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Have the norms and jurisprudence of the African human rights system been pro-poor?

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Summary

Drawing upon the important insight of critical human rights scholars that 'pro-human rights' are not necessarily 'pro-poor', this article mainly utilises Baxi's germinal thesis on the emergence of a trade-related market-friendly human rights (TREMF) paradigm (that is slowly but surely displacing what he refers to as the UDHR paradigm, much to the advantage of global capital and the rich/powerful/elite, and greatly to the disadvantage of the poor) in assessing the extent to which the norms and jurisprudence of the African human rights system have been pro-poor. After demarcating its scope, outlining its limitations and offering an explanation of the conception of poverty that animates its use of the terms 'the poor' and 'pro-poor', the article analyses the relevant norms and jurisprudence of the African system in the context of the conceptual framework of the study, and concludes that these norms and jurisprudence have tended to be animated by an anti-TREMF (and pro-UDHR paradigm) sensibility, ethic and politics, and have for this and other reasons been more or less pro-poor in orientation. While these findings show that the TREMF paradigm has not completely eaten away at the pro-poorness of the textual

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affirmations of human rights that guide and have been produced by such international human rights systems, and such texts are important enough in 'loosely' framing and shaping human rights that their character must be carefully studied, it must still be cautioned that such textual affirmations are not self-executing. They must be implemented in the concrete sense by governments, peoples, corporations, institutions and other agents for them to really matter. It should therefore be kept in mind that it is at this level, the level of the 'living' human rights law (that is, the law as it is actually experienced by ordinary people) that the TREMF paradigm's ultimate impact is to be observed. This suggests that the TREMF paradigm may have exerted more influence in the living world than this study (focused as it largely is on 'the text') might suggest.

1 Introduction

As critical human rights scholars (such as Baxi and Rajagopal) have noted, the expression 'human rights' is capable of accommodating both elite and subaltern politics, both progressives and reactionaries, and both the politics of domination and the politics of liberation or insurrection.[1] For instance, as is well known, both the Egyptian freedom fighters who marched on and massed in Tahrir Square in early 2011 (an admirably progressive and insurrectionary movement) and the neo-Nazi's who all too frequently terrorise racial and other minorities in Europe and North America (a virulently reactionary movement) have laid credible claim to the protection of the human rights to freedom of expression and assembly.[2] As such, it is fair to say that not every human rights claim, practice, judicial/administrative decision or system will – on the balance – be pro-poor. While some human rights politics, claims, decisions or even systems have tended to be more pro-poor than pro-elite, the converse has been true for others. It is therefore imperative that scholars and observers of governance systems and institutions on the African continent as elsewhere not assume that 'pro-human rights' necessarily translates to 'pro-poor'.[3]

It is against this background that this article examines the extent to which the norms and jurisprudence of the African human rights system have been pro-poor. To what extent have the norms of the African

1 See U Baxi *The future of human rights* (2002) 6; B Rajagopal 'Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective' (2007) 8 *Human Rights Review* 157 158. See also See OC Okafor 'Attainments, eclipses and disciplinary renewal in international human rights law: A critical overview' in D Armstrong (ed) *Routledge handbook of international law* (2009) 303.

2 'Egypt revolution 2011: A complete guide to the unrest' *Huffington Post* http://www.huffingtonpost.com/2011/01/30/egypt-revolution-2011_n_816026.html (accessed 18 May 2011); 'European neo-Nazi's move to the US for free speech' http://rt.com/usa/news/neo-nazis-usa-free-speech (accessed 27 June 2011).

3 See Rajagopal (n 1 above).

system (that is, the African Charter on Human and Peoples' Rights (African Charter) itself, as the main constitutive instrument of the African system, its Women's Protocol, and the Resolutions passed by the African Commission on Human and Peoples' Rights (African Commission) been pro-poor? And to what extent has the jurisprudence of the African Commission been pro-poor?

Given the fact that almost all of the body of work of the African Court on Human and Peoples' Rights (African Court) still lies ahead, and there is very little, if any, substantive evidence to go on at the moment with regard to the Court's engagement with the claims of poor people in Africa, the article does not focus on that admittedly important component of the African system. The analysis of that Court's receptiveness to the claims of the poor, or the lack thereof, must therefore be deferred to a future occasion.

Another important (if justifiable) limitation of the article is that, although the indivisibility and interdependence of all human rights norms have now been well established, and are accepted by the authors, and civil and political rights jurisprudence (or struggles for the enthronement of similar values) can contribute significantly to the amelioration of poverty and the enhancement of the social conditions of the poor,[4] the article's interrogation of the norms and jurisprudence of the African human rights system with regard to the extent of their receptiveness to the claims of the poor focuses on the economic and social rights norms and jurisprudence of that system (broadly construed). Other than for reasons of space, the focus on economic and social rights is justified by the fact that the deprivation of this category of human rights is more directly and immediately tied to the production and maintenance of impoverishment and poverty in Africa, as elsewhere. What is more, as Pogge has noted, economic and social rights are also by far the most violated category of rights, a fact that has had dire consequences for the enjoyment of the historically far more favoured civil and political rights.[5] As Pogge puts it:[6]

> Socio-economic human rights, such as that 'to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care' (UDHR, art 25) are currently, and by far, the most frequently violated human rights. Their widespread violation also plays a decisive role in explaining the global deficit in civil and political human rights which demand democracy, due process, and the rule of law: Very poor people – often physically and mentally stunted due to malnutrition in infancy, illiterate due to lack of schooling, and much preoccupied with their family's survival – can cause little harm or benefit to the politicians and officials who rule them. Such rulers therefore have far less incentive to

4 See SR Osmani 'Poverty and human rights: Building on the capability approach' (2005) 6 *Journal of Human Development* 206.

