

Extraordinary rendition and extraterritorial reach of the African human rights system

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Summary: *African states' participation in the United States programme of extraordinary rendition and the creation of a similar approach among African states and other states have raised the question of the extraterritorial scope of the African Charter on Human and Peoples' Rights. The article seeks to address the question of whether the African Charter gives rise to extraterritorial obligations in case of extraordinary rendition. It evaluates the circumstances for extraterritorial application of international human rights law in the context of extraordinary rendition. The African Commission on Human and Peoples' Rights has received and entertained cases on extraterritorial obligations and extraordinary rendition. Thus, the article discusses the scenarios that need to be fulfilled for extraterritorial obligations and responsibilities of states to be called into question in cases of extraordinary rendition. Accordingly, even though the African Charter is devoid of a jurisdictional clause, based on article 60 of the Charter and teleological interpretation, the obligations imposed by African Charter arguably have extraterritorial reach.*

Key words: *Africa; extraordinary rendition; extraterritorial obligation; human rights; non-refoulement*

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1 Introduction

There is no universally-recognised description of or definition for the term 'extraordinary rendition'.¹ As a result, scholars have attempted to define extraordinary rendition based on their objectives, but most give emphasis to the absence of formal definition.² The term was first coined by the Central Intelligence Agency (CIA) to justify the secret extrajudicial arrest, detention and transfer of an individual suspected of 'terrorism' to the custody of another state.³ Originally, it was termed just 'rendition'.⁴ It was carried out on an exceptional basis and sought to bring suspects before a court of law, but it was not conducted in line with extradition laws.⁵

Extraordinary rendition is a relatively new introduction in the discourse of human rights and defined by its informality.⁶ It is a kind of state-sponsored abduction and extrajudicial transfer of a suspect of a crime from one state to another for the purpose of enhanced interrogation, including torture, and mostly conducted by the United States of America (US), by cooperating with other states.⁷ Extraordinary rendition is defined by the European Court of Human Rights (European Court) as 'an extrajudicial transfer of persons from one jurisdiction or state to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture, or cruel, inhuman or degrading treatment'.⁸ It is also referred to as the transfer of terrorist subjects to foreign countries for interrogations that rise to torture outside of normal legal processes in order to gain intelligence for the war on terror.⁹ Satterthwaite also defines extraordinary rendition as 'the transfer of an individual, without the benefit of a legal proceeding in which the

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- 1 See JM Retief 'Foreign aid toward extraordinary rendition: An African perspective' in HJ van der Merwe & G Kemp (eds) *International criminal justice in Africa: Issues, challenges and prospects* (2016) 65; R Chandrasekaran & P Finn 'US: Behind secret transfer of terror suspects' *Washington Post* (Washington) 11 March 2002.
 - 2 Retief (n 1) 65.
 - 3 Retief (n 1) 65-81.
 - 4 E Nadelmann 'The evolution of United States involvement in the international rendition of fugitive criminals' (1993) 25 *New York University Journal of International Law and Policy* 813-885.
 - 5 J Mayer 'Outsourcing torture: The secret history of America's extraordinary rendition programme' *The New Yorker* (New York) 14 February 2005.
 - 6 W Kaleck 'Justice and accountability in Europe: Discussing strategies' in 'CIA-'extraordinary rendition' flights, torture and accountability – A European approach' (2009) *European Centre for Constitutional and Human Rights* 26.
 - 7 M Fisher 'A staggering map of the 54 countries that reportedly participated in the CIA's rendition programme' *Washington Post* (Washington) 5 February 2013 6.
 - 8 *Babar Ahmad & Others v United Kingdom* ECHRt (6 July 2012) 24027/07, 11949/08, 36742/08, 66911/09 and para 113.
 - 9 House of Commons Library 'Standard note on extraordinary rendition' (2006), cited in M Byers & HP Aust 'Complicity and the law of state responsibility' (2012) 23 *European Journal of International Law* 586-589.

individual can challenge the transfer, to a country where s/he is at risk of torture'.¹⁰ Moreover, Bulto defines extraordinary rendition as a handing over of suspects with no legally-established procedure, but he further mentions the garnishing elements of extraordinary rendition such as 'an arrest without warrant, denial of access to a court, lawyers or family, and detentions in inhuman and degrading conditions usually outside the country of citizenship or residence for indefinite periods of time'.¹¹

As outlined above, extraordinary rendition is a term that cannot be defined based on a single unlawful act but, rather, it is a process consisting of multiple and complex series of illegal acts.¹² Therefore, for the purpose of this article, extraordinary rendition is defined as multiple and complex illegal acts made by states, which includes coercive and illegal capturing and transferring of individuals from one state to another state by state agents, or agents acting under the sponsorship of another state. In the process, torture is used as a means of interrogation, but it is performed outside of public scrutiny and oversight of the law. Basically, it is usually conducted without assurances required from the receiving state. Moreover, after the transfer, the detainee is kept in 'black sites', denied access to justice and access to legal assistance, and treated in an inhuman and degrading manner.¹³

Even though the US is an architect of the extraordinary renditions programme, the execution of this programme is eventually dependent upon the active and collaborative involvement of foreign governments.¹⁴ Regarding this, several African states are cooperating with the US to capture, detain, interrogate, abuse and transfer individuals to secret CIA detention centres, and allow the use of their air spaces and airports for purposes of this programme.¹⁵ In addition, some of those states also created their own extraordinary rendition programmes for the same purpose and using the so-called enhanced interrogation techniques to obtain the confessions

10 M Nino 'Extraordinary renditions: The role of European security services in the fight against international terrorism' First World Conference of Penal Law: Penal Law in the 21st Century, Guadalajara, Mexico, 18-23 November 2007 1. See also Open Society for Justice Initiative 'Globalising torture: CIA secret detention and extraordinary rendition' (2013).

11 TS Bulto 'Tortured unity: United States-Africa relations in extraordinary renditions and states' extraterritorial obligations' in L Chenwi and TS Bulto (eds) *Justice beyond borders: Extraterritorial human rights obligations from an African perspective* (2018) 6.

12 See Retief (n 1) 67.

13 As above.

14 ML Satterthwaite 'Rendered meaningless: Extraordinary rendition and the rule of law' (2007) 75 *George Washington Law Review* 1333.

