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Presence through absence? Understanding the role of capital in the African Human Rights Action Plan*

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ABSTRACT

This study examines the African Human Rights Action Plan (AHRAP) through the lens of Upendra Baxi's germinal theory on the emergence in our time of a 'trade-related, market-friendly human rights' (TREMF) thesis that is challenging the

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specific understandings of 'people-centric' human rights that are predicated in the letter and spirit of the Universal Declaration of Human Rights (UDH). Baxi contends, instead, that the dominant strands of the contemporary understandings of human rights are – for the most part – designed to protect the interests of global capital. That said, human rights frameworks in low-income countries need to be studied with a view to what they say and don't say about global capital. Despite its attempt to facilitate a progressive realisation of human rights in Africa, the AHRAP does not rise far enough above the TREMF paradigm to re-locate itself within the UDH one. This is due to the AHRAP not adequately theorising and analysing the role of capital in the (non)realisation of human rights in Africa. By allowing trade and market practices to slip to a significant extent beyond its purview, the AHRAP privileges – to a significant degree – the needs/interests of capital over the human rights of ordinary Africans. That is, the victims of the excesses of capital in Africa are reincarnated in the AHRAP document by the fact of their exclusion from it.

Keywords: Africa; human rights; the African Human Rights Action Plan; global capital; victims; absence; presence; exclusions.

INTRODUCTION

The 2016 Summit of the Assembly of the African Union (AU) in Kigali, Rwanda, marked the start of the Human and Peoples' Rights Decade in Africa. In the formal Declaration following the meeting, the AU recommitted itself to a progressive realisation of human rights in Africa between 2017 and 2026 and the development and adoption of a pan-African action plan. The Pan African Lawyers Union (PALU) was eventually appointed to lead the crafting of a 10-year action plan that would deliver on the human rights-related provisions contained in the AU's ambitious 'Agenda 2063: an Africa of good governance, democracy, respect for human rights, justice and the rule of law' (AU 2015).

In June 2018, PALU produced a draft human rights action plan for Africa (AHRAP) that draws on a variety of sources such as state reports with the AU Commission, national human rights institutions, civil society, monitoring bodies and the media. Many of the concerns identified by previous studies were cross-referenced by consulting stakeholders, particularly civil society actors. The AHRAP is organised under five themes: human rights education; the obligations of states to fulfil existing human rights-related commitments; institutional strengthening; the enforcement of rights pertaining to development and African integration; and leadership (AU 2018: 9).[1] The plan contains 10 goals meant to deal with the challenges and obstacles hindering the implementation of human rights on the continent (AU 2018: 22).[2]

This article views the AHRAP through the lens of its relationship to capital, or the lack thereof. As used here, 'capital' is both a descriptor and a term of art. In the first, Marxist sense, it refers to both the ownership and/or the control of the means and networks of production, both at a transnational level and at a local level. (Since local economic interests remain key to this narrative, 'global

capital' on its own would have been an inaccurate descriptor.) In its second and third senses, respectively, 'capital' absorbs elements of Sklair's 'transnational capitalist class' (TCC) and further applies these insights to locally owned capital. In Sklair's original formulation, ownership and/or control of the means of production is not the sole criterion for TCC membership; *those who serve the broader interests of capital* (for example, bureaucrats or media professionals) also qualify as members. These members believe themselves to be global citizens and share similar lifestyles but, above all, share global and local economic interests; seek to exert economic control in the workplace, political control in global and domestic polities and culture-ideology control in everyday life; and they also tend to have global – as opposed to local – perspectives on issues (Sklair 2002: 98–9).[3] However, this desire for economic, political and culture-ideology control is not the sole remit of those with global or transnational ambition; a significant class in many countries understands and promotes its interests as distinct from those with global interests. For the purposes of this article, 'capital' refers to all three sets.

The article comprises five parts (excluding this introduction). The first describes the theoretical lens used in this paper to study the (non)interaction of capital and human rights in the AHRAP: a synthesis of Baxi's TREMF thesis with Althusser's insight about visibility. The argument is that while human rights paradigms in low-income countries tend to be designed or function to protect the interests of global capital, this paradigmatic 'design' or 'functioning' needs to be studied with an eye to what is included as well as what is excluded. The excluded content also shapes policy *by the fact of its exclusion*. That is, what a human rights framework says about global capital is as important as *what it doesn't say*.

The second part briefly outlines what the AHRAP does say about capital: transnational corporations (TNCs), other business interests, and other formations of capital. This will aid insight into what the AHRAP does not say about capital. The third part discusses some of the various challenges posed by capital's excesses to the protection of human rights on the continent, as identified in both the existing literature and the interviews conducted as part of the research project on which this article is based. The fourth applies the Baxi–Althusser combinatory as well as the relevant findings from the literature/interviews regarding the patterns of capital's human rights violations in Africa – to the AHRAP. In its fifth and concluding part, this article argues that while the audacity of ambition contained in the AHRAP is commendable, the plan itself is vitiated *to a significant degree* by three factors. First, it does not adequately theorise or discuss the role of capital and its bearing on the realisation of human rights in the mostly Third World (African), capital-importing contexts in which it would have to be applied. Second, the value of AHRAP as a policy document or roadmap is diminished because its commendable attempt to ground actionable 'outcomes' in contemporary African and global political economy is still not adequate. Finally, the two omissions create a cognitive dissonance

that militates against the feasibility of the plan as an organic whole, especially given the specific histories and realities of Africa's political economies.