5 T Pogge 'Recognised and violated by international law: The human rights of the global poor' (2005) 18 *Leiden Journal of International Law* 717 718.

6 As above.

attend to the interests of the poor compared with the interests of agents more capable of reciprocation, including foreign governments, companies, and tourists.

It is for all these reasons that our analysis in this article concentrates on the economic and social rights norms and jurisprudence of the African system; which is admittedly only one dimension of the poverty question. Nevertheless, it should be kept in mind that it is a highly important and understudied dimension of that question.

2 Conceptual framework

It is important at this juncture, however, to develop and define the notion of poverty that undergirds and frames our conceptions of 'the poor' and 'pro-poor'. As may be clear to some, *poverty* now tends to be conceived of in the relevant literature sets not merely in terms of material deprivation, but – following Sen's important work – *also* in terms of 'a very low level of well being',[7] or as 'the denial of opportunities and choices basic to human development'.[8] More quantitatively, following the World Bank's work on the subject, Pogge tends to utilise either the 'one-dollar-a-day' measure or its 'two-dollars-a-day' counterpart.[9] It is also imperative to factor into our analyses of the issue the growing feminisation of poverty and its disproportionate impact on females.[10] Thus, in this article, the expression 'poverty' includes any incidence of the fundamental deprivation, and/or of the serious lack of basic needs (such as food, water, shelter, education, clothing and essential medicines). Yet, it must be kept in mind that the article focuses on the latter, that is, the lack of basic needs component of the equation. Therefore the expression 'the poor' refers to those whose lives are characterised by this kind of poverty; and the term 'pro-poor' refers to any phenomenon, decision, system, and such, that favours or contributes to the amelioration or elimination of this kind of condition of poverty.

It is also important from a conceptual perspective to develop and explain early on in the article the nature of the measure(s) or barometer(s) of 'pro-poorness' or 'anti-poorness' that also inform and frame our assessment of the quality of the African system's sensitivity to, and engagement with, the claims of the poor. As Shivji has shown, the starting point for this exposition must be a reference to the (relative) divorce between individual rights jurisprudence and

7 See Osmani (n 4 above).

8 W van Genugten & C Perez-Bustillo (eds) *The poverty of rights: Human rights and the eradication of poverty* (2001).

9 T Pogge *World poverty and human rights* (2002).

10 PI Ozo-Eson 'Law, women and health in Nigeria' (2008) 9 *Journal of International Women's Studies* 285.

fundamental questions of socio-economic justice that was historically imposed by and within the dominant liberal human rights paradigm and discourse.[11] This relative divorce was made manifest in a number of ways, including the human rights versus development binary opposition argument between many 'Third World' leaders and many in the geo-political West;[12] and the emergence in the mid-1960s of two separate and unequal international human right covenants – the one on civil/political rights and the other on economic, social and cultural rights.[13]

More recently, though, attempts have been made to (re)marry human rights to socio-economic justice, in part through the increasing acceptance of the equality in status and interdependence of economic/social rights and civil/political rights,[14] the attempts to (re)marry human rights to development, and efforts to achieve the opposite.[15]

Many scholars are, however, skeptical – to say the least – of the success of this (re)marriage. Some, like Mathews and Baxi, correctly see this touted (re)marriage as still more rhetorical than real.[16] For them, the 'actually existing' marriage seems to be between human rights and market ideology (and at worst between human rights and market fundamentalism), much to the disadvantage of the poor.[17] To Baxi, a new human rights paradigm has emerged as the result, one that I will henceforth refer to as the trade-related market-friendly (TREMF) paradigm.[18] In Baxi's words:[19]

> The paradigm of the Universal Declaration of Human Rights is being steadily, but surely, *supplanted* by that of trade-related, market-friendly [or TREMF] human rights. This new paradigm seeks to reverse the notion that universal human rights are designed for the attainment of dignity and well-being of human beings [as opposed to local or global capital, etc] and for enhancing the security and well being of socially, economically and civilisationally vulnerable peoples and communities [in other words the poor].

In the main, the detailed character of this TREMF paradigm as theorised by Baxi is that it (i) favours global capital's property interests mostly at the direct expense of the most vulnerable human beings (that is,

11 I Shivji 'Constructing a new rights regime: Promises, problems and prospects' (1999) 8 *Social and Legal Studies* 253 257-261.

12 As above

13 H Steiner *et al International human rights in context: Law, politics, and morals* (2007) 263.

14 See Vienna Declaration and Programme of Action http://www.unhchr.ch/ huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en (accessed 27 June 2011).

15 S Mathews 'Discoursive alibis: Human rights, Millennium Development Goals and poverty reduction strategy papers' (2007) 50 *Development* 76 78-79.

16 As above; Baxi (n 1 above) 132-145.

17 As above.

18 Baxi (n 1 above).

19 Baxi (n 1 above) 132.

the poor); [20] (ii) protects global capital against political instability and market failure, usually at a significant cost to the most vulnerable among its own citizens (that is, the poor);[21] and (iii) denies a significant redistributive role to the state, calling upon it to free as many spaces for capital as possible, initially by pursuing the three-Ds of contemporary globalisation, that is, deregulation, denationalisation and disinvestment,' and thereby disadvantaging the poor.[22]

On the whole, therefore, it appears that the turn toward the TREMF human rights paradigm that Baxi has identified has tended to disadvantage the poor in favour of global capital and the rich/powerful/elite actors who tend to control and benefit from capital in greatly disproportionate measure. Given the massive uprisings and discontent among the world's poor that resulted from the introduction in many African and other Third World states of the TREMF-style economic policies that characterised the structural adjustment programmes of the 1980s and 1990s, it can reasonably be surmised that those economic policies were more or less anti-poor, or were – at the very least – experienced as such by the vast majority of the world's poor. It should not then surprise the keen observer that the similarly-oriented TREMF human rights paradigm would tend to function as anti-poor.