15 Nino (n 10) 6.

of suspects.¹⁶ Accordingly, by a single extraordinary rendition operation, several human rights are subject to violation.¹⁷ As a result, several human rights activists, United Nations (UN) treaty bodies and other organisations have repeatedly condemned extraordinary rendition.¹⁸ Yet, there is support from African states for effective implementation of the extraordinary rendition programme of the US. Several recurring justifications have been given as reasons for African states reverting to extraordinary rendition.¹⁹ However, the US administration cooperates with other states by considering the political and financial imperatives of extraordinary renditions.²⁰

African states' participation in the US led extraordinary rendition programme and the creation of a similar approach among African states have raised the question of the extraterritorial scope²¹ of the African Charter on Human and Peoples' Rights (African Charter).²² Under international and other regional human rights systems, there are controversies on the spatial reach of obligations of states.²³ These controversies originated mainly from the *lacunae* in international human rights instruments.²⁴ Some treaties either failed to include the jurisdictional clause or may not mention the extraterritorial applicability of human rights obligation of states.²⁵ In this regard, similar to some other international human rights instruments, the African Charter is silent on extraterritorial obligation of states.²⁶

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- 16 Muslim Human Rights Forum (MHRF) (2007) Horn of Terror Report of US-Led Mass Extra-Ordinary Renditions from Kenya to Somalia, Ethiopia and Guantanamo Bay presented to the Kenya National Commission on Human Rights.
- 17 D Weissbrodt & A Bergquist 'Extraordinary rendition: A human rights analysis' (2006) 19 *Harvard Human Rights Journal* 123.
- 18 UN Committee against Torture and the Human Rights Committee (HRC) (2009).
- 19 BE Whitaker 'Compliance among weak states: Africa and the counter-terrorism regime' (2010) 36 *Review of International Studies* 639-645.
- 20 Several justifications forwarded for extraordinary rendition and its secrecy; Whitaker (n 19) 680.
- 21 Bulto (n 11) 18.
- 22 The African Charter on Human and Peoples' Rights adopted in Nairobi 27 June 1981 and entered into force 21 October 1986.
- 23 For academic debate on this issue, see K da Costa *The extraterritorial application of selected human rights treaties* (2012); M Gibney & S Skogly *Universal human rights and extraterritorial obligations* (2010); M Gondek *The reach of human rights in a globalising world: Extraterritorial application of human rights treaties* (2009); M Milanovic *Extraterritorial application of human rights treaties: Law, principles, and policy* (2011).
- 24 R Wilde 'Legal "black hole"? Extraterritorial state action and international treaty on civil and political rights' (2005) 26 *Michigan Journal of International Law* 739-806.
- 25 Art 2(1) International Covenant on Economic, Social and Cultural Rights (ICESCR); art 1 European Convention on Human Rights 1950 (ECHR); art 2(1) Convention on the Rights of the Child (CRC); art 1(1) American Convention on Human Rights (ACHR).
- 26 The African Charter does not contain a general provision limiting the scope of obligations either *ratione personae* or *ratione loci*.

Accordingly, this article examines the extraterritorial obligations of states and extraordinary rendition under the African human rights system. In particular, the article addresses the question of whether the African Charter applies extraterritorially and, if so, on what basis and in which circumstances it can be applicable to extraordinary rendition under the African human rights system. The first part of the article is an introduction. The second part highlights the practice and patterns of extraordinary rendition in Africa. The third part of the article mainly concerns the content of extraordinary rendition and extraterritorial obligation in general. The fourth part scrutinises extraterritorial obligations of states under the African human rights system in cases of extraordinary rendition. The final part of the article is dedicated to concluding remarks.

2 The practice and patterns of extraordinary rendition in Africa

It is true that European states were working together with the US extraordinary rendition programme.²⁷ However, due to the active and collaborative investigation and decisions of the Council of Europe and the European Court, European countries are becoming legally accountable for their involvement in the US extraordinary renditions programme.²⁸ Yet, without the European states willing to aid and abet the policy of extraordinary rendition, the US administration would be forced to turn to African states willing and looking for their political and financial advantages to become hosts for secret prisons and be partners in the abduction, transport and abuse of suspected terrorists.

Credible reports indicate that more than a dozen African states are highly engaged in extraordinary rendition.²⁹ For instance, over the last 20 years, more than 100 terror suspects are thought to have been arrested in Somalia and Kenya and transferred to Ethiopia to face enhanced interrogation³⁰ at the central prison or *Maekelawi*.³¹ *Maekelawi* is one of the most notorious police detention centres for mostly high political and terrorism detainees in Ethiopia. One writer named it 'Mini Guantanamo Bay'. However, reports indicated that the practice of extraordinary rendition does not exist in a distant past

27 M Hakim 'The Council of Europe addresses CIA Rendition and Detention Program' (2007) 101 *American Journal of International Law* 442-452.

28 As above.

29 Open Society for Justice Initiative (n 10).

30 Spiegel International 'Extraordinary renditions in Africa: US interrogates terror suspects in Ethiopian jails' 11 June 2007.

31 See Bulto (n 11).

since violations continue to be experienced to the present.³² One of the 'black sites' for the extraordinary rendition programme of the US in Africa is found in Lemonier, Djibouti, which is operational to this day.³³ Egypt³⁴ and Morocco³⁵ appear to be the most frequently-used receiving countries.³⁶ Algeria also allowed its air space and airports for US extraordinary rendition flights.³⁷ Not only these countries, but also countries such as Libya,³⁸ Malawi,³⁹ South Africa,⁴⁰ Mauritania,⁴¹ The Gambia,⁴² and Zimbabwe⁴³ are involved in US extraordinary renditions. As stated above, extraordinary rendition in Africa is not only contingent on the US, but there are African states that have created their own rendition programmes. For instance, the East African governments have been transferring terrorist suspects without any extradition laws.⁴⁴

As Bulto identified, extraordinary renditions in Africa have existed with multiple states and in a variety of patterns.⁴⁵ As noted above, extraordinary rendition as a programme is highly supported by the US. As a result, most of the extraordinary rendition cases are linked with the CIA. For instance, Ahmed Agiza and Mohammed Alzery (El Zari) are Egyptian citizens transferred from Sweden to CIA operatives, then to Egypt where they were tortured. This pattern of extraordinary rendition illustrates the rendition of citizens of African states by the US agent from a European state to their country of citizenship, Egypt. The extraordinary rendition process of Mohammed Abdullah Saleh AlAsad contains another version of extraordinary rendition pattern in Africa. He is a non-African, Yemeni citizen, but rendered by an African state, Tanzania, to the US agent. In other words, there is a rendition of non-Africans by an African state to the CIA.⁴⁶ Furthermore, reports

32 UN Experts 'Ugly chapter of unrelenting human rights violations' (10 January 2022).

33 M Fisher 'A staggering map of the 54 countries that reportedly participated in the CIA's rendition programme' *Washington Post* (Washington) 5 February 2013 1; see also F Hajdarmataj 'Review of America's covert war in East Africa: Surveillance, rendition, assassination' (2020) 22 *Insight Turkey* 271-273.

34 Open Society for Justice Initiative (n 10) 19.

35 E Ben Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Geneva 2013.

36 Association of the Bar of the City of New York and Centre for Human Rights and Global Justice *Torture by proxy: International and domestic law applicable to 'extraordinary renditions'* (2004) 1-123.