Methodologically, it should be noted that the discussion in the article is grounded in a range of relevant sources: the secondary literature; primary documents; and 15 semi-structured interviews of civil society organisations, AU and government officials (which were conducted in Addis Ababa, Ethiopia, as well as in Ottawa, Canada).[4] In-person interviews were conducted in Addis Ababa and Ottawa. Additional telephone interviews were also conducted with officials based in Ottawa. The data collected from such interviews were manually analysed for significant patterns within them and assessed against the knowledge contained in the relevant portions of the existing theoretical and policy literature. It bears emphasising here that the interviews of Canadian actors in Ottawa, and some of the interviews in Addis Ababa, were primarily aimed at finding out *more* (in addition to the knowledge already documented in the literature) about what government officials and civil society activists from one important capital-exporting country think about the role of capital both in human rights in Africa (in general) and in the AHRAP (in particular). Given extensive documentation in the literature of the general similarity of the approaches of capital-exporting countries to the protection of the interests of their corporations abroad from the activists and local resistance who campaign against the human rights wrongs they too often commit (see Wood 1980; Frieden 1981; Breed 2001; Richards *et al.* 2001; Giuliani & Macchi 2014; McLean 2015; Kelly & McKay 2020), it is reasonable to partially rely on the Canadian example as allegorical of the perspectives of capital-exporting countries on a human rights policy-document such as the AHRAP.

Nevertheless, it should be remembered that the primary focus of the analysis in this article is to tease out what the knowledge synthesised from the relevant existing secondary literature (theoretical, doctrinal, policy-oriented and so on) can tell us about the role of capital in the AHRAP (a primary human rights document that is more or less representative of the AU's general human rights thinking and plans going forward). Thus, the interviews are relied on primarily to *supplement* and fill certain gaps in existing knowledge regarding the AHRAP and/or human rights in Africa. The interviews do not therefore stand on their own as the only 'sources' that ground the analysis conducted, and conclusions reached, in this article. It is only in this way that these interviews contribute to more general understandings of human rights in Africa and the AHRAP's place within it.

PRESENCE THROUGH ABSENCE? BAXI MEETS ALTHUSSER

The problematic relationship between human rights and capital is well documented in contemporary literature, news cycles and even case law (Araya v. Nevsun Resources Ltd SCC 2020). Baxi's provocative TREMF thesis argues that the conception of human rights enunciated in the Universal Declaration of Human Rights has been 'supplanted' by a paradigm of trade-related

market friendly human rights. This paradigm, he contends, enables 'the promotion and the protection of the collective human rights of global capital, in ways which "justify" corporate well-being and dignity even when it entails continuing gross and flagrant violations of human rights of actually existing human beings and communities' (Baxi 2006: 234).

Core to the thesis are four, interrelated sub-claims: first, the new paradigm promotes and protects the rights of global capital over those of human beings and communities. Second, to count as 'progressive', a state needs to demonstrate that it is a good host to global capital even if that role sets it against its own citizens. Third, and as a corollary to the second, the good host state must also effectively quell dissent against global capital by suppressing and delegitimating the human rights-based practices of its citizens as well as their pursuit of alternative politics. Finally, the new paradigm signifies the end of the redistributionist state (Baxi 2006: 246–9; Okafor 2007: 2–3).[5]

Since Baxi's first articulation in 2002, the TREMF paradigm has been productively deployed to explain many trade and non-trade struggles in the Global South (Okafor 2007). However, the analysis has mostly been confined to the obvious: the most egregious examples of corporate wrong-doing, the most extreme behaviours of states, and the most lopsidedly pro-capital manifestations in law and policy. Part of this focus owes to Baxi's original formulation – 'gross and flagrant violations' – but the other part has to do with context. The capitalism of the 1990s and 2000s was characterised by impunity: for example, the dumping of toxic waste off the Ivory Coast and the travesties related to Ogoniland. The now abandoned and much critiqued Multilateral Agreement on Investment was also a product of this era (Wallace-Bruce 2001). Accordingly, the resistance to the excesses of global capital by activists and academics using the TREMF thesis was as obvious as the harms that this resistance sought to prevent.

The capitalism of the 2010s, in comparison, has been conditioned by both memories of this resistance as well as the lingering effects of the 2008 global recession (Doorey 2018: 4). Simply put, unemployment bit deeper when coupled with the aftershocks of the US subprime mortgage crisis; the anger over income inequality was stoked further when seen in conjunction with the Panama and Paradise leaks about the fabulously wealthy. This is not to say that global capital was scared into better behaviour by the anger of the global have-nots; the violations just became less 'flagrant' in some ways. Obviously, exceptions do exist – Libya and DRC, as well as complaints about flagrant abuses of human rights in the case of Canada's Hudbay Minerals in Guatemala being heard before Ontario Courts (*Choc v. Hudbay Minerals Inc.* 2013), being prime examples – but the general trend seems to be towards subtler forms of wrong-doing.

To chart the evolution of corporate wrong-doing, compare the BP oil spill of 2010, the Rana Plaza collapse of 2013 and the 2015 UN report on conscripted labour in Eritrea with the Nigerian and Ivory Coast debacles (1995 and 2006, respectively). In both Nigeria and in the Ivory Coast, the role of Shell Nigeria and Trafigura in violating human rights was plain to see, for almost everyone

that is (Amnesty International 2017).[6] But the causal link is not so clear in the other three examples. The US government report on the Gulf of Mexico oil spill blamed BP and its partners only for missing warnings signs, failing to share information and a lack of appreciation of the risks involved (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling 2011: 87–128).[7] Meanwhile, an Ontario Superior Court of Justice found that Loblaws was not responsible for verifying the structural integrity of Rana Plaza and, indeed, had no control over its supplier in Bangladesh (Doorey 2018: 4–5). And while media reports accused Nevsun of using forced labour in Eritrea, the UN report blames the government for having conscripted the workers in the first place (Anderson 2015; UN General Assembly 2015).