If this premise is accepted, then the chief questions that remain to be answered in this article are: To what extent have the norms and jurisprudence of the African system been TREMF-like, and therefore anti-poor? And to what extent have those norms and jurisprudence *not* been TREMF-like, and thus pro-poor? Put differently, do the norms and/or jurisprudence of the African system undermine or support the emergent TREMF human rights paradigm?

However, it should be noted that, while the Baxian thesis on the move to a TREMF paradigm is the primary optic through which we view the norms and jurisprudence of the African system that are analysed in the article, it is not the sole such optic. It is supplemented in the appropriate places and, when necessary, by a more general analysis of the extent to which the relevant norm or jurisprudence either promotes/protects or undermines the interests of the poor (as defined in this section of the article).

3 African human rights norms and the claims of the poor

The African Charter came into existence in the shadows of a fierce debate on the relationship between civil and political rights, on the one hand,

20 As above.

21 Baxi (n 1 above) 141.

22 Baxi (n 1 above) 139.

and economic, social and cultural rights on the other. The dimensions of that debate were carefully traced by Howard as questioning[23]

> whether the separate sets of rights embodied in the two 1966 Covenants on human rights are intrinsically related, such that they must be developed and enlarged simultaneously, or whether, on the other hand, one set of rights takes priority over the other. Are they in other words sequential or interactive?

Many people from Africa and the rest of the Third World did make their voices heard in that debate, their major point (at least at that point in history) being that 'economic, social, and cultural, but especially 'economic' rights (usually meant as the right to development) must take priority over civil and political rights'.[24]

Regardless of the merits of the prioritisation argument, its historical popularity among the ranks of African leaders and peoples should not surprise any keen student of African affairs. For, from the time of the drafting of the African Charter to this day, the African continent has been mostly defined to both insiders and outsiders by the poverty of all too many of her peoples. As Nhlapo somewhat hyperbolically suggests, one of the explanations for the slow progress of the struggle to enthrone the human rights ideal on the continent 'is provided by Africa's special conditions of poverty, ignorance, disease and lack of political sophistication afflicting the vast majority of the continent's peoples'.[25]

As such, one would expect that the widespread incidence of poverty on the continent did play on the minds of the designers of the African Charter which, after all, was conceived of as a mechanism to meet the needs of the continent and improve its political, social and economic conditions.[26] So notwithstanding that the term 'poverty' is not directly referenced in the African Charter (even though its Preamble commits state parties to that document to the elimination of such other social monstrosities as colonialism, neocolonialism, apartheid, and the dismantling of aggressive foreign military bases), that term seems to have nonetheless featured prominently in the consciousness or subconscious thinking of those who drafted that treaty. Instructive

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23 R Howard 'The full-belly thesis: Should economic rights take priority over civil and political rights? Evidence from sub-Saharan Africa' (1983) 5 *Human Rights Quarterly* 467 468.

24 As above.

25 RT Nhlapo 'International protection of human rights and the family: African variations on a common theme' (1989) 3 *International Journal of the Family* 1 2.

26 BO Okere 'The protection of human rights and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 141 145, quoting the Committee of Experts that drafted the Charter that they worked on the understanding that the 'African Charter on Human and Peoples' Rights should reflect the African conception of human rights' and 'should take as a pattern the African philosophy of law and meet the needs of Africa'.

in this regard is the relative pride of place that is accorded in the African Charter to guarantees of the right to development, and of other more commonly-protected economic, social and cultural rights,[27] as valuable resources in aid of those struggling to ameliorate in significant measure the prevalence of poverty on the continent. Against the prevailing orthodoxy at the time it was drafted, the African Charter stood on the side of the right to development. It also integrated in a single normative document two generations of rights that had been isolated in similar global and regional instruments.[28] The African Charter's tone was well set in its Preamble, which proclaimed that

> it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

It is against this background that Udombana describes the three categories into which the rights enshrined in the African Charter may be divided: libertarian rights (which are rights relating to the exercise of free will); egalitarian or equalitarian rights (that are established on the foundation of social equality and aimed at the just and equal distribution of economic and social goods); and solidarity rights (which are those rights not vested in individuals but in collective groups of individuals called peoples).[29] As discussed in the introduction to the article, our particular concern here is with those rights that fall within the rubric of egalitarian or equalitarian rights (that is, economic and social rights and similar kinds of rights, such as the right to development). As we have pointed out earlier as well, they are the rights that speak more directly to the living conditions of the poor and the deprived peoples of the African continent. They clearly fall within the category of the 'real needs' that a former Senegalese president had urged the drafters of the African Charter to keep constantly in mind.[30] And, according to

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27 As above.

28 DM Chirwa 'Toward revitalising economic, social, and cultural rights in Africa: *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*' (2002) 10 *Human Rights Brief* 14; JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*' (2005) 1 *African Journal of Legal Studies* 129 140.