37 Fisher (n 7).

38 HRW Report (2013).

39 See Open Society for Justice Initiative (n 10) 95.

40 Open Society for Justice Initiative (n 10) 107.

41 Open Society for Justice Initiative (n 10) 96.

42 Open Society for Justice Initiative (n 10) 77.

43 Open Society for Justice Initiative (n 10) 118.

44 MHRF (n 16) 7.

45 Bulto (n 11) 8.

46 *Mohammed Abdullah Saleh Al-Asad v Djibouti* Communication 383/10, African Commission on Human and Peoples' Rights 28 (2014) paras 176-177.

indicate instances of rendition of Africans by a third African state to the CIA. For instance, Kenya, an African state, rendered the citizens of Somalia and of Eritrean into the hands of the US agency.⁴⁷

African states have taken lessons from US extraordinary rendition programme. As a result, like the US programme, but without the involvement of the US, African states, in collaboration with African and non-African states, also create distinct patterns of extraordinary rendition programmes. For instance, an Ethiopian shepherd, Ishmael Noor, without having any justified ground of suspicion for his involvement in the Ethiopian rebel group Ogaden National Liberation Front (ONLF) and Islamic Courts Union, was rendered from Kenya to a detention facility in Somalia and then rendered to Ethiopia. In his incommunicado detention at Ethiopian 'local mini-Guantanamo Bay', he endured several human rights violations, including torture. However, no human rights group, no journalist, no family member or government ever came – or, rather, was allowed – to visit him.⁴⁸ According to the Human Rights Watch (HRW) report, there also is another pattern of extraordinary rendition, which is a rendition of Kenyans by Kenya to Ethiopia and Somalia.⁴⁹ This shows the possibilities of the rendition of Africans by an African state of citizenship into the hands of a third African state. The same report also indicates the rendition of Africans, Ethiopian citizens, by another African state, Somalia, to an African state of citizenship, Ethiopia.⁵⁰ In addition, the African states are also participating in the rendition process in collaboration with non-African states. For instance, Andargachew Tsige is a British national who was captured in Yemen by the joint operation of Ethiopian and Yemeni authorities and was transferred to Ethiopia without any involvement of the US.⁵¹ Similarly, Abdella Ocalan, a Turkish national, who was abducted or detained in Kenya by the joint operation of Kenyan and Turkish agents, was transferred to Turkey.

As discussed above, extraordinary rendition has evolved in the past two decades to encompass more complex and multifaceted *modi operandi*. It is a legacy that does not exist in a distant past, but is also currently practised in Africa as well as in other parts of the world. However, international human rights instruments are

47 MHRF (n 16) 7.

48 HRW "'Why am I still here?' The 2007 Horn of Africa renditions and the fate of those still missing' (HRW 2008) 4, <https://www.hrw.org/reports/2008/estafrica1008/estafrica1008web.pdf> (accessed 6 April 2021).

49 HRW (n 48) 2-4.

50 As above.

51 A Tsige 'Ethiopian brutality, British apathy' 30 March 2015, <https://www.opendemocracy.net/opensecurity/graham-peeble/andargachew-tsige-ethiopian-brutality-british-apathy> (accessed 8 July 2021).

not specifically dealing with the issue. Yet, the garnishing elements of extraordinary renditions are included in the major international human rights instruments. Therefore, the following part evaluates the elements of extraordinary rendition in light of international human rights instruments.

3 The extraordinary rendition and extraterritorial human rights obligation of states in general

There are at least three obligations of states, namely, the obligations to respect, protect and fulfil.⁵² However, the question is: Can these human rights obligations of states be applied in extraterritorial contexts, and specifically for extraordinary rendition? Conventionally, the obligation of a state is restricted to the territory of the state and the extraterritorial obligation of a state remains controversial.⁵³ Recently, there has been increased recognition by treaty bodies that these obligations apply extraterritorially, but the controversy remains with the obligation to fulfil. The term 'extraterritorial obligation' in international human rights law is used to describe obligations related to the 'acts and omissions of a state, within or beyond its territory, that have effects on the enjoyment of human rights outside of state's territory'.⁵⁴ Although some international human rights instruments do not contain jurisdictional clauses, there are instruments that contain the clause specifying the jurisdictional application of the human rights treaty.⁵⁵

The meaning of the term 'jurisdiction' in the case of human rights is not limited to national territory, and this can be understood from the subsequent discussion. In distinguishing territory from jurisdiction, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights has brought clarification.⁵⁶ Similarly, the Inter-American Commission on Human Rights (Inter-American Commission) has clearly stated that the term 'jurisdiction' in the sense of article 1(1) of the American Convention is

52 H Shue *Basic rights* (1996). See also UN High Commissioner for Human Rights Guiding Principles for Implementation of the 'Respect, Protect, Remedy' Framework, 2011 (accessed 4 March 2021).

53 See C Anyangwe 'Obligations of state parties to the ACHPR' (1998) 10 *African Journal of International and Comparative Law* 625.

54 UN Human Rights Council 'Elaboration of an international legally-binding instrument on transnational corporations and other business enterprises with respect to human rights' UN Doc A/HRC/26/L.22/Rev.1, 25 June 2014.

55 Eg, see art 1(1) IACHR; art 1 European Convention on Human Rights.

56 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights ETO Consortium. See also Gibney & Skogly (n 23).

not limited to or merely dependent on the national territory.⁵⁷ Rather, a state party to the American Convention can be held responsible under certain circumstances for the acts and omissions of its agents that produce effects or are undertaken extraterritorially.⁵⁸ The same understanding can be inferred from the decisions of the European Court⁵⁹ and the Human Rights Committee (HRC).⁶⁰ There are ways to determine whether the elements of a violation of human rights carried outside the territory of the state or by agents of the state are tantamount to an exercise of 'jurisdiction'. Emerging jurisprudence indicates that states are under an obligation to secure the human rights and freedoms of all individuals under their actual authority and responsibility.⁶¹ Therefore, based on case law of international human rights monitoring and quasijudicial bodies, the state or the state agent that exercises jurisdiction abroad has an obligation to protect and promote the human rights of individuals,⁶² and those three levels of human rights obligations apply *mutatis mutandis* in certain extraterritorial contexts.

Extraordinary rendition is an extraterritorial transfer of suspects and has several garnishing elements, because it is a process by which a state or its agent seizes a person assumed to be involved in terrorist activity and then transports them for interrogation to a state where due process of law is unlikely to be respected.⁶³ Therefore, it was designed to put detainees beyond any kind of legal oversight, premised on the view that the relevant government was not bound by applicable international human rights law when acting outside its own territory.⁶⁴ This would contravene the basic features of human rights since international human rights law is principally informed by the features of universality, integrity and equality. These characteristics generate the principle that wherever an agent can guarantee equal treatment in an area of human existence covered by a recognised international human right is justifiably allocated the burdens of the corresponding obligations. This is because this

57 *Saldan v Argentina* IACmHR 11 March 1999 Report 38/99 para 17; *Coard & Others v United States* IACmHR 29 September 1999 Report 109/99 para 37.