These examples illustrate two critical features of the ostensible trend towards less flagrancy within 2010s capitalism in the context of the TREMF paradigm. First, the sins are mostly of *omission*, not commission. The lazy conclusion would be that the crimes are lesser in magnitude[8] – an implication unsupported by the evidence regarding the extent of harms caused – and the actors generally well-intentioned (Ruggiero 2017).[9] But to buy into either claim would be to ignore the key point that global capital, its processes, operations and even wrong-doing are *designed* to look different today. The fundamental rules of capital have not changed: the logic of capitalist accumulation is evident in all five examples. However, the way capital engages with the world, its positionality vis-à-vis its various publics has changed. This shift is expressed in what global capital *professes* to value, *how* it chooses to sin: by acts of omission on the fringes of legality (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling 2011: 106).[10]

Second, this shift has been enabled by the blurring of the distinction between the public and the private (Kennedy 2018: 44).[11] Capital can characterise itself and its excesses in a particular way because it has co-authored, with the state, the rules of the game. The 'free market' is not and has never been truly free of state intervention or regulation; the only difference in the role of the state pre- and post-neoliberalism is the visible alignment of the state's priorities with those of the market. These 'joint' priorities are articulated by the state through actions/reactions via law and public policy but, increasingly, through inaction at both (Tombs & Whyte 2015; Kirchgaessner 2018; Bittle *et al.* 2018).[12] The blurring of the state-corporation distinction is what enables the neoliberal deployment of social power (that is, mutually reinforcing ideological, economic *and* political power) to reinforce what is ultimately accepted as the natural order of things. Moving in the direction of 'less egregious' human rights violations is not a consequence of capitalism's moral awakening but because its proclivities, preferences and excesses have receded so far into what Kennedy calls the background.

As Kennedy articulates it, the context for making a decision is neither a subjective preference nor an objective necessity; it is the settled outcome of 'background work' or the social construction of interests and facts relevant for decision making (Kennedy 2018: 112–14). Background work, as he explains it, is at its best when it is least visible and has become internalised as a way of

thinking. Each decision is thus informed by the background in precognitive ways and couched in the language of expertise in order to secure greater legitimacy (Kennedy 2018: 115–16). In each of the three examples above, the background is a fundamental recognition of the 'imperative' of profit maximisation. (The BP report, for example, repeatedly adverts to the scale, impressiveness and scientific innovativeness of the industry and uses the time value of money principle to explain BP's deviance from prudence (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling 2011: 116)). Accordingly, even those who could theoretically hold capital accountable – the government, the courts and the UN – locate crimes without criminals and find ways to 'adjudicate' without judging capital. The findings, thus, blame no one and are of systemic, industry-wide regulatory failure in the BP case, of moral versus legal failure at Rana Plaza and of complicity versus active participation in Eritrea.

The findings corroborate what Baxi (2006: 239) argued presciently in *The Future of Human Rights*: in the absence of a genuine alternative to capitalism, human rights and social action movements can only ameliorate the severity of globalisation, and that too only within a certain ideological straitjacket. More simply: the justification of a failure as 'systemic' or 'industry wide' is predicated on the very brokenness of the system *as an unalterable constant*. As national social structures are displaced by global and local information and communication structures – for example, the codes of conduct, business ethics, corporate social responsibility (CSR) initiatives, human rights language – capitalist accumulation *appears* more responsive to human rights calls (Baxi 2006: 240). But concealed within the Trojan horse of these codes and ethics are the dominant ideology of capitalism and, consequently, the notion of trade-related market-friendly human rights. For TNCs, the 'evolution of human rights normativity' 'has paradigmatically taken the form of "soft law"' (Baxi 2015: 33). Under initiatives such as the UN Global Compact, TNCs may be able to 'pick and choose' applicable 'human rights norms and standards' (Baxi 2005: 24). Even under the UN Guiding Principles on Business and Human Rights (UN Human Rights Office of the High Commissioner 2011), TNCs 'are not bound by any legal obligation' (Baxi 2015: 36). To interrogate the quality of human rights available in the capitalism of the 2010s, the TREMF lens needs to be turned onto these subtler expressions of corporate will.

The issue of concealment merits further consideration. Several influential theorists have discussed the centrality of invisibility to the construction of an edifice of power (Kennedy 2018: 111, 275).[13] Althusser makes the important point that invisibility, too, is constructed. Both the subject (the knower) and the object of study pre-date knowledge; as such, both already *define* a certain fundamental field. The real object, argues Althusser (2015: 36), comprises an essential and an inessential part; knowledge is the *process* of abstraction (from the realm of objects to that of ideas) designed to purge the inessential real *as well as every trace of its operation*. The invisible, he contends, becomes so *because* it is 'repressed from the field of the visible'. It goes unperceived because the *function* of the field 'is not to see them, to forbid any sighting of them'. As

such, he contends, the invisible does not exist *outside* the visible but is 'the *inner darkness of exclusion*, inside the visible itself' [emphasis in original] (Althusser *et al.* 2015: 24–5). To reiterate: the decision to exclude is thus as significant an exercise of power as the decision to include. And what gets left out defines a field of knowledge as surely as what is included.

What does this mean in the context of the TREMF paradigm? First, it is not enough for the paradigm to be identified in obvious examples of bad corporate or state behaviour. To harness its potential as an extraordinarily powerful analytic tool, the paradigm needs to be located within subtler expressions of corporate will, including seemingly unobjectionable, unassailable laws, policies and human rights frameworks. Second, even this focus needs further sharpening: it is not enough to look at what is said; what is left unsaid matters equally, if not more, in some cases. As Althusser shows, the invisible 'inner darkness' needs to be excavated from the visible. Only by focusing on what is left out of these laws, policies and frameworks can one assess their overall impact and direction as well as appreciate the version of human rights they espouse. With respect to the AHRAP, this insight suggests that to assess the former's merit as a human rights framework, the document needs to be mined both for what it articulates explicitly about capital and for its silences. For, what remains unsaid in the AHRAP about the relationship of capital to human rights is as important as what is articulated therein.

WHAT DOES THE AHRAP SAY ABOUT CAPITAL?

