commission has yet to elaborate the normative content of the right to water. However, the ESCR Committee has elaborated, in its General Comment 15, the entitlement that the human right to water entails. As demonstrated in section 3 above, General Comment 15 of the ESCR Committee is potentially a vital inspirational source for the interpretation and explication of the human right to water under the African Charter. It is thus instructive to examine General Comment 15 of the ESCR Committee as a potentially crucial inspirational source – which might even serve as a template – for the African Commission's approach to the discovery and elaboration of the human right to water under the African Charter.

Needless to state, water is the life blood of every living being. It is used for drinking, cooking, bathing, washing, waste disposal, irrigation (food production), industry, power production, transportation,

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84 See Abuja Declaration (n 42 above).

85 See UN General Assembly Resolution (n 43 above).

86 This occurred in the framework of the UN General Assembly Resolution that recognised water as a human right and which was passed with a positive vote of 122 states, while it saw as many as 41 states abstaining, in the belief that they did not owe a legal obligation to ensure the right towards their residents. See General Assembly Adopts Resolution Recognising Access to Clean Water, Sanitation (n 43 above).

recreation and in cultural and religious practices.<sup>87</sup> Without it, life is virtually impossible. In terms of uses to which water is put, agriculture (food production) accounts for 65 per cent, industries for 25 per cent of global water use, while water deliveries to households, schools, businesses, and other municipal activities account for less than a tenth of global water use.<sup>88</sup> According to Riedel, 74 per cent of municipal water is used for bathroom consumption, 21 per cent for washing clothes and cleaning and only 5 per cent is used in the kitchen.<sup>89</sup> It is estimated that the absolute daily minimum *per capita* water need for human survival is two to five litres, depending on individual and climatic conditions.<sup>90</sup>

As a point of departure, formulating the human right to water as the right of every individual and group to an adequate amount and quality of water for all conceivable uses would be tantamount to promising what cannot be delivered. Put differently, the human right to water does not entitle individuals and groups to a limitless supply of water, but 'merely to the bare necessities of life, no more'.<sup>91</sup> The approach taken by General Comment 15 of the ESCR Committee is to identify selected types of uses and a minimum quality and quantity of water that should be immediately and continuously made available to satisfy the right holders' basic needs.<sup>92</sup> Understood as such, the General Comment's main aim is to interpret the human right to water as a guarantee to every right holder of a continuous supply of the bare minimum amount of water of adequate quality that an

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87 In the Hindu and Buddhist traditions, the rivers of the earth, including the Indus, the Ganges and the Brahmaputra, originate from the mythical Mount Meru – the dwelling place of the gods – at the centre of the universe. In early Christian tradition, the waters of earth originate in the fountains of the Garden of Eden, which divide into the world's great streams such as the Nile, the Tigris, the Euphrates, the Indus and the Ganges. Similarly, in the Koran, every living thing is made from water and next to human kind it is the most precious creation. See PH Gleick 'An introduction to global fresh water issues' in PH Gleick (ed) *Water in crisis: A guide to the world's fresh water resources* (1993) 3; M Falkenmark, quoted in A Swain *Managing water conflict: Asia, Africa and the Middle East* (2004) 1.

88 S Postel *The last oasis: Facing water scarcity* (1992) 21-22.

89 Riedel (n 75 above) 19-20. See also AP Elhance *Hydropolitics in the Third World: Conflict and cooperation in international river basins* (1999) 8.

90 Riedel (n 75 above) 20.

91 Riedel (n 75 above) 26.

92 It is argued that such a minimalist approach, wherein the minimum core is explicated as an immediate guarantee as a starting point of the journey towards progressive and (eventually) full realisation of a given right, implies that maximum human rights gains can be achieved through temporarily minimising goals. Accordingly, Young argues that the minimum core approach 'trades rights-inflation for rights-ambition, channelling the attention of advocates towards the severest cases of material deprivation and treating these as violations by states towards their own citizens or even to those outside their territorial reach'. See KG Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 113 114.

individual and group can reasonably expect and all states are obliged to supply.

The ESCR Committee in General Comment 15 identified minimum core entitlements in relation to the human right to water. The minimum core of the human right to water has been defined in terms of the *types* of uses involved, the adequacy of the *quantity* of water that a state should make available to the right holders and its *quality* while the right to *equality* of the right holders to have such an access to the selected uses must be ensured.