29 N Udombana 'Between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105 112-118.

30 Address of President Leopold Senghor to the Dakar Meeting of Experts Preparing the Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/X, reprinted in P Kunig *et al* (eds) *Regional protection of human rights by international law: The emerging African system* (1985). Senghor appeared to conflate 'rights' with "needs"'. Even though it is clear in theoretical terms, they do not mean one and the same thing. See eg J Waldron 'The role of rights in practical reasoning: "Rights"

Udombana, they also tend to have a strong positive dimension, in the sense that '*they enhance the power of the government* to do something for the person, to enable him or her in some way ...'[31]

What is more, not only did the African Charter enshrine these rights, but some writers have even suggested that they are privileged in contrast to civil and political rights. As Odinkalu has noted, the African Charter's Preamble[32]

> went much further than was implied in the principles of universality, indivisibility, and interdependence of human rights ... and appeared to suggest that the Charter would accord priority to economic, social and cultural rights over the so-called civil and political rights.

This is especially so as the relevant clause stated that satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights. But quite as significantly, the African Charter formulated those egalitarian rights as direct entitlements rather than mere aspirations in similar international and regional instruments.[33] Equally important is the Charter's failure to qualify the economic and social rights that it enshrines with such phrases as 'progressive realisation' and 'resource constraints'.[34]

Although, as we have seen, it is clear that the mere inclusion of economic and social rights in the dominant human rights discourse and jurisprudence, and its mere marriage to civil and political rights, will not on its own suffice to produce a real-life pro-poor social environment (since much more must be done in real life in order to actualise the presumed pro-poor ethic that animated that marriage in the first place), the relative pride of place that the Preamble and main text of the African Charter accords to economic and social rights, broadly construed (including the rights to development and some other so-called solidarity rights), does suggest that that treaty is significantly sensitive to the interests of the poor. It is also an indicator of its significantly anti-TREMF sensibility. For, given that, according to Baxi, the TREMF paradigm tends to require the protection of the property interests of the global elite/rich/powerful at the expense of the interests of the poor, and in view of the fact that the rich/powerful elite can usually get by much more easily than the poor in the absence of the protection of economic and social rights by the state, the emphasis that the African

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versus "needs"' (2000) 4 *Journal of Ethics* 115; M Tushnet 'An essay on rights' (1984) 62 *Texas Law Review* 1363

31 N Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1209 1224-1225 (our emphasis).

32 CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327 337.

33 See Chirwa (n 28 above); F Coomans 'The *Ogoni* case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749 751.

34 Steiner *et al* (n 13 above) 505.

Charter has placed on economic and social rights is strongly suggestive that it is imbued with a counter-TREMF ethic, or that it, at the very least, does not affirm that paradigm. As insufficient on its own as this textual orientation of the African Charter is to uplift the social conditions of the African poor, it is a good and auspicious beginning point. It can greatly resource the activists, judges, legislators, administrators and other actors who are minded to struggle in favour of the upliftment of the African poor.

It is also worth noting here that the fact that economic and social rights provisions, as Udombana has shown, tend to 'enhance the power of the government to do something' does strongly suggest that their inclusion in significant numbers in a human rights treaty pushes back against the TREMF paradigm which would, as Baxi has argued, tend to deny a significant redistributive role to the state, and call upon it to pursue deregulation, denationalisation, and disinvestment, thereby disadvantaging the poor.

Among the social and economic rights specifically guaranteed under the African Charter is the individual right to work under equitable and satisfactory conditions and the right of employees to receive equal pay for equal work, both under article 15. The right of individuals to enjoy the best attainable state of physical and mental health is enshrined in article 16 of the Charter. It enjoins all state parties to the Charter to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. In addition to the above-stated rights, the African Charter also provides for the right to education.[35] The Charter provides equally for the elimination of discrimination against women (who account for a disproportionate percentage of Africa's poor) and the protection of the rights of women and children as stipulated in international declarations and conventions.[36]

More problematically, the African Charter also guarantees the right to property, though it is explicitly stated that this right could be encroached upon in the interests of a public need or in the general interests of the community in accordance with the provisions of appropriate laws.[37] However, although the guarantee of the right to property in a human rights treaty is not necessarily pro or anti the TREMF paradigm that tends to harm the poor, and regardless of the fact that such an act of inclusion can in fact help protect the property of poor peoples, in the specific historical context of many African societies, this right has too often proven to be extremely harmful to the interests of the poor in those countries, and has far too frequently functioned as an obstacle in

35 Art 17.

36 See generally S Chant *Gender, generation and poverty: Exploring the 'feminisation of poverty' in Africa, Asia and Latin America* (2007); M Buvinic 'Women in poverty: A new global underclass' (1997) 108 *Foreign Policy* 38.

37 Art 14.

the way of socially-progressive land and other property tenure reform. Thus, such guarantees of the right to property as are contained in the African Charter can too often operate in a way that 'favours global [and/or local] capital's property interests mostly at the direct expense of the most vulnerable human beings (that is, the poor)'.[38]

Subject to the notable exception of certain interpretations and applications of the right to property, all of the rights discussed above could, in most contexts, more or less be legitimately placed under the umbrella of the category of rights described by Udombana as egalitarian/equalitarian. However, there are other rights in the genre he describes in solidaritarian terms that could equally address the conditions of the poor in Africa. For example, article 21(5) of the African Charter commits state parties to an undertaking to 'eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'. Ease of implementation aside, the provision signals the African Charter's sensitivity to the activities not just of monopolies, but also of other agencies of foreign capital whose policies have, as has been argued elsewhere, contributed substantially to the impoverishing of all too many Africans.[39] This right is one of the most clearly anti-TREMF provisions in the African Charter. It directly and explicitly seeks to counter the ethic/jurisprudence that tends to favour global capital's property interests mostly at the direct expense of the poor, and can even be credibly read as somewhat opposed (at least to a high degree) to the now fashionable deregulation, denationalisation and disinvestment models of socio-economic governance and development.