The AHRAP explicitly deals with capital, albeit briefly, as part of the discussion in its Chapter IV. It does so under the appellations 'private sector organisations', 'businesses' and 'business interests', all of which are identified as stakeholders (AU 2018: 35–6). It insightfully disaggregates private sector organisations into community level businesses, national level businesses, regional and continental businesses, transnational business corporations, holders-in-trust of business interests, and corporate social responsibility initiatives. The AHRAP recognises that all-too-many Africans have been harmed by the human rights violations committed by or on behalf of, or in the interest of, businesses, and that the African continent is 'very vulnerable to exploitative practices by global business interests', too often leading to serious human rights violations. The AHRAP then goes on to recognise that 'it is possible to carry out [sic] business and other economic activities while respecting and in fact supporting and promoting human and peoples' rights' on the African continent. It concludes, however, that this can only happen going forward if businesses also obtain social licences to operate from African peoples – and not just from governments or the armed militia groups who control certain territories. It concludes that it 'provides a framework for systematic non-antagonistic engagement' of businesses with citizens, governments and NGOs on the improvement of the 'rights environment for doing business in Africa'.

While there is, of course, much to commend here in what the AHRAP explicitly states about capital (a fact that testifies to the human rights commitment, intellectual sophistication and political awareness of its primary drafters at the PALU), it should be kept in mind that this article is as concerned with what the AHRAP says about capital, as it is with what it does *not* say.

CAPITAL AND THE HUMAN RIGHTS CHALLENGES ON THE AFRICAN CONTINENT

In this section, some of the challenges posed by capital's excesses to both the realisation of human rights on the continent and the effective implementation of the AHRAP, as identified in the interviews we conducted and highlighted in the relevant literature sets, are discussed. Each of the challenges identified in the interviews is flagged and situated within the relevant literature.

Capital per se

Despite a variable understanding of the complexity of issues involved, it is remarkable that, in line with the trend in the more general literature on human rights in Africa (Shivji 1989; Gutto 1993; Oloka-Onyango 1995; Okafor 2007), all the interviewees see the role of capital – especially foreign capital – as central to the realisation of human rights for everyone on the continent and the viability and effectiveness of any pan-African human rights action plan. While few had seen the AHRAP draft or, indeed, knew of the AU's work on the issue, the strong consensus was that AHRAP ought to address the human rights violations occurring on the continent at the behest of global, continental and even local capital.

The point here is not, of course, that these interviews on their own show that there is a consensus among all who are relevant that, if it is to be effective, the AHRAP must focus intensely on the important role of global capital in the generation of human rights violations in Africa. Rather, it is that the views of the interviewees (a purposive sample of the most relevant activists, government officials and AU staff) exemplify the trend in the relevant academic literature on human rights in Africa.

While recognising that the primary responsibility for the protection and promotion of human rights lies with states, it was also felt by many interviewees that – based, at least, on the applicable power dynamics between the typical African state and the typical formation of global capital – a human rights action plan that is prepared and implemented without the involvement of 'the private sector' was doomed to fail. Two participants suggested that each country should make its own regulations – as opposed to joining in adopting and implementing an AHRAP – to protect itself, regulate MNCs and protect its people from abuse (e.g. Interviewee 9, an InterPares activist; Interviewee 10, an Amnesty International activist).[14] Interestingly, as Baxi shows, such an understanding of where responsibility properly belongs and what it entails is

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also predicated on a problematic premise. As he argues, somewhat provocatively, would the notion that states have the primary duty to protect the human rights of their populations also raise the question whether many of these states (which he sees as more 'hostage' states than 'host' states) have been assigned roles that they are structurally incapable of performing? This is very important as such role assignments also tend to displace duty/responsibility from the actual formation(s) of power that both committed the relevant human rights violations and in reality exercise net control in the relevant territory or relationship to weak African (or other Global South) states which lack substantive (as opposed to formal) power to control these formations of global capital effectively (Baxi 2006: 284–5). This difficulty has been highlighted several times, for example in the decision of the African Commission on Human and Peoples' Rights (2001) in the 'Ogoni case' (SERAC & Another v. Nigeria 2001), and more recently in one of the SERAP cases decided by the ECOWAS Court (SERAP v. Nigeria & 8 Ors 2012).

Repeatedly, interviewees articulated the need for host states to embed human rights concerns in trade and investment negotiations and treaties; one interview subject even suggested it should be made a conditionality in future deals (e.g. Interviewee 9, an InterPares activist; Interviewee 1, an African Union official). However, the question of how the AHRAP itself ought to deal with this issue drew varied responses – again not all that surprisingly, given the tenor of the relevant literature and the complexities involved (Sheffer 2010; Sikka 2011; Simma 2011; Barry *et al.* 2013; Mann 2013; Ofodile 2013). Mindful of the consequences for investment and employment in the context of the political economy of almost all African states, some suggested an open-ended conversation because capital is 'unused to such an engagement' (Interviewee 4, an African Union AGA Secretariat official). Only one participant suggested that foreign investors should be told they are duty-bearers who owe obligations to their host states and their populations (Interviewee 13, a Canadian Human Rights Commission official).

That official's suggestion finds support in some African states' recent foreign investment arrangements. Interviewees' calls for including human rights considerations in investment treaties is reflective of the current state of the debate regarding the human rights obligations/responsibilities of global capital. Foreign investor/corporate obligations under international human rights law have been the subject of extensive, often contentious, debate and it is, perhaps, the case that the AHRAP's silence regarding capital stems partly from this controversy. Businesses voiced significant opposition to initiatives such as the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (2003) which sought to impose binding human rights obligations on TNCs (Weissbrodt & Kruger 2003) while many actors expressed support for the UN Guiding Principles on Business and Human Rights (UN Human Rights Office of the High Commissioner 2011) that articulates a 'corporate *responsibility* to respect human rights'.