#### 4.1 Types of use

As is the case with many of the other socio-economic rights guaranteed under ICESCR, the realisation of the human right to water depends on the availability of resources in the implementing state and does not necessarily entail the fullest and immediate implementation of all aspects of the right. However, as noted above, the implementation of the minimum core entails a state's obligation to realise that minimal entitlement immediately. Put differently, as regards the minimum core, individuals and groups are entitled to claim the immediate fulfilment of the identified minimum threshold of a right at issue.

The implication is that the selection of a minimum core of a given right must be made very carefully for it to be capable of immediate translation into reality by all states irrespective of their degree of access to resources (means at their disposal) and their level of development. In relation to the human right to water, this means that not all types of uses are part of the minimum core of the right. Only two types of uses qualify as a minimum core of the human right to water: personal and domestic.<sup>93</sup> The two types of uses comprise the use of water for drinking, washing, cooking, bathing, and other sanitation purposes.<sup>94</sup> In selecting these uses as the minimum core of the human right to water, the ESCR Committee has been mindful of the variety of essential uses to which water can be put but made a deliberate choice to single out the two uses as forming the minimum core of the

93 ESCR Committee General Comment 15 (n 69 above) paras 2, 6 & 12.

94 This is in line with other global and regional treaties as well as expert opinions. See Protocol on Shared Watercourse System in the Southern African Development Community (SADC) Region, adopted on 23 August 1995, entered into force on 29 September 1998; ILC 'Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on trans-boundary confined ground water' (1994) 2 *Yearbook of the International Law Commission* 89 110; ILA 'The Berlin (Revised Helsinki) Rules' International Law Association (adopted at the Berlin Conference) 2004 12. See also D Shelton 'Equity' in J Brunnee & EHD Bodansky (eds) *The Oxford handbook of international environmental law* (2007) 639 648-649; SC McCaffrey *The law of international watercourses* (2007) 371; P Beaumont 'The 1997 UN Convention on the law of non-navigational uses of international watercourses: Its strengths and weaknesses from a water management perspective and the need for new workable guidelines' (2000) 16 *Water Resources Development* 475 483-484.

right.<sup>95</sup> It thus excluded such uses of water as is necessary to produce food (right to adequate food), religious and cultural practices (the right to take part in cultural life) and environmental hygiene (right to health).

This approach has been chastised for being too restrictive in defining the human right to water as an entitlement merely to water required for personal and domestic uses.<sup>96</sup> Biswas, for instance, argues that the approach to the elaboration of the human right to water should have cast the net wider in a manner that includes within its ambit such entitlements as the right required for environmental needs, agriculture, energy production, industrial and regional development, conservation and tourism.<sup>97</sup>

Apparently this is a result of a misunderstanding of the ramifications of General Comment 15 of the ESCR Committee. The approach of General Comment 15 does not preclude the possibility of claiming the waters needed for other purposes in the context of the realisation of other closely-related rights. For instance, some amount of water could be claimed for the production of food as part of the right to food, or for cultural practices under the right to take part in cultural life. General Comment 15 has the main purpose of identifying that amount of a non-derogable bare minimum amount of water that should always sit at the heart of the human right to water *per se* and the related implementation duties of states. Accordingly, General Comment 15 stated:<sup>98</sup>

Water is required for a range of different purposes, besides personal and domestic uses, to realise many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.

In effect, the water quantity and quality required for the purpose of realising claims other than the human right to water should be analysed in the context of those particular rights. The UN Special Rapporteur on the Right to Food, Jean Ziegler, for instance, has shown in at least two

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95 See ESCR Committee General Comment 15 (n 69 above) para 6.

96 AK Biswas 'Water as a human right in the MENA region: Challenges and opportunities' (2007) 23 *International Journal of Water Resources Development* 209 219-221.