58 *Saldan* (n 57) para 37.

59 *Drozd and Janousek v France and Spain* EHRC 26 June 1992 App 12747/8 91.

60 General Comment 31 Nature of the general legal obligation imposed on state parties to the Covenant, UNHR Committee (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

61 General Comment 31 (n 60) para 3.

62 *Cyprus v Turkey* 4 586 para 8.

63 Extraordinary Rendition *Dictionary*, <http://dictionary.reference.com/browse/extraordinary+rendition> (accessed 12 July 2022).

64 See United Nations Human Rights Council 13th session, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, UN Doc A/HRC/13/42 (20 May 2010) para 40.

position best describes the power that human rights are meant to channel and constrain.⁶⁵

Though conventionally the principle for a state's human rights obligation is territorial,⁶⁶ the jurisprudence of both international and regional human rights monitoring bodies clearly shows the existence of 'exceptional scenarios' called spatial and personal controls.⁶⁷ It is true that the jurisprudence, standard setting and findings of the UN and regional systems provide useful insights into the development of the African human rights system. Article 60 of the African Charter mandates the African Commission on Human and Peoples' Rights (African Commission) to take inspiration from international and regional human rights systems. Therefore, the jurisprudence of international and regional systems concerning extraterritorial human rights obligations of states can be an important inspirational source for the African human rights system. As many of the human rights contained in the African Charter reflect rights contained in the UN and other regional human rights instruments, there is a degree of cross-pollination in interpreting the African Charter so that, for example, International Court of Justice (ICJ), Inter-American Court and European Court judgments that expand the principles in the spatial reach of human rights may be used as tools for interpreting the parallel extraterritorial human rights obligation of states in the African Charter. The international and regional human rights systems possibly justify the human rights obligation of states beyond territories. Pursuant to the inspirational clause and the exceptional standard set by international and regional systems, an African state has been held responsible primarily for human rights violations beyond its territory. Therefore, the following part analyses the exceptional scenarios in the context of extraordinary rendition.

3.1 Extraordinary rendition and spatial control

One of the scenarios for extraterritorial human rights obligation of states is when a state's conduct is performed outside its national territory and occurs in an area over which it exercises its authority and control.⁶⁸ Under this scenario, there are several cases and circumstances

65 L Raible 'Justifying extraterritorial human rights obligations and climate change as a counterexample' (2023) *Blog of the European Journal of International Law*.

66 W Vandenhoe 'Obligations and responsibility in a plural and diverse duty-bearer human rights regime' in W Vandenhoe (ed) *Challenging territoriality in human rights law: Building Blocks for a plural and diverse duty-bearer* (2015) 115.

67 M Salomon *Global responsibility for human rights: World poverty and the development of international law* (2007) 190.

68 For detail, see R Wilde 'Triggering state obligations extraterritorially: The spatial test in certain human rights treaties' (2007) 40 *Israel Law Review* 503.

that demonstrate extraterritorial obligations of states.⁶⁹ For instance, the ICJ in its Advisory Opinion on the Palestinian Wall observed that 'Israel as the occupying power had exercised its territorial jurisdiction over the occupied Palestinian territories'.⁷⁰ As to the ICJ explanation, international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.⁷¹ The Court affirmed this decision in *Congo v Uganda* where it held that international human rights instruments are applicable 'in respect of acts done by a state in the exercise of its jurisdiction outside its own territory', particularly in occupied territories.⁷²

Similarly, the European Court has also established the application of human rights treaties where states act outside their respective territories. For example, the Court asserted that areas of Northern Cyprus occupied by Turkey incurred Turkey's responsibility in upholding the human rights of local citizens.⁷³ Such occupation, or effective control, is established when the occupying power 'exercises all or some of the public powers normally to be exercised by the occupied government'.⁷⁴ Thus, these cases only apply to the situation where a government has established control of territory such that it has the responsibility to uphold the customary norm of *non-refoulement* when acting outside its territory. Furthermore, in *Abdella Ocalan v Turkey*⁷⁵ and *Issa v Turkey*⁷⁶ the Court stated that temporary effective overall control of only a particular area in question was sufficient to bring individuals present in that area within the jurisdiction of the controlling state.⁷⁷ Under the African human rights system, there are cases that show the spatial control as a model for expanding state obligation beyond its territory. The *DRC* case is the first instance in which the African Commission recognised extraterritorial obligations, thereby affirming the spatial model. As discussed in part 4.2, the *Al-Asad* case was also the important instance that further affirmed the African Commission's recognition of extraterritorial obligations when states are in effective control over parts of a territory.

69 *Loizidou v Turkey* ECtHR 18 December 1996 (1996) sec A para 62. See also *Democratic Republic of the Congo v Uganda* ICJ 116 Armed Activities on the Territory of the Congo ICJ (19 December 2015) (2015) Judgment para 173.

70 See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ (9 July 2004) (2004) Advisory Opinion para 136.

71 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 70) 180.

72 *DRC v Uganda* (n 69).

73 *Loizidou* (n 69).

74 *Hussein v 21 States* ECtHR 14 March 2006 (Court Decision on Admissibility).

75 *O'calan v Turkey* ECtHR 12 May 2005 Court Decision 44.

76 *Issa & Others v Turkey* ECtHR 16 November 2004 Judgment 48.

77 *Issa* (n 76) 74. See also *Bankovic & Others v Belgium & Others* ECtHR 19 December 2001 (2001) 35-35.

3.2 Extraordinary rendition and personal control

In case of personal control, without exercising sufficient control over a space, a state or state agents may perform temporary operations in the territory of another state and exercise control over an individual. The European Commission on Human Rights (European Commission) and the HRC established personal control on different bases. As to the European Commission, the personal control derived from the authority and control exercised by states over individuals.⁷⁸ The HRC, by reiterating General Comment 31, established extraterritorial obligation of states based on the universality of human rights. Particularly, in interpreting article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) the HRC stated that, like the state obligation for the act of its agent within its own territory, the state has an obligation for the acts of its agent in the territory of another state.⁷⁹

The international human rights bodies on several occasions accepted and reaffirmed the theory on effective control. For instance, in *Cyprus v Turkey* the European Court clearly accepted the extraterritorial application of human rights in cases where state agents exercised authority and control over individuals.⁸⁰ Similarly, *Lopez v Uruguay* stated that states are responsible for infringements committed by their foreign diplomatic representatives.⁸¹ Moreover, in General Comment 31 the HRC has also stated that a state must provide for the Covenant's rights to anyone within its power or effective control, even if that person is not 'within its respective national borders and regardless of the circumstance in which such power or effective control was obtained'.⁸² Similarly, the European Court stated that 'the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad'.⁸³ Moreover, under the Inter-American human rights system, the Inter-American Court has stated that, if there is an exercise of control over individuals, it may be sufficient to find that a matter is within a state's jurisdiction, whether

78 S Besson 'The extraterritoriality of the European Convention on Human Rights: Why human rights depend on jurisdiction and what jurisdiction amounts to' (2012) 25 *Leiden Journal of International Law* 857-884.