In similar fashion, article 22 of the African Charter guarantees to all peoples the right to economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. It provides further that states shall have the duty, individually and collectively, to ensure the exercise of the right to development. While this provision does not clearly stipulate in any detail the particular ideology of development that animates it,[40] the mere fact that it imposes the development duty primarily on the African states that are party to the African Charter,[41] and the tenor of evidence from other normative statements of this right,[42] suggests

38 Baxi (n 1 above) 136.

39 OC Okafor 'Re-conceiving Third World legitimate governance struggles in our time: Emergent imperatives for rights activism' (2000) 2 *Buffalo Human Rights Law Review* 1.

40 See OC Okafor '"Righting" the right to development: A socio-legal analysis of article 22 of the African Charter on Human and Peoples' Rights' in S Marks (ed) *Implementing the right to development: The role of international law* (2008) 52.

41 As above.

42 As above.

that there is an extent to which this provision runs counter to the TREMF paradigm that tends to deny a redistributive role to the state and calls upon that institution to largely denationalise, disinvest and deregulate its economy. The provision is, at least, in this sense a pro-poor one. In any case, the attainment of people-led development (understood more progressively), the kind of development that seems to be suggested by the assigning of the right to development to 'all peoples' rather than 'all states', will tend to contribute to the significant amelioration of poverty among the relevant people.

Finally, regarding the norms of the African Charter itself, article 24 provides that all peoples shall have the right to a general satisfactory environment favourable to their development. Here again, this provision would appear to provide strong support to the effort to improve the living conditions of the poor, who to often bear the brunt of the devastation of the environment. For example, the anti-toxic waste dumping ethic and prohibition (which is clearly subsumed by the protection guaranteed under article 24 above) will disproportionately protect the world's poor, many of whom live on the African continent.[43] Yet, the kind of protection of global capital's profits that have been too often demanded by world leaders and larger corporations alike would tend to require looser environmental standards and regulations; a TREMF-like orientation. It is in this kind of sense that article 24 is anti-TREMF and pro-poor. But it should also be noted that a contrary argument can also be credibly made that the unrestricted implementation of this right in many developing societies can in fact depress economic activity and competitiveness, and therefore produce or accentuate poverty.

The African Commission has gone further to pass resolutions dealing with similar issues as are dealt with by its economic and social rights provisions. For example, in 2001 it passed a Resolution on HIV/AIDS Pandemic – Threat against Human Rights and Humanity[44] in which the Commission reminded itself of the provision of the African Charter to promote human and peoples' rights and ensure their protection in Africa, but especially as it relates to the right of every individual to enjoy the best attainable state of physical and mental health. The Commission declared the HIV/AIDS pandemic a human rights issue and called upon African governments and state parties to the Charter[45]

> to allocate national resources that reflect a determination to fight the spread of HIV/AIDS, ensure human rights protection of those living with HIV/AIDS against discrimination, provide support to families for the care of those dying of AIDS, devise public health care programmes of education and carry

43 CU Gwam 'Toxic waste dumping and the enjoyment of economic, social and cultural rights in Africa' (2008) 15 *African Yearbook of International Law* 237.

44 ACHPR/Res.53 (XXIX) 01 http://www.achpr.org/english/_doc_target/documentation.html?/ resolutions/resolution58_en.html (accessed 8 June 2011).

45 Gwam (n 43 above). See also T Kohi *et al* 'HIV and AIDS stigma violates human rights in five African countries' (2006) 13 *Nursing Ethics* 404.

> out public awareness especially in view of free and voluntary HIV testing, as well as appropriate medical interventions.

Here, the African Commission's insistence that states 'provide' support, programmes and free services clearly runs counter to the TREMF paradigm that tends to call on states to disinvest from the provision of public services and deregulate (and privatise) the economy as much as possible. Clearly, the Commission does see the African state playing a redistributive role to a significant degree. In this sense, then, and according to the conceptual framework outlined in the last section of the article, it is fair to conclude that both the Resolution and the Commission's jurisprudence here were pro-poor.

The African Commission has also passed a Resolution on the Situation of Women and Children in Africa at its session held from 21 May 21 to 4 June 2004.[46] In it the Commission described women and children in Africa as victims of multiple human rights violations and stated that children in particular are endangered by deportation, slavery, child trafficking and their proliferation as street children. It considered the persistence of traditional practices that are harmful to women and children and raised concern about 'widespread poverty among women and the stigmatisation of women and children with HIV/AIDS'. The African Commission therefore called on member states to protect women and children by, among other strategies, implementing programmes to fight against HIV/AIDS and helping women benefit from social security. This Resolution is pro-poor in our view, in part because it does show a high degree of sensitivity to the feminisation of poverty in Africa as in the rest of the world. It should also be noted that, by contributing to the normative de-legitimisation of 'modern day slavery' and child trafficking, the Resolution functions against the TREMF paradigm's promotion and protection of the property interests of local and global capital because these are the very categories of agents that tend to profit the most from such crimes. Furthermore, by urging states to 'implement programmes' to help the vulnerable, it affirms (not denies) the redistributive role of the state, thereby evincing a pro-poor orientation.