While African states mostly rely on the general soft rules that define the international human rights responsibilities of global capital (Ewelukwa 2011; Odumosu-Ayanu 2013), there have been some attempts to modify this paradigm. An example is the Supplementary Act Adopting Community Rules on Investment and the Modalities for its Implementation within ECOWAS (2008) which includes provisions, including human rights provisions, that it labels investors' 'obligations'. The Bilateral Investment Treaty (BIT) between Morocco and Nigeria is also representative of this still limited, albeit significant, shift (Morocco and Nigeria 2016; Ejims 2019; Odumosu-Ayanu 2019). The Morocco–Nigeria BIT labels some provisions as investor obligations including provisions regarding human rights. The BIT also imposes civil liability on foreign investors in their *home* state's judicial systems for harm or damage done in the *host* state. The treaty, however, includes permissive CSR language and adopts some of the commonly included provisions in most BITs that have been subjects of debate. Instruments such as the Nigeria–Morocco BIT are *limited* shifts away from the general reluctance to impose binding international human rights obligations on TNCs and other investors, even as the draft UN treaty on business and human rights (OHCHR 2019) is being debated.

On the whole, the AHRAP largely adopted the prevailing 'soft' trajectory in its engagement with capital rather than the binding obligation direction which a few African investment treaties have adopted. It recognised capital as a stakeholder, acknowledged the sometimes problematic relationships, alluded to capital's potential contributions and then engaged in the silences that this article explores. The 'softness' with which African and other states treat capital has – at least since the neo-liberal turn in global political economy in the mid-1980s – been widely rationalised and justified partly on this basis: that strong regulations of capital will lead to them fleeing the relevant jurisdiction(s), resulting in the loss of a significant number of jobs (Wiegratz 2010; Ndikumana & Boyce 2011; Sandbrook 2011; Labonté & Stuckler 2016; Ovadia 2016; Zghidi *et al.* 2016; Lee 2018).

Capital and 'the political' within Africa

In its treatment and understanding of capital, AHRAP presents interesting political conundrums for Africa and Africans. First, while the AHRAP pitches global capital as a 'stakeholder', as is evidenced in the interviews and parts of the relevant literature (e.g. Agbakwa 2003; Baxi 2006; Okafor 2006; Chukwuemeka *et al.* 2011; Irogbe 2013; Orock 2013), this understanding is not shared as enthusiastically by many scholars of the subject and people working 'on the ground'.

Another elephant in the room (re the relationship between capital and the political in Africa) is the task of getting all African states to agree on a common way of framing and implementing the AHRAP with regard to business practices. There is, for example, the core issue of how responsibility for human rights is to be allocated between states and corporations (e.g. Baxi 2006: 284–5)

which the UN Guiding Principles on Business and Human Rights articulates as 'the state *duty* to *protect* human rights' and 'the corporate *responsibility* to *respect* human rights'. The range of responses among African states to this extremely important question might put a strong consensus out of easy reach; one without which it will be even more difficult than it already is for the AHRAP to become an optimal tool in the fight against the human rights malfeasance of capital on the African continent. As an analogy, examples of 'beggar-thy-neighbour' and 'race-to-the-bottom' economic policies are well documented in the literature (e.g. Adebajo 2009; Baldwin & Evenett 2012; Martinez 2017). These can have seriously negative implications for the enjoyment of human rights in Africa, as elsewhere. Such worries were further corroborated by interviewees who spoke of how the AU's Business and Human Rights strategy paper was deferred since a significant number of member states claimed they needed more time to study what they referred to, rather diplomatically, as 'sensitive' issues (Interviewee 1, an African Union official).

Another key theme in the related literature is fears among some states and not others that higher human rights standards would increase unemployment in their (already poor) countries (Baxi 2006: 283). Some interviewees raised such concerns or at least showed understanding of it when they noted that African states with poor human rights track records feared the common standards pushed by the AHRAP would tie their hands. This situation, felt participants, would lead to the inevitable dilution of human rights policies and practices in order to secure the buy-in of such states (Interviewee 4, an AGA Secretariat official) – a practice Baxi refers to as 'tokenism' (Baxi 2006: 289).

THE AHRAP: THROUGH THE TREMF LOOKING GLASS

Having developed our theoretical/analytical framework in the first section; set out the content of the AHRAP as it relates to the role of capital in human rights violations in Africa in the second section; and discussed – in the third section – many of the human rights challenges faced by African peoples as a result of the activities on the continent of certain formations of capital (as flagged by the interviews and the relevant literature); it remains to apply our conceptual framework – our Baxian TREMF/Althusser combinatory – to the material thus far disclosed and discussed; focusing especially on mining the AHRAP for its silences regarding capital, i.e. what it does *not* say.

To examine the implications of Upendra Baxi's TREMF thesis for the AHRAP, a quick review of the four sub-claims is required. To qualify as one that is firmly oriented toward a trade-related, market-friendly human rights paradigm, a human rights framework would need to, first, promote and protect the rights of global capital over those of people. Second, the state – or the continent, in this context – needs to demonstrate a commitment to global capital equalling or even surpassing its commitment to Africans. Third, the good host state or continent must also pre-empt and quash potential dissent against global capital by suppressing and delegitimising the human rights-

based practices of its citizens as well as their pursuit of alternative politics. Finally, the state or continent must significantly renounce its 'redistributory' aspirations. Unfortunately, while it has made commendable and unprecedented effort to address the tendency of global capital to be rapacious on the African continent, the AHRAP still delivers – to one extent or the other – on all four counts.