79 See *Lopez Burgos v Uruguay* (HRC) paras 12.1-12.3; *Lopez Burgos v Uruguay* Communication 52/1979, UNHR Committee 29 July 1981 UN Doc CCPR/C/13/D/52/1979 See General Comment 31 (n 60) See also *Loizidou* (n 69).

80 M Scheinin 'Extraterritorial effect of the International Covenant on Civil and Political Rights' in F Coomans & M Kamminga (eds) *Extraterritorial application of human rights treaties* (2004) 73.

81 *Lopez Burgos* (n 79) para 156.

82 General Comment 31 (n 60).

83 *Cyprus v Turkey* (n 62) para 8.

or not there is effective control of the territory in question.⁸⁴ In the African human rights system, the African Commission in *Al-Asad* endorsed the personal model and assumes obligations beyond territorial jurisdiction such as where the state exercises control or authority over an individual. The personal model is very relevant for invoking the applicability of human rights norms to situations where state agents detain and extraordinarily render individuals from one state to another state and interrogate them in the custody of another state, whatever the degree of that state's operations in the foreign territory.⁸⁵

3.3 Extraordinary rendition and *non-refoulement*

One distinct class of scenario for obligation beyond state territory is *non-refoulement*, which involves acts committed within the territory of the state that has extraterritorial human rights implications on another state. Basically, the principle of *non-refoulement* originates from article 33 of the Convention Relating to the Status of Refugees.⁸⁶ However, it is clearly included in other international human rights instruments, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and in the subsequent part particular emphasis is placed on the African human rights system.⁸⁷ While the violation of the *non-refoulement* principle is a territorial violation of a person's rights, the violation of the rights in the receiving state, to the extent it was foreseeable before their extradition, entails the extraterritorial responsibility of the extraditing state for facilitating such violations in spaces beyond its own.⁸⁸

In case of extraordinary rendition, participant states are violating their international obligations by handing a person over to another state where there are reasonable grounds to believe that there is a 'well-founded fear' that they will suffer a violation of their human rights in the receiving state.⁸⁹ There is no doubt that the actual breach of

84 D Cassel 'Extraterritorial application of Inter-American human rights instruments' in Coomans & Kamminga (n 80) 23.

85 D van Natta & S Mekhennet 'German's claim of kidnapping brings investigation of US link' *New York Times* (New York) 9 January 2005.

86 The Convention Relating to the Status of Refugees, Geneva, 28 July 1951, UNTS Vol 189.

87 Art 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

88 Bulto (n 11) 21.

89 See *Soering v United Kingdom* Series ECtHR 7 July 1989 88-91. See in general G Gilbert *Aspects of extradition law* (1991); C van den Wyngaert 'Applying the European Convention of Human Rights to extradition: Opening Pandora's box?' (1990) 39 *International and Comparative Law Quarterly* 39; CJR Dugard & C van den Wyngaert 'Reconciling extradition with human rights' (1998) 92 *American*

human rights occurred outside the territory of the state and under the jurisdiction of another state. However, without showing a sufficient degree of control either over an area as a whole or over particular individuals, based on the principle of *non-refoulement*, a state may be considered responsible for a breach of its human rights obligations.⁹⁰ As the European Court clearly stated, '[a] state's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction'.⁹¹ Similarly, by creating a relation between the principle of *non-refoulement* and article 2(1) of ICCPR, the HRC has argued in favour of the above assertion.⁹² The Committee also in its General Comment stated that article 2 of ICCPR provides an obligation on state parties to respect and to ensure that human rights are recognised for all persons in their territory and all persons under their control.⁹³ Therefore, such obligation contains an obligation not to extradite, deport, expel or otherwise remove a person from their territory, if there are substantial grounds for believing that there is a real risk of irreparable harm, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

In the rendering of individuals from one state to another state, states have resorted to the practice of diplomatic assurances for the purpose of excluding extraterritorial responsibilities.⁹⁴ However, there are cases that clearly show the ineffectiveness and unreliable nature of such assurances.⁹⁵ The other argument concerning extraordinary rendition and *non-refoulement* is related to its extraterritorial nature. For instance, in a report to the CAT Committee the US argued that the *non-refoulement* obligation did not extend to a person detained outside its territory, such as in Guantánamo Bay.⁹⁶ However, the Committee responded that the protection provided under article 3 of CAT extends to all territories under the effective control of the state party's authority and the 'rendition' of individuals from Guantánamo Bay to Egypt, Jordan, or any other state is a violation

Journal of International Law 187; S Borelli 'The rendition of terrorist suspects to the United States: Human rights and the limits of international co-operation' in A Bianchi (ed) *Enforcing international law norms against international terrorism* (2004) 334.

90 Gibney & Skogly (n 23).

91 *Ilascu & Others v Moldova and Russia* ECtHR 8 July 2004 (2004) 317 (citing *Soering v United Kingdom* Series A, No 161; *Ilascu & Others v Moldova and Russia* paras 88-91).

92 *Kindler v Canada* Communication 470/1991 para 6.2.

93 General Comment 31 (n 60) para 67.

94 Satterthwaite (n 14) 219.

95 Satterthwaite (n 14) 19.

96 Second periodic report of US to CAT Committee.

to article 3 of CAT or the prohibition on *refoulement*.⁹⁷ Therefore, by taking into consideration the ultimate objective of article 3 of CAT, the phrase 'another state' in fact needs to be interpreted as 'another jurisdiction'.

There are substantial grounds for believing that there is a real risk of irreparable harm in the case of extraordinary rendition or extraterritorial transfer of suspects. Even if the actual breach of human rights occurred in case of the extraordinary rendition being under the jurisdiction of another state, a transferee state shall be considered responsible for a breach of its human rights obligations. Therefore, by taking the logic of *non-refoulement*, one can argue that states are prohibited from transferring individuals from their territory to any other part of the world for the purpose of extraordinary detention.

4 Extraordinary rendition and extraterritorial reach of the African human rights system

This part examines extraordinary rendition and extraterritorial obligations of states under the African human rights system. Accordingly, it examines the substantive provision of the African Charter and the practice of the enforcement bodies, including the African Commission and the African Court on Human and Peoples' Rights (African Court) if they are seized with an issue related to extraterritorial obligations. It also examines extraordinary rendition and the territorial scope of the African Charter.

4.1 Extraordinary rendition and the substantive provisions of the African Charter

The African Charter is the main African human rights instrument setting out the rights and duties relating to human and peoples' rights in the African Union (AU) member states. Extraordinary rendition is a clandestine, multiple and complex illegal act committed by states. It includes coercive and illegal capturing and transferring of 'suspected terrorists' from one state to another state, by state agents, or agents acting under the sponsorship of another state. Largely extraordinary rendition violates several provisions of the African Charter.