Further, the African Commission at its session held from 23 November to 7 December 2004 passed another Resolution on Economic, Social and Cultural Rights in Africa[47] in which it recognised 'the urgent need for human rights, judicial and administrative institutions in Africa to promote human dignity based on equality and to tackle the core human rights issues facing Africans, including food security, sustainable livelihoods, human survival and the prevention of violence'. Here again, the affirmation of a significant (though not exclusive) redistributive role for

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46 ACHPR/Res.66 (XXXV) 04 http://www.achpr.org/english/_doc_target/documentation.html?/ resolutions/resolution71_en.html (accessed 8 June 2011).

47 ACHPR /Res.73(XXXVI)04 http://www.achpr.org/english/_doc_target/documentation.html?/ resolutions/resolution78_en.html (accessed 8 June 2011).

the state in Africa (as is evidenced by its call on the state to ensure food security, and so on) undermines the TREMF paradigm to an extent and supports the causes of the poor.

However, an important qualification to the broadly pro-poor character of the African Charter is that its text does not contain a number of internationally-recognised economic and social rights. These omissions are unfortunate indications of the limits of the pro-poor ethic that animated the founders of the African system. It is for this reason that a couple of these rights had to be read into the African Charter by the African Commission in the now celebrated *Ogoni* case (discussed in the next section of this article).

Besides the African Charter, a number of derivative human rights instruments that clarify and emphasise specific themes within the general framework of the Charter's normative provisions exist. These instruments also address the situation of poor Africans. These include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),[48] the African Charter on the Rights and Welfare of the Child (African Children's Charter)[49] and the OAU (now AU) Convention Governing Specific Aspects of Refugee Problems in Africa.[50] Thus it appears that, for the most part, the texts of the economic and social rights norms of the African system are pro-poor in orientation. However, the notable exception of the right to property, which in the context of the African continent is less solidly either anti-TREMF or pro-poor, was discussed. In our view, the specific context in which this right is sought to be implemented will greatly shape its orientation as either pro- or anti-poor. In any case, it is only when they are read in context that the pro- or anti-poor orienta-

48 This Protocol includes such rights as those relating to economic and social welfare (art 13); health and reproductive rights (art 14): the right to food security (art 15); the right to adequate housing (art 16); the right to a healthy and sustainable environment (art 18); the right to sustainable development (art 19); rights of widows (art 20); the right of inheritance (art 21); special protection of elderly women (art 22); and special protection of women with disabilities (art 23).

49 The African Children's Charter reinforced some general provisions of the main Charter by directing them specifically to the concerns of the African child. It protects the right to education (art 11); the rights of handicapped children (art 13); the right of the child to health and health services (art 14); and the prohibition of child labour (art 15). For an analysis of the African Children's Charter, see D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

50 The Convention defines a refugee as 'every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. Refugees often become poor in their new surroundings. Space does not allow us to delve into a detailed consideration of the ways in which these instruments address the claims of the poor in Africa. Suffice it to note, though, that their general ethic appears to be pro-poor.

tion of any norm whatsoever can be more accurately appreciated. This is why, as ultimately insufficient in the end as it is, the analysis of the jurisprudence of the African Commission in interpreting the African Charter in various contexts that is offered below is important.

4 African Commission and the adjudication of subaltern claims

The African Commission was until recently the main international institution charged with translating the African Charter's formal guarantees into individual and collective entitlements. Until the recent establishment of the African Human Rights Court, the African Commission shouldered that duty near-exclusively. In this part of the article we evaluate the jurisprudence of the Commission for its receptiveness to the claims of Africa's poor.

The African Commission's mandate to protect human rights is covered by articles 46-59 of the African Charter. Under this mandate, the Commission could accept both inter-state communications[51] as well as communications from individuals.[52] In its early years, the Commission dealt almost exclusively with civil and political rights. Even today, an audit of all of the communications that the Commission has dealt with from its inception to date would inevitably show that the vast majority of its decisions have been on communications alleging violations of civil and political rights.[53] This skewed record notwithstanding, the Commission has also pronounced substantively on economic and social rights. And, not surprisingly, its economic and social rights decisions contain reasoning that, if implemented, could provide healthy relief from poverty and deprivation for the applicants. This point is easily illustrated.

In *Free Legal Assistance Group and Others v Zaire*,[54] several communications against Zaire were consolidated into a single complaint. One of those communications was submitted by the Union Interafricaine des Droits de l'Homme which included allegations that the public finances of Zaire were mismanaged and that the government had failed to provide basic services. The complaint also alleged a shortage of medicines and the forced closure of universities and secondary schools for a period of two years. In its decision, the African Commission dwelt on articles 16 (the right to the best attainable state of physical and mental health) and 17 (the right to education) of the African Charter, among several others. It found Zaire to be in violation of these articles.

51 Arts 47-54.

52 Arts 55-59.

53 Nwobike (n 28 above) 130.

54 (2000) AHRLR 74 (ACHPR 1995).

According to the Commission, state parties to the African Charter should take necessary measures to protect the health of their people. It also held that the failure of the government to provide basic services, such as drinking water and electricity, and the shortage of medicines constituted a violation of article 16. Regarding article 17 on the right to education, the Commission held that it had been violated by the closure of universities and secondary schools.

Here, it is significant that the issue for determination partly concerned the failure of the state to ensure the provision of certain critically-important public goods (that is, healthcare, education, water, electricity, and such). It is also as important to our analysis here that the African Commission affirmed the duty of the state to take steps to ensure the provision of these public goods, and that it did so in terms that suggested that it did not – for the most part – subscribe to the TREMF paradigm that, *inter alia*, denies a significant redistributive role to the state, and calls upon it to denationalise, disinvest and deregulate national economies. As has been explained in section II of this article, this is a largely pro-poor posture.