Despite the valiant efforts of its crafters, the AHRAP remains pockmarked with scars of subterranean battles between the agents of capital and the African people. The AHRAP discusses capital and the need to rein in its excesses, but the devil is in the detail of its silences: what is left unsaid, what is backgrounded, what is not ostensible. The *fact* of these omissions shows the ossification of outcomes and illustrates how 'settled' outcomes are embedded within frameworks. Africa's resource 'curse' has left it particularly susceptible to gross human rights violations in the wake of corporate misadventures. As such, the failure of the AHRAP to mount as significant a discussion of the role of global capital as is required both minimises capital's past human rights violations in Africa and undermines the prospect of the enforcement of human rights in the future (sub-claim 1). The violations AHRAP doesn't discuss are the violations that will go unrecognised, unchallenged and unabated. Second, Africa's greatest commitment to the cause of global capital – and in derogation of its commitment to Africans – is a human rights action plan that fails to *adequately* problematise the role of global capital in rights violations (sub-claim 2). To put it another way: the AHRAP's conception of rights and how they are to be protected and promoted produces a distinctly pro-capital tilt, which comes at the expense of ordinary African citizens. Further, when a pro-capital stance is so embedded in a framework, it forestalls the possibility of resistance or dissent *but without appearing to do so* (sub-claim 3). That is, by ignoring the imbalance of power between global capital and Africans, the drafters of AHRAP bake that imbalance into the action plan, a process that precludes both redressal of and opposition to such a skewed balance. Finally, with avenues for accountability thus closed off *by the human rights framework itself*, the redistributive role of the state also disappears (sub-claim 4). That is, the state's responsibility to protect and enforce human rights standards – especially against corporate violators – *independent* of the framework is thus significantly diminished, if not extinguished entirely.

The emancipatory potential of AHRAP as a pan-African human rights framework is undisputed. However, to guard against the possibility of reaffirming the status quo and to realise its full potential, AHRAP needs to illuminate further the tireless political struggles of African states and peoples on two planes. The first comprises material struggle on the global, regional and national levels simultaneously. The second comprises ceaseless intellectual struggle: thinking more profoundly about what human rights mean and constantly recalibrating itself to achieve those ends.

Limited capital

Africa's ultimately unfortunate experiences with global capital are writ large on its 50-year plan – the Agenda 2063 document. The first item on the seven-point list is 'A Prosperous Africa, based on inclusive growth and sustainable development'; the last, 'An Africa as a strong, united, resilient and influential global player and partner' (AU 2016: 2). Together, the two aspirations speak to the continent's experiences of poverty and the rapacious power of TNCS – as reflected by the desire to be an influential partner in an inclusive growth environment. Against this background, the AHRAP's inadequate treatment of capital is particularly ironic since it is supposed to have been inspired by Agenda 2063 (AU 2018: 21).

Of a total of 64 pages, the AHRAP document devotes just one to a discussion of how capital violates human rights (AU 2018: 36). AHRAP chooses to abandon even the conventional terms used to refer to capital, preferring the quaint neologism 'Private Sector Organisations' or the rather vapid 'business interests' to the more robust 'global capital', 'Transnational Corporations' or even 'big business'. For example, AHRAP conceives human rights as 'challenges that keep Private Sector Organisations and citizens apart' (AU 2018: 36). While the ostensible characterisation of capital and Africans as star-crossed lovers may appear ill-conceived, it is even more far-fetched to expect – as the AHRAP seems to do – that a corporation would willingly pledge 'responsibility to this Plan', almost as a token of its fealty (AU 2018: 36). As Baxi (2006: 297) cautions, trade, business and industry are addicted to the practical logics of voluntarism and minimisation of the application of human rights standards and norms. In fact, most of the human rights initiatives related to business have been based on voluntarism. As Baxi notes, member states of the UN agree that TNCs should not operate with 'complete impunity'; the debate is between 'voluntarism' and 'obligatory enforcement' (Baxi 2015: 24). While voluntarism may serve some useful purposes, Baxi urges us 'to tame our approach in a way that harnesses both the mandatory and voluntaristic perspectives' (Baxi 2015: 38).

As the AHRAP acknowledges, as they have been expressed in the living world, the interests of capital are '*almost* always' inimical to those of African citizens. Why would capital then respect, support and promote human rights in Africa, and a plan that is intended to help remedy violations thereof, in derogation of its own interests? This question turns on what AHRAP *recognises* as the protection and promotion of human rights. In its desire to provide a framework for 'non-antagonistic engagement' between businesses (on the one hand) and citizens, governments and intergovernmental organisations (on the other hand), the AHRAP suggests that 'private sector organisations' educate themselves about their role in the human rights project and fund some human rights initiatives (AU 2018: 37).[15] Both options are inadequate to the task of protecting and promoting human rights. First, inchoate codes of obligations for businesses usually promote tokenism, which in itself is a violation of human rights (Baxi

2006: 289). The AHRAP suggestion is predicated on a series of domino-like assumptions: that corporations that ignore or violate human rights do so *because they don't know any better*; that education and awareness would inculcate a sense of virtuous duty towards Africans and inhibit bad corporate behaviour; that self-learning in line with self-determined objectives would achieve this effect. Unfortunately, the AHRAP does not justify these assumptions. As such, it is hard to imagine why the AHRAP sees and promotes this as a way for capital to support human rights, unless, of course, the idea is to support the interests of capital over those of Africans.

Second, corporate funding for human rights initiatives harks back to the era of corporate philanthropy, an idea progressively supplanted – and for good reasons – by social responsibility and finally, sustainable development (Baxi 2006: 296). Yet, in many parts of Africa, the practice of CSR sometimes still manifests in the form of corporate philanthropy (Amodu 2020). As the literature shows, corporate funding often determines the agenda of the recipient organisations; further skews the uneven partnership between global capital and developing states; and tends to allow TNCs to mould state policies to their ends (Sklair 2002: 153; Baxi 2006: 250–1; Couch 2011: 34, 47).[16] Corporate funding also imposes bureaucratic requirements that such institutions are ill-equipped to handle[17] and, most importantly, compromises the credibility and the work of such institutions (OHCHR 1993).[18] Why would, for example, a Nevsun-funded think tank on labour rights have adequate credibility?[19] Further, as has previously been seen with similar initiatives in environmental planning, the funding option often becomes another way corporations can buy their way out of the consequences of their behaviour since the state regulators who would hold them responsible are now financially beholden to the corporation (Lambooy & Rancourt 2008: 254, 259).