Extraordinary rendition arises from coordinated actions involving two or more states, often aimed at interrogating detainees.

⁹⁷ CAT Committee General Comment 4 (2017) on the implementation of art 3 of the Convention in the context of art 22, 4 September 2018.

Unfortunately, in many cases the detainee becomes a victim of torture. While the African Charter does not explicitly mention 'extraordinary rendition', it does recognise the right to physical and mental integrity under article 5. This prohibition extends to cruel, inhuman or degrading treatment or punishment. Furthermore, articles 4 and 6 of the Charter safeguard an individual's right to life, liberty and security. The African Charter emphasises the humane and dignified treatment of all detained persons. Any torture or cruel treatment following transfer violates the African Charter, and the process of abduction and transfer undermines a detainee's inherent human dignity.

Extraordinary rendition also runs afoul of states' obligations related to non-expulsion, *non-refoulement* and extradition. For instance, according to articles 12(2) and (3) of the African Charter, the expulsion of a non-citizen lawfully present within the territory of a state party is strictly prohibited. In exceptional cases where expulsion occurs, it must be carried out in accordance with established laws. Procedural protections become particularly relevant and appropriate when human rights violations are at stake.⁹⁸ However, in defiance of this stipulation, extraordinary rendition is carried out without due regard for laws that provide effective diplomatic assurances and thorough review. The principle of *non-refoulement* serves as an extension of the norm prohibiting torture, and some argue that it holds a status akin to that of *jus cogens* – a peremptory norm of international law.⁹⁹

Access to justice is one of the fundamental human rights recognised under article 7 of the African Charter, but extraordinary rendition denies individuals the right to access recognised judicial procedures for extradition.¹⁰⁰ This is because extraordinary rendition is an illegal transfer of a suspect, including arrest without warrant, the denial of judicial guarantee, lawyers, and detentions for indefinite periods of time. Therefore, such acts of states are a clear violation of the African Charter, which unambiguously provides individuals access to judicial and legal guarantees. Therefore, it implicitly violates individual rights to equality as recognised under article 3 of the Charter, particularly 'equality before the courts and tribunals'. It also violates the right to be recognised as a person as recognised under the African Charter. In cases of extraordinary rendition, the detainees are also denied access

98 HRC General Comment 20.

99 See Office of the United Nations High Commissioner for Human Rights (OHCHR) (2011) Interpretation of Torture in the Light of the Practice of Jurisprudence of International Bodies.

100 Eg, see, arts 8(1) & 8(2) of the American Convention on Human Rights; arts 9, 10, 14 & 15 ICCPR and art 6(1) ECHR.

to counsel. In addition, the interrogation is conducted in a coercive manner, and violates the protection against coercive testimony or confession of guilt. Even though there were persons wrongly detained and tortured by several states related to extraordinary rendition, it was difficult to get an effective remedy for those victims.

One of the human rights violations related to extraordinary rendition is enforced disappearance. Enforced disappearances have terrible and long-lasting impacts, both physical and psychological, for those who disappeared, as well as their relatives, friends and communities. In this regard, the Guidelines on the Protection of All Persons from Enforced Disappearances in Africa were adopted by the African Commission during its seventy-first ordinary session held virtually from 21 April to 13 May 2022. The Guidelines are developed pursuant to article 45(1)(b) of the African Charter, which mandates the African Commission to formulate standards, principles and rules upon which African governments can base their legislation. It also adds to the standards developed by the African Commission through its jurisprudence and commentary, including the Guidelines on Human and Peoples' Rights while Countering Terrorism; the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines); General Comment 3 on the Right to Life; and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Fair Trial Principles). Therefore, acts of extraordinary rendition will fall within the ambit of these guidelines.

Extraordinary rendition is also indirectly associated with other civil and political rights, such as the rights to freedom of religion, thought, opinion, expression and movement. Even though extraordinary rendition by its nature is highly implicated with civil and political rights of individuals, it also has its own impact on individuals' socio-economic and cultural rights recognised under the African Charter. When government agents abduct and transport a person to another country to face torture and other forms of cruel, inhuman or degrading treatment, that government violates the person's economic, social and cultural rights. For instance, extraordinary rendition violates individual rights, including the right to found or maintain a family, as well as rights to health, food, water, and so forth, as they recognised under the African Charter.

4.2 Territorial scope of the African human rights system in cases of extraordinary rendition

As pointed out in the preceding parts, international and regional human rights monitoring bodies exceptionally extend the states' human rights obligations beyond borders. However, under the African human rights system, not much has been discussed about extraterritorial human rights obligations.¹⁰¹ The African Charter contains a general obligation clause,¹⁰² but it does not contain an explicit jurisdictional clause that limits or extends state parties' spatial obligations.¹⁰³ In relation to this, there are controversies about whether the lack of an explicit provision renders the African Charter always applicable to African states anywhere on the globe, or whether some sort of spatial test for applicability should be read into these and, if so, what constitutes the limits of that test. Based on article 60 of the African Charter, the African Commission is mandated to draw inspiration from international and regional human rights systems to extend the applicability of the African Charter in case of extraterritorial transfer of individuals, and to provide remedies for victims of extraordinary rendition.¹⁰⁴ In relation to this, the African Commission initially viewed that, due to the sovereignty of states, the African Charter applies principally within the territorial jurisdiction of states.¹⁰⁵ However, based on spatial and personal models of jurisdiction, a state assumes obligations beyond its territorial jurisdiction. Similarly, CAT has developed an interpretation of 'territory under its jurisdiction' which includes effective control over an individual as well as over territory.¹⁰⁶ Therefore, in the following part the African Charter and its jurisprudence, with respect to the need for extraterritorial obligation of states in case of extraordinary rendition, will be analysed.

As noted above, even though it is not a unique feature, the African Charter does not expressly limit its territorial and/or jurisdictional application (*ratione loci*). Scholars have different views on the exclusion and inclusion of extraterritorial human rights obligation

101 TS Bulto 'Patching the "legal black hole": The extraterritorial reach of states' human rights duties in the African human rights system' (2011) 27 *South African Journal on Human Rights* 249.

102 Art 1 African Charter.

103 As above.

104 A Buyse *Lost and regained? Restitution as a remedy for human rights violations in the context of international law* (2008) 68.

105 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004).