Two years later, in the case of *Union Interafricaine des Droits de l'Homme and Others v Angola*,[55] the communication alleged the mass expulsion of West African nationals by the Angolan government. Those affected were said to have lost their belongings in the process. Though the complaint asserted that the Angolan government violated articles 12(4) and (5), prohibiting the expulsion or mass expulsion of non-nationals from any territory into which they had been legally admitted, in considering it, the African Commission coupled several social and economic rights. In finding a violation of articles 14 and 18 of the African Charter, the Commission held:

> This type of deportations calls into question a whole series of rights recognised and guaranteed in the Charter; such as the right to property (article 14), the right to work (article 15), the right to education (article 17(1)) and results in the violation by the state of its obligations under article 18(1) which stipulates that 'the family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health.' By deporting the victims, thus separating some of them from their families, the defendant state has violated and violates the letter of this text.

In 2008, the African Commission was again called upon to decide a mass expulsion case involving Angola, but in which the victims this time were 14 Gambian nationals resident and working in that country. In *Institute for Human Rights and Development in Africa v Angola*,[56] the complainants alleged that, even though they had proper documentation permitting them to live and work in Angola, they were all rounded up, detained and later deported without legal protection. The conditions of their detention prior to being expelled were unduly harsh, they

55 (2000) AHRLR 18 (ACHPR 1997).

56 (2008) AHRLR 43 (ACHPR 2008).

said. There was no medical attention, they had little or no food and lacked proper sanitation. According to them, 500 people were provided with just two buckets of water to use in the bathroom, which was in no way separated from the sleeping or eating areas. They also alleged that victims' personal property had been seized. These included television sets, shoes, wrist watches, clothing, generators, furniture and cash. They told the Commission that this was a violation of, among others, their rights to property and to work enshrined in the African Charter.

The African Commission found no justification for the action of the Angolan authorities. Though recognising that the right to property under the Charter was not absolute, it held that the respondent state provided no evidence to prove that its actions were necessitated by either a public need or community interest. 'Without such a justification and the provision of adequate compensation determined by an impartial tribunal of competent jurisdiction,' the Commission held that Angola's actions violated the complainants' right to property guaranteed by article 14 of the Charter. On their right to work under article 15 of the Charter, the Commission was of the opinion that the abrupt expulsion without any possibility of due process or recourse to national courts to challenge the respondent state's actions severely compromised the victims' right to continue working in Angola under equitable and satisfactory conditions.

A similar case to the above was that of *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea*.[57] The facts were that, following a speech delivered by the Guinean President, soldiers and civilians alike descended on Sierra Leonean refugees resident in that country, committing widespread looting and extortion. They evicted the refugees from their homes and refugee camps and confiscated their food and other personal property. In this complaint the Sierra Leoneans alleged the violation of among others their rights to be free from mass expulsions and not to be arbitrarily or unjustly deprived of their property. Recognising that mass expulsion presented a special threat to human rights, the African Commission found Guinea to have violated the enumerated rights.

With regard to the last three cases, although the African Commission's decisions can definitely be seen as pro-poor, especially given the way in which the Commission took sides with the poor and vulnerable parties in those cases against the much stronger governments involved, it should still be noted that their common major subject matter (the expulsions of immigrants) does not necessarily implicate the Baxian TREMF thesis. As such, there is little to say about these cases from the TREMF optic; except to note the fact that in some of these cases, the African Commission did affirm the responsibility of the state of Angola to provide medical attention and food to migrants while they were in

57 (2004) AHRLR 57 (ACHPR 2004).

detention preparatory to their expulsion. This can be read as a more marginal affirmation of the role of the state in providing public goods (in this case to a marginalised and vulnerable but small group in its custody), in which case the case would constitute a more marginal rejection of the TREMF paradigm's denial of a redistributive role for the state.

The case of *Malawi African Association and Others v Mauritania*[58] presented the African Commission with the opportunity to consider the rights of detainees to medical care as well as several other economic, social and cultural rights. The communication concerned the situation in Mauritania between 1986 and 1992. It alleged the existence of a practice in some parts of that country analogous to slavery. Some persons affected by this practice released documents calling for a dialogue with the government about how it could be ended. But rather than hearing out their plea, several of them were tried and imprisoned for holding unauthorised meetings, distributing materials injurious to the national interest and engaging in racial and ethnic propaganda. Among the rights relevant to this article that engaged the attention of the Commission were the right to property, the right to work, the right to cultural life and the right to health. On the right of detainees to health, the Commission held that a state's responsibility was far more evident because 'detention centres are its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities'.[59] The Commission found that some of the detainees died because of the lack of medical attention. They also lacked food, blankets and adequate hygiene. The Commission also held that a violation occurred when the government of Mauritania allowed the confiscation and looting of the property of black Mauritanians and the expropriation or destruction of their land and houses. In its judgment, it recommended that the Mauritanian government take appropriate measures to ensure payment of compensation to the widows and victims of the violations in question.

In terms of the relationship of this decision to the interests of the poor and/or the Baxian TREMF thesis, the decision is clearly a pro-poor one. It seeks to protect the rights of the sometimes enslaved, highly-marginalised and relatively impoverished black population in Mauritania. It is noteworthy here that, *inter alia*, rather than call on the government to disinvest from and deregulate the relevant areas of socio-economic life, the decision actually calls for more investment and regulation by the government in the prison sector so as to ensure the provision of the services and public goods that were denied to the detainees that filed this petition against the government at the African Commission. This move is clearly counter and not pro the TREMF paradigm.

58 (2000) AHRLR 149 (ACHPR 2000).