Even if one were to accept at face value AHRAP's contention that a pro-human rights way of doing business is possible, the AHRAP understanding of how business is conducted inspires little confidence. It articulates a position on local community engagement that seems rather too idealistic given the realities almost everywhere on the continent. For example, the plan argues that guarantees, which are 'voluntarily provided' by 'well-informed local communities' are more sustainable than those provided by governments or enforced by armed militias (AU 2018: 36). First, while there is, of course, a compelling case for local community participation in decision-making (Odumosu-Ayanu 2014), capital-intensive industries, such as the extractive industries but also commercial agriculture, mostly *demand* sovereign guarantees to insure their investment against risks imposed by economic variables.[20] Even if a local community can contain political dissent in the area, it can rarely determine or even influence the government's commodity pricing or land use policies. Strategic long(er)-term investors – unlike, for example, retail investors – insist on sovereign guarantees because the profitability of their enterprises is conditioned by the predictability of economic costs and revenues. Businesses, by themselves, may not provide a sufficiently robust environment for local

community engagement if appropriate frameworks are not enacted in consultation with states, business and local communities, as well as through continent-wide initiatives such as the AHRAP, which has ironically remained mostly silent when direction is required.

Second, while it is important to ensure that communities are well-informed, the imbalance of power between an impoverished community that has been stripped of its negotiating leverage often through laws enacted to mostly protect capital and a deep-pocketed investor more often than not precludes 'fair' deals or even less unfair ones. Communities that depend on investors for job creation and/or the development of critical infrastructure are unlikely to make additional human rights-related demands, especially where they know they are in competition with other, similar communities for the resources. Finally, there is the question of what constitutes 'well-informed' decision-making: for example, is the subsistence farmer who refuses to leave his land better off than one who sells their land directly to a corporation and ends up either swapping rural poverty for urban poverty or with disposable income but limited prospects of livelihood? Well-informed communities cannot be separated from legal protection that ensures that the rights of communities are not traded in favour of protection of capital.

Embedded in the AHRAP is also what appears, at first blush, a deep-seated suspicion of the state. Of course, the involvement or the complicity of some African states in human rights abuses cannot be discounted. That said, the structure of contemporary political and economic systems necessitates some level of engagement with the state. Albeit problematic and all-too-often 'hollowed out', the state remains the locus of governance at national, international and transnational levels (Baxi 2006: 246–9). What is more, the distinction between the public and the private made in the AHRAP is false because both are co-dependent now: states need private capital to meet financing needs and generate employment; private capital needs the state to provide an enabling environment through legislation and administration (Kennedy 2018: 44). By virtue of this position and this co-dependency, the state remains – despite its many flaws – the most viable mediator between citizens and capital. No other actor has both the carrot of policy inducements and the stick of policing; at least not in as ample a measure.

For all its relegation of the state's role and valorisation of non-state, the AHRAP – like many other human rights documents – does not adequately address how the role of the state is to be negotiated, traversed or supplanted. Or, indeed, who or what can replace the state. While AHRAP wants businesses to respect human rights and develop sustainable businesses in partnership with local communities, it doesn't address the issue of how this *can* be achieved *unless* the state creates the necessary environment. And thus, interestingly, the AHRAP remains locked in a state-centric paradigm while ostensibly rejecting the state's role in redistribution.

The centrality of foreign or even local capital to Africa's development cannot be denied. At the same time, the inherent conflict between the interests of

capital and Africans cannot be ignored either. By tending to allow capital to cherry pick 'lite' rights (however unintentionally), AHRAP reproduces the injustices perpetrated by capital. To emerge as a robust human rights framework, AHRAP requires a fuller and well-developed treatment of capital. It further needs to review the voluntarism embedded in its recommendations. Sans both, the question risks becoming: *which* human rights would capital *choose* to endorse?

Limited politics

To many, politics does not belong in a human rights action plan. The plan is meant to be a policy document outlining a timeline of activities and goals to be achieved as well as the targets and indicators that would signal progress. Properly speaking, a plan addresses identified institutional and structural issues, priority areas, targets, goals, timeframes and identity of institutions and agencies charged with implementation (Commonwealth Secretariat 2007: 30). However, none of the above exists outside their immediate context, outside of politics. Accordingly, a plan that ignores the politics undergirding any given situation risks being – to quote Shakespeare in another context – 'full of sound and fury, signifying nothing' (Macbeth, Act 5, Scene 5).

Take the issue of responsibility for the realisation of human rights, for example. The plan places all responsibility for the realisation of human rights onto Africans: citizens and civil society, states and the RECs. The plan is unequivocal in its endorsement of African citizens as 'key rights holders' and African states as the 'primary duty bearers' (AU 2018: 24). But it appears to ignore the fact that the conduct of duty bearers is conditioned and determined by their political context: for example, regardless of sovereignty, a state that needs foreign capital for infrastructure or tax revenue from local corporations necessarily balances its rights obligations against this need. Similarly, despite equality claims, a state's negotiations at a REC or other international body are significantly affected by the strength of its economy relative to the others in the system.

One weakness of the AHRAP is that it does not account for how politics affects agency – nationally, regionally, continentally and even globally. Micro details about educational campaigns and media partners are easier thrashed out and the AHRAP delivers on this. But the bigger question of how rights are to be enforced against powerful business lobbies is something AHRAP does not deal with adequately. In its present form, AHRAP presumes a pan-African political consensus on how to deal with capital *that does not appear to have been produced as yet* and proceeds to layer activities and targets on that basis. States that are riven by their differing responses to capital cannot be all that united on the issue of the relationship of business organisations to human rights. To put it another way: there can be no *joint* targets and goals without a much greater consensus undergirding them. In the absence of such an *adequate* pan-African consensus, the AHRAP may become ineffectual.

CONCLUSION

The potential value of an African Human Rights Action Plan as an instrument to protect and promote the rights of Africans is uncontestable. However, to realise this ambition, the AHRAP will need to rise far above the TREMF paradigm and deliver a framework that is as critical of global capital as it is of authoritarian states. And while the political is beyond its direct purview, the AHRAP needs to be vigilant about the encroachment of the political in its sphere of work.