97 Biswas (n 96 above) 219-220.

98 ESCR Committee General Comment 15 (n 69 above) para 6.

of his reports<sup>99</sup> that the water needed for the realisation of the right to food should be analysed separately from the human right to water.<sup>100</sup>

The preferential treatment of water allocation for personal and domestic uses had already been enshrined in the 1997 Watercourses Convention.<sup>101</sup> Under article 10(2) the Watercourses Convention provides that, in the event of conflicts between different uses of water, the conflict 'shall be resolved with special regard being given to the requirements of vital human needs'. The International Law Commission (ILC), the UN body that was responsible for drafting and elaborating the provisions of the Watercourses Convention, explained that the 'vital human needs' proviso is designed to protect and prioritise water needed 'to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation'.<sup>102</sup> Similarly, the International Law Association (ILA), a highly influential body composed of experts in the field of international law, whose earlier works provided a model draft for and influenced the final content of the Watercourses Convention, also stated that 'the vital human needs' phrase under article 10(2) of the Watercourses Convention underscores the need to prioritise water uses for 'natural wants'.<sup>103</sup> It stressed:<sup>104</sup>

Whatever one terms the preferred uses, they include water needed for immediate human consumption such as drinking, cooking and washing, and for other uses necessary for the immediate sustenance of a household, such as watering livestock for household use and keeping a kitchen garden. Any other use, including using water for commercial irrigation, in mining, in manufacturing, to generate power, or for recreation, is not included within the concept of "vital human needs".

It also showed that the preferential treatment of water for vital human needs, otherwise referred to as personal and domestic uses, is in line

99 'Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food, Jean Ziegler' (United Nations General Assembly (A/56/210) 2001) paras 58-71; 'Report Submitted by the Special Rapporteur on the Right to Food, Jean Ziegler, in Accordance with Commission on Human Rights Resolution 2002/25' (United Nations Economic and Social Council (E/CN.4/2003/54, 10 January 2003) 2003) paras 44-51.

100 On the necessity of treating the human right to water differently from the right to food, see NAF Popovic 'In pursuit of environmental human rights: commentary on the Draft Declaration of Principles on Human Rights and the Environment' (1996) 27 *Columbia Human Rights Law Review* 487 526-527.

101 The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses; adopted 21 May 1997, not yet in force. See General Assembly Resolution 51/229, annex, Official Records of the General Assembly, 51st session, Supplement 49 (A/51/49).

102 ILC 'Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and commentaries thereto and resolution on transboundary confined ground water' (1994) 2 *Yearbook of the International Law Commission* 89 110.

103 ILA 'The Berlin (Revised Helsinki) Rules' International Law Association (adopted at the Berlin Conference) 2004 12.

104 As above.



with long-standing state practice. It stated that '[c]ourts and other legal institutions have long recognised a preference in municipal law for "domestic uses" of water relative to competing uses of water, or as the UN Convention, article 10(2), describes it, "vital human needs"'.<sup>105</sup> Thus, the priority attached to water required for personal and domestic use by the ESCR Committee in its General Comment 15 is neither novel nor objectionable. It has already been applied in international water-related conventions, accepted by expert bodies as well as the ILC and domestic tribunals.

## 4.2 Adequacy of water for these selected uses

The minimum core of the right to water required for personal and domestic uses involves access to a quantitative and qualitative minimum. According to the ESCR Committee,<sup>106</sup>

[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

The human right to water therefore implies an entitlement to water of adequate quantity and quality that would satisfy the personal and domestic uses of an individual and groups. According to the ESCR Committee, this can further be broken down into the availability, quality and accessibility aspects of the water resource.

### 4.2.1 Availability

According to the ESCR Committee, the minimum core of the human right to water comprises the availability of a sufficient and continuous supply of water for personal and domestic use.<sup>107</sup> The sufficiency of the available water is gauged in terms of each person's need for uses such as drinking, personal sanitation, the washing of clothes, food preparation and other personal uses. However, General Comment 15 of the ESCR Committee states that the 'quantity of water available for each person should correspond to the World Health Organisation (WHO) guidelines'.<sup>108</sup> General Comment 15, however, accommodates a differential treatment of individuals and groups that may need additional water due to health, climate and work conditions.<sup>109</sup> Apart from a soft

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105 As above.