106 CAT Committee Conclusions and Recommendations UN Doc.CAT/C/USA/CO/2 25 July 2006 para 15.

under the African Charter.¹⁰⁷ The article strongly argues that the African Charter's silence on extraterritorial obligations of states is not an exclusion of extraterritorial obligations of the Charter. Even if there is no concept referring territory or jurisdiction under article 1 of the African Charter, from the wording of article 1 there is no intent that precludes the extraterritorial applicability of the African Charter. Similarly, the International Law Commission (ILC) has avowed that 'the acts or omissions of organs of the state are attributable to the state as a possible source of responsibility regardless of whether they have been perpetrated in national or in foreign territory'.¹⁰⁸ Consequently, in relation to extraordinary rendition, there is no explicit rejection for creating an extraterritorial obligation for the attendant African states. The African Commission also follows the same logic and, on several occasions, HAS stated that article 1 of the African Charter does not expressly limit the application of the Charter within the territory and jurisdiction of state parties.¹⁰⁹

In addition, the African Charter under its substantive provisions, specifically under chapter II, provides for substantive extraterritorial human rights guarantees that have the effect of extending a state's obligation beyond its territory.¹¹⁰ For instance, article 12(2) of the Charter provides that individuals have the right to return to their country of origin. In such a case, logical interpretation can be used to include extraordinary rendition under the ambit of this provision. Even if African Charter is silent regarding violations related to the extraterritorial transfer of individuals, it can be completed by logical reasoning using analogy. Since the person's right to return to his country of origin is provided to the individuals who are in the custody of another state, it is the duty of the state to allow the same to return home, and this also applies extraterritorially. In addition, there are other substantive provisions that have extraterritorial implications, including 'the right to national and international peace and security' and 'equality and the prohibition of discrimination'. Even though it is argumentative, the presence of these provisions illustrates the intention of the drafter to extend the obligation of states beyond territory.¹¹¹

107 F Ouguerkouz *The ACHPR: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 554; F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* 61. See the detail in Bulto (n 101).

108 International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 (Draft Articles on Responsibility of States) art 1.

109 *Mohammed Abdullah Saleh Al-Asad vs Djibouti* (n 46) para 134.

110 Bulto (n 101) 258.

111 Bulto (n 101) 260.

Unfortunately, neither the African Court nor the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has addressed extraterritorial obligations and extraordinary renditions. The planned merger with the Court of Justice could provide more opportunities for the African Court to develop its jurisprudence on these matters, as it will have jurisdiction over transboundary crimes such as trafficking, terrorism and money laundering.¹¹² The African Children's Committee, through its General Comment, has provided authoritative interpretations that emphasise states' extraterritorial positive obligations under international humanitarian law. These obligations encompass a broad range of rights, including civil, political, economic and social rights.¹¹³ This means that states must ensure that these rights are respected and protected, even beyond their own borders.

Likewise, the African Commission adopted authoritative interpretations: General Comment on the right to life (General Comment 3) and General Comment on the prohibition of torture (General Comment 4) under the African Charter.¹¹⁴ These General Comments expressly outline the extraterritorial scope of application of the right to life and the prohibition on torture respectively.¹¹⁵ Even though the African Charter does not explicitly guarantee the prohibition of *refoulement*, based on the aforementioned General Comments, violating human rights within a state's territory or by a state's agents in a third state or rendition to torture brings the victim under a state's jurisdiction and engages the state's responsibility.¹¹⁶ The Commission also clearly stated that states 'should not violate the principle of *non-refoulement*, through extradition or other mechanisms, by transferring or returning individuals to circumstances where their lives might be endangered'. Similarly, article 2(3) of the Convention Governing the Specific Aspects of Refugee Problems in Africa also specifies that states may not subject individuals to measures, including return or expulsion, which would compel them to return to or remain in a territory where their life, physical integrity

112 A Oloo & W Vandenhole 'Enforcement of extraterritorial human rights obligations in the African human rights system' in M Gibney and others (eds) *The Routledge handbook on extraterritorial human rights obligations* (2022) 11-30.

113 General Comment on Article 22 African Children's Committee Children in Situations of Conflict (19 July 2021).

114 General Comment 3 on the African Charter: The Right to Life (art 4), adopted during its 57th ordinary session, held in Banjul, The Gambia, in November 2015 para 40; General Comment 4 on the African Charter: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art 5).

115 General Comment 3 (n 114) para 18.

116 General Comment 3 (n 114) para 14.

or liberty would be threatened.¹¹⁷ Moreover, the Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism and its subsequent subordinate instruments also accepted the same understanding and reaffirm the extraterritorial obligation of states under the African Charter.¹¹⁸ *Non-refoulement* not only prohibits African states from surrendering individuals under their jurisdiction to states where there is a substantial risk that they will be subjected to violations of their fundamental rights, but also prohibits their surrender to countries that are likely, in turn, to surrender them to states where their fundamental rights may be violated.¹¹⁹

However, some African states may reject the application of the rule of *non-refoulement* in relation to extraterritorial transfers. They may emphasise the fact that they have obtained assurances from receiving states before transferring individuals to places where they face a risk of torture. By pointing to 'diplomatic assurances', African states may seek to exploit an area of African Charter that has been less than fully developed under the African human rights system. The relationship between substantive norms, such as the *non-refoulement* rule, and the procedural mechanisms required to implement and safeguard those rules, is not specified in the African Charter. However, international and other regional human rights systems have developed norms about procedural guarantees in case of diplomatic assurance.¹²⁰ For instance, the CAT Committee and the HRC in the case of Egyptian nationals Ahmed Agiza and Mohammed Alzery underlined the importance of both the rule against *non-refoulement* and the procedural guarantees needed to safeguard that prohibition. The Swedish government had received assurances that the men would not be tortured, and that the Swedish authorities would have access to the men once they were in Egyptian custody.¹²¹ Regardless of these safeguards, both men have alleged that they were tortured upon return to Egypt.¹²² Ahmed Agiza was also subjected to electric shocks during interrogation.¹²³

117 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974).

118 OAU Convention on the Prevention and Combating of Terrorism adopted in the OAU Summit, Algiers 14 June 1999.

119 CAT Committee General Comment 1, Implementation of art 3 of the Convention in the Context of art 22 (1996) para 2. See also General Comment 31 (n 60) para 12.

120 Conclusions and Recommendations of the Committee Against Torture, Canada (7 July 2005) (2005) UN Doc CAT/C/CR/34/CAN.

121 HRW *Still at risk: Diplomatic assurances no safeguard against torture* (2005) 67-72.

122 HRW (n 121) 68.

123 *Agiza v Sweden*, UN Committee Against Torture (20 May 2005) 233/2003, UN Doc CAT/C/34/D/233/13.

In addition, although the African Court has not pronounced on extraterritorial obligations, the investigation of the practice of the African Commission can be an opening point to address the problem. The interpretative work so far of the Commission provides some basic lines of approach towards a systematic view on extraterritorial obligations under the African Charter. For instance, the African Commission concerning the case of the *DRC v Burundi & Others*¹²⁴ has importance in clarifying the scope of the extraterritorial applicability of the African Charter. As to the final report of this case, the attempts to interpret the notion of 'effective control over the space' do not preclude the theory of an extraterritorial applicability of the African Charter.¹²⁵ This means that when a state is effectively linked to an extraordinary rendition-related activity, it shall have a legal obligation to be proactive and protective, that is, to demonstrate state responsibility.