Given the intrinsic fragility of a pan-African human rights framework, the AHRAP's current kid-gloves approach is understandable. The task of mobilising consensus across the continent on human rights issues is acutely sensitive and will prove unachievable if the various stakeholders are unnecessarily antagonised. However, the audacity of ambition inherent to the idea (that is, a continent-wide consensus on human rights) deserves a plan as bold and compelling. Not a trenchant critique of capitalism perhaps but still a more politically viable understanding of how Africa and Africans can claim their rightful place in the (human rights) world.

NOTES

1. The 10 goals outlined in the AHRAP are as follows: educate Africans on their rights; treat African human and peoples' rights law as a development priority; enhance national investment in protection of human and peoples' rights; open human and peoples' rights courts and other institutions to citizens; make human and peoples' rights courts and other institutions work better together (complementarity); enhance efficiency and effectiveness of Africa's human and peoples' rights courts and other institutions; achieve free movement for Africans in Africa; guarantee the right to nationality and citizenship for every African in Africa; implement development as a right; and promote transformative political leadership that values human and peoples' rights.

2. Some of the challenges identified in the AHRAP include: insufficient knowledge of human rights among people and public officials; low-level commitments by states to key human rights instruments (both legislatively and procedurally); absence of implementation strategies; inadequacy of funding for human rights projects; patchy coordination among key players responsible for promoting and protecting human rights (both nationally and at a pan-African level); lack of political will; violent conflict on the continent; absence of a human rights-specific AU policy organ; and decision-making by AU policy organs that aid member states in undermining African human rights institutions.

3. Chimni (2004) presents an interesting account of how Sklair's original formulation affects international law.

4. The ethics protocol that guided the study on which this article is based requires that the names of the interview subjects be kept anonymous and that their consent be obtained before they were interviewed. Accordingly, each subject's consent to be interviewed was obtained, and codes (e.g. interviewee 1, 2, 3 and so on) were assigned to the interview subjects. These subjects are only identified through such codes in this article. The specific job titles of interview subjects have also been kept confidential. Only general indications of the organizations they work for and the types of roles they play are indicated here.

5. For Baxi, this 'hollowing out of state sovereignty' diminishes the state as national economic planner; owner of resources; producer of goods and services; and regulator of corporate behaviour. This redefined state is not just a free market advocate but a piece of the strategy that creates 'a borderless world for global capital'.

6. Shell Nigeria was accused of triggering and abetting human rights violations, including the murder of the Ogoni 9, rape and torture. While Trafigura did not accept liability for dumping toxic waste off the Ivory Coast, it made payments worth $260 million to the government and individuals.

7. The report itself makes for harrowing reading, setting out the series of 'compromises' made by the key actors, including the omission of key safety tests; the use of faulty cement and even the failure to maintain equipment and batteries that would have activated the deadman emergency switch, which could have

prevented the blowout. Meanwhile, the description of regulatory oversight mechanisms illustrates vividly the problem of regulatory capture in highly technical industries, where government regulators are far less sophisticated than the industry wallahs they are meant to regulate.

8. Ruggiero uses the word 'criminaloids' to refer to white-collars criminals who are deemed less than criminals and so, found worthy of lesser punishments.

9. A detailed discussion of contemporary trends in corporate criminality are beyond the scope of the present paper but for rich accounts, see, generally, David Whyte, Steve Tombs and Vincenzo Ruggiero.

10. For example, a key contributor to the Gulf of Mexico blowout was BP's decision to use drilling fluid to separate mud and seawater. The fluid was left over from other operations on the oil rig and, had BP ferried it back to shore, would have needed to be disposed of as hazardous waste. But if the fluid were circulated down the oil well, BP could legally toss it overboard (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling 2011).

11. Kennedy takes the comparatively extreme position that there is no difference between public and private power.

12. This shows up as state or policy capture (that is, the influence large corporations have on public policy in both domestic and global markets); regulatory capture (that is, the 'outsourcing' or privatisation of regulatory policy particularly in those industries where public officials lag behind private actors in terms of knowledge and expertise); and the active undermining of regulation by the state itself through the deliberate lack of enforcement of the same regulation. A recent example is that of Amazon's involvement in the launch of a new web portal that will generate billions in revenues for the online retailer by allowing it to function as an interface between the US government and all those looking to sell to the government.

13. These include Weber, Bourdieu, Foucault and Lukes. Even Kennedy speaks of it where he argues that expertise provides plausible deniability regarding the agency of individual decision makers and again, in the context of war and law, where he contends that the process of abstraction allows actors to make decisions without having to assume responsibility for the same.

14. This is because the interviewee believes local ownership of the regulation is more useful than regional or continental ownership.

15. The plan specifically states that all businesses (be they community-level, national, regional, continental or transnational) ought to focus on building their own understanding of the nexus between business and human rights; understand their role as duty bearers; support and communicate the action plan; finance state and non-state human rights institutions; and educate themselves about the African Human Rights System.

16. Baxi's incisive analysis of Kofi Annan's speech is an excellent example. Since the cash-strapped UN wanted global capital to help further its goals, Annan did not talk about the egregious violations of human rights by corporate governance.

17. These could include, for example, requirements to furnish detailed financial accounts; specifications regarding expenditure such as bars on cash outlays; and process-related limitations such as open bidding on basic infrastructure contracts.

18. The Paris Principles for National Human Rights Institutions, for example, insist that human rights institutions must have sources of funding independent of the government since financial control can compromise the institution's operational independence – a key issue where state violations are being investigated. Where corporate human rights violations are being investigated, it only stands to reason that human rights institutions and initiatives be insulated from corporate funding.

19. In 2014, the Canadian mining company was sued by three former employees of its Bisha Mine in Eritrea. The plaintiffs accused Nevsun of complicity in gross human rights violations, including torture, forced labour, slavery and crimes against humanity.

20. These include, for example, the possibility of political unrest; lease revocations; land use changes or of changes in pricing policy that could reduce profitability for the foreign investor.

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