106 ESCR Committee General Comment 15 (n 69 above) para 2.

107 ESCR Committee General Comment 15 (n 69 above) para 12(a).

108 As above.

109 As above.

guideline, the ESCR Committee has found it unnecessary to lay down fixed *per capita* water availability.<sup>110</sup>

#### 4.2.2 Quality

Stated in the negative, the quality of water must not pose a threat to a person's health. As such, it must be safe from micro-organisms, chemical substances and radiological hazards.<sup>111</sup> According to the ESCR Committee, the water should be of an acceptable colour, odour and taste for each personal and domestic use.<sup>112</sup> The requirement of colour, odour and taste may not be necessary for health purposes, but it has been considered to be consistent with the dignity of the individual beneficiary.<sup>113</sup>

#### 4.2.3 Accessibility

The human right to water entitles everyone to the right to access water and water facilities and services without discrimination. According to the ESCR Committee, the accessibility of water and water facilities and services involves four dimensions.<sup>114</sup> *Physical accessibility* implies the right to have sufficient and clean water and water facilities 'within, or in the immediate vicinity of each household, educational institution and workplace'.<sup>115</sup> *Economic accessibility* ensures the affordability of clean and sufficient water delivery for all.<sup>116</sup> Affordability does not entitle individuals and groups to free water for personal and domestic uses but provides for the right to access the water at a price that everyone can afford. General Comment 15 does not rule out the possibility that the state be required to provide free water for those who could not afford to pay for water for personal and domestic uses. It is the obligation of states to fulfil the individuals' and groups' right to the minimum core of the right to water. According to the CESCR:<sup>117</sup>

State parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal.

The accessibility of water should be in line with the requirements of the right to equality and discriminatory policies and practices are prohibited. This layer of the human right to water has wide-ranging benefits for rural communities, poorer sections of the society and

110 The ESCR Committee stated that '[t]he adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies'. See ESCR Committee General Comment 15 (n 69 above) para 11.

111 ESCR Committee General Comment 15 (n 69 above) para 12(b).

112 As above.

113 Kok & Langford (n 44 above) 191 199.

114 ESCR Committee General Comment 15 (n 69 above) para 12(c).

115 ESCR Committee General Comment 15 (n 69 above) para 12(c)(i).

116 ESCR Committee General Comment 15 (n 69 above) para 12(c)(ii).

117 ESCR Committee General Comment 15 (n 69 above) para 25.

communal and traditional groups. Access to water implies not only the availability of water resources as a physical object, but also individuals' and people's rights to information (information accessibility) related thereto: It incorporates 'the right to seek, receive, and impart information concerning water issues'.<sup>118</sup>

## 5 Conclusion

The human right to water has been a Cinderella of the African Charter's socio-economic rights guarantees. The ambiguity surrounding the legal basis and normative content of the right to water is in part characteristic of the remainder of all the socio-economic rights of the Charter, albeit aggravated in the case of the right to water by the absence of an explicit mention of the right in the regional instrument. Given the object and purpose of the African Charter, which include securing individuals' and groups' rights to the necessities of livelihood, the African Commission can appropriately read the right to water into other rights that are explicitly guaranteed in the African Charter (such as the right to life, dignity, health and a healthy environment) in a way that helps establish a free-standing entitlement which the beneficiaries can claim on its own. This is in line with regional jurisprudence, where the Commission allowed the 'reading-in' of implicit rights to food and shelter into other rights and freedoms of the African Charter. Further legal bases for the declaration of the human right to water come from other regional treaties, including the African Children's Charter, the African Women's Protocol and the Nature Convention. The African Commission's attempt hitherto to ground aspects of the human right to water solely in the *corpus* of the African Charter is too narrow an approach, given the more explicit additional legal guarantees of the right in related regional treaties.

What is more, the African Commission needs to revisit its stance on the right to water, and clearly state that the Charter does indeed protect the right, albeit in implicit terms. The Commission should return to its usual stance of reading in implicit rights in such a way that facilitates the rights' explication. In short, the human right to water in the African human rights system only needs a discovery instead of an invention. The analogous practice of the ESCR Committee where the right to water is not explicit in ICESCR also suggests that the African Commission would be within its right to have recourse to such a purposive approach to treaty interpretation in order to bring out the latent content of the treaty. The sooner the Commission establishes the human right to water as an independent right, and defines its normative content, so much the better, as without it millions of Africans would face what Achebe referred to as 'a kind of slow and weary life which is worse than death'.

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118 ESCR Committee General Comment 15 (n 69 above) para 12(c)(iv).