In the context of extraordinary rendition, attendant African states violate human rights, including the prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment by detaining individuals by their agents outside their territories. In such a scenario, the state party does not exercise detailed control over the policies and actions of the authorities in the area situated outside its national territory. However, to lower the possibilities of state impunity, international and regional human rights adjudicative and quasi-adjudicative bodies have recently extended the more localised spatial control theory.¹²⁶ As to this theory, spatial control includes the space controlled by the peace keepers,¹²⁷ prisons¹²⁸ or vessels,¹²⁹ including vessels flying the flag¹³⁰ of other nations. Therefore, attendant African states must be held responsible for acts of extraordinary rendition that occur outside of their territory even though effective control of that territory might not be established. For instance, in the case between *DRC v Burundi & Others* the African Commission recognised the spatial control theory at the admissibility stage, and it understood that the alleged violations were allegedly being perpetrated by the respondent states in the territory of the Democratic Republic of the Congo (DRC). Similarly, at the merits stage, the African Commission stated that military action and occupation of the territory of another state led to the assignment of human rights obligations with regard

124 *DRC v Burundi, Rwanda and Uganda* (n 105).

125 As above.

126 See Concluding Observations of the HRC 8 December 1998 UN Doc CCPR/CO/81/BEL.

127 *Al-Jedda v the United Kingdom* ECtHR 7 July 2011.

128 *Al-Jedda* (n 127) Judgment.

129 See also *Jamaa v Italy* ECtHR 23 February 2012 27765/09. See also *Medvedyev v France* ECtHR 10 July 2008 3394/03.

130 See also *Ocalan v Turkey* (n 75); see Wilde (n 24) 503.

to that extraterritorial conduct, given the effective control exercised over parts of the DRC territory.¹³¹ Similarly, the African Commission in *Alasad* indicated that 'circumstances may obtain in which a state assumes obligations beyond its territorial jurisdiction such as when a state assumes effective control of part of a territory of another state'. The Commission endorsed the position of the ICJ's decision in the *Armed Activities in the Congo* case to hold that occupation by a state of the territory of another state amounts to effective control and triggers the obligations of the occupying state under the African Charter.¹³² The African Commission in *Alasad* also stated that 'circumstances may obtain in which a state assumes obligations beyond its territorial jurisdiction where the state exercises control or authority over an individual',¹³³ which is a personal model of jurisdiction.

Sometimes it may be doubtful whether the attendant African states had effective control of the territory where an individual was extraordinarily rendered. However, it does appear that the attendant African states' officials had a significant degree of control over capturing and transferring an individual to detention in third countries where he was subject to improper treatment. Where it appears that a state has such a degree of control over a person in custody outside that state's territory, the state should still be obligated to uphold human rights obligations and refrain from *refoulement* of persons who will be subjected to torture. Therefore, the personal control model is exclusively fit in cases of extraterritorial transfer and detention, which comprise physical custody of individuals by state agents. This interpretation safeguards that the African Charter fulfils its object and purpose to shield those individuals who are at the risk of extraordinary rendition. On the other hand, the African Commission's report on the case of the *Embargo Measures against Burundi*¹³⁴ can demonstrate the extraterritorial applicability of the African Charter.¹³⁵ Based on the Commission's view, the exercise of the 'effective control' on individuals would not be necessary to define the personal model, because the source of the extraterritorial applicability of the African Charter could sometimes not be represented by the control on the territory, but rather it may be from the 'indirect control' on individuals suffering the consequences of

131 *DRC v Burundi, Rwanda and Uganda* (n 105) paras 63, 68, 69, 88 & 91.

132 *Mohammed Abdullah Saleh Al-Asad v Djibouti* (n 46) paras 134, 135, 136 & 139.

133 *Mohammed Abdullah Saleh Al-Asad v Djibouti* (n 46) para 134.

134 *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003).

135 TŠ Bulto 'Towards rights-duties congruence: Extraterritorial application of the human right to water in the African human rights system' (2011) 29 *Netherlands Quarterly of Human Rights* 491f, 509-514.

measures adopted by states that are external to the territory where the injured subjects are physically set.¹³⁶

The lack of explicit jurisdiction clause in the African Charter is an opportunity for its treaty bodies to expand and introduce approaches to extraterritorial obligations of states, as no territorial limit or definition of territoriality is provided in the Charter. However, the acceptance of African states regarding extraterritorial obligations is very important for the development of the doctrine of extraterritorial obligations in the African human rights system. Besides, it is the right time for the African Commission and the African Court to use these opportunities in their case law to fill the jurisdictional gap of the African Charter.

Generally, although the African Charter failed to provide the jurisdictional clause, there are avenues to expand the obligation of states beyond territories under the African human rights system. Based on the substantive provisions of the Charter, there is an implication for extraterritorial obligations of states. Through the mandates of the African Commission, which are provided under articles 30 and 45 of the African Charter, it is possible to extend the spatial reach of the Charter in order to have the potential to govern extraordinary rendition in Africa. This can be inferred from the aforementioned General Comments on the provisions of the African Charter. In addition, based on article 60 of the Charter, the article argues that the African human rights system may not exist without the help of international and other regional human rights systems in governing extraterritorial obligation of states relating to extraordinary rendition rather through the African Commission being mandated to draw inspiration from these systems to deal with extraordinary rendition. Therefore, based on the above analysis, the African Commission may receive and adjudicate cases of extraterritorial violations, including extraordinary rendition, and states shall not have defences on the territorial limits of the African Charter.

5 Conclusion

Most African states are signatories to the African Charter and other international human rights instruments that explicitly prohibit elements associated with extraordinary rendition. However, paradoxically, some African states engage in extraordinary rendition, thereby violating human rights enshrined in the African Charter.

¹³⁶ As above.

These violations span a range of rights, including the prohibition on torture, and the rights to life, liberty, privacy, fair trial, equality, presumption of innocence, health and freedom of movement.

Extraordinary rendition encompasses both territorial and extraterritorial dimensions. However, the African Charter lacks explicit provisions defining the territorial or jurisdictional scope of the rights it upholds. The absence of a specific jurisdiction clause in the Charter invites novel approaches to extraterritoriality. Consequently, this article explores three extraterritorial perspectives: the spatial and personal control approaches and the principle of *non-refoulement*. However, due to the scarcity of relevant cases, a uniquely African perspective remains inconclusive. The African Commission and African Court should shape jurisprudence based on international and regional human rights case law. Notably, proving instances of extraordinary rendition is inherently complex due to its clandestine nature, making acquisition of evidence challenging. Consequently, participating African states face a broad basis of responsibility. This situation underscores the inherently extraterritorial nature of extraordinary rendition.