59 Para 122.

The particular health needs of mental health patients were central to the complaint in *Purohit and Another v The Gambia*.[60] It was presented on behalf of patients detained at Campama, a psychiatric unit of the Royal Victoria Hospital under the Gambian Mental Health Acts. The major issue raised by the complainants was that the law governing mental health in The Gambia was outdated. They also alleged overcrowding in that unit and that there was no requirement of consent to treatment or subsequent review of treatment. In its decision, the African Commission stated that the enjoyment of the human right to health was vital to all aspects of a person's life and well-being, and was crucial to the realisation of all other fundamental human rights. The Commission also expressed its awareness that millions of people in Africa were not enjoying the right to health maximally because African countries were generally faced with the problem of poverty which rendered them incapable of providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. With this in mind, the Commission decided to read into article 16 of the African Charter the obligation of state parties 'to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind'.[61]

Here, even while noting that most African governments were hampered as to the extent to which they could ensure the enjoyment of economic and social rights by the paucity of resources, the African Commission nevertheless insisted that these states must still take measures to the maximum of their available resources to ensure the enjoyment of these rights by their populations. Given that the failure to ensure that this is the case tends to much more negatively impact the poor than the elite/rich/powerful, and that the TREMF paradigm calls on the state to disinvest from the provision of social services, this decision can be commended as anti-TREMF and pro-poor.

Mauritanian-style slavery echoed in the case of *Rabah v Mauritania*.[62] The complainant and his family had been forcefully expelled from their ancestral home by a man claiming that the complainant's mother was his slave. As 'owner' of the slave, the said man claimed legal rights to the entire estate and property bequeathed to the complainant by his deceased mother. After exhausting all domestic remedies without much to show for it, the complainant brought the case before the African Commission. The Commission noted the persistence of slavery in Mauritania and its consequences. It held that

> to accept that someone, and a mother for that matter, can deprive her own children of their inheritance for the benefit of a third party, with no specific

60 (2003) AHRLR 96 (ACHPR 2003).

61 Para 84.

62 (2004) AHRLR 78 (ACHPR 2004).

> reason ... is not in conformity with the protection of the right to property (article 14 of the African Charter).

The Commission therefore found a violation of the complainant's rights. This decision is clearly pro-poor, not the least because it seeks to restrict the property 'rights', increase the transaction costs, and reduce the profits, of the local/global capitalists who profit immensely from slave (read 'free') labour in Mauritania, as elsewhere. The decision clearly favours the poor against local/global capital, and is thus much more in line with the UDHR paradigm than the TREMF one.

The right to property was again the bone of contention in *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire*.[63] The complainant in this case argued that paragraphs 1 and 2 of article 26 of Law 98-750 passed in December 1998 and regulating rural land ownership violated article 14 of the African Charter on the right to property. Apparently the law in question tied Ivoirian citizenship and qualification to aspire to certain political offices to rural land tenure in a manner that the complainant said was discriminatory. The Ivoirian government's response to this complaint was that the law affected only a few individuals and companies of which there was an insignificant African composition. The African Commission held that the argument of the Ivoirian government was irrelevant from a legal standpoint. The Commission reasoned that if Law 98-750 was allowed, it would give rise to the expropriation of property from a category of the Ivoirian population on the sole basis of their origin. Here again, because it basically seeks to remedy the attempt by a dominant group within Côte d'Ivoire to expropriate and thus appropriate the lands of a vulnerable and marginalised minority group, this decision can be read as pro-poor. It is in this sense that it is also an anti-TREMF decision.

While the African Commission has up to this moment shown a positive inclination towards such complaints as concerns the rights of the poor, its decision in the next case, however, leaves a sour taste in the mouth. In *Darfur Relief and Documentation Centre v Sudan*,[64] the victims all worked for an Iraqi oil company in the early 1980s as drivers, mechanics, electricians, cooks, servants and manual workers. They were arrested in 1983 at the outbreak of the first Gulf War between Iran and Iraq. They were taken to Iranian territory as civilian detainees. While in detention, the victims lost their sources of income and personal property. They did not have access to medical care and could not carry out religious rituals. However, the Iraqi government agreed to meet part of their unpaid salaries for the time that they were in Iranian custody. This money was transmitted through the Sudanese Ministry of Finance and Economic Planning. However, after disbursing the initial

63 (2008) AHRLR 62 (ACHPR 2008).

64 (2009) AHRLR 193 (ACHPR 2009).

instalment, the ministry first delayed paying the balance, then refused to pay altogether.

The complaint alleged the violation of several rights contained in the African Charter, including the right to property under article 14 and the right to health under article 16. The African Commission declared the complaint inadmissible on the grounds that the period of 29 months between the time when the High Court in Sudan dismissed the victims' case and their presentation of the complaint before it (the Commission) was unreasonable. The Commission relied heavily on the jurisprudence of the European Court of Human Rights and the Inter-American Commission on Human Rights to reach this verdict. In these systems, the threshold period of unreasonable delay is set at six months. We believe that in adopting these comparative practices under the circumstances, the African Commission should have been mindful of context and shown sensitivity to peculiar problems that may have impeded a timely presentation of the complaint. The Commission stated that it received no mitigating facts as to why the long delay had occurred. Yet it should have been guided by principles that would otherwise not have permitted a powerful government to keep resources belonging to poor citizens on a mere technical consideration. Thus, whatever its technical merits, this decision is, in our view, anti-poor.

The case of *Prince v South Africa*[65] is also remarkable as it is somewhat troubling from a pro-poor perspective. The complainant alleged that it was a violation of his rights to work and education when the Law Society of Cape of Good Hope denied the registration of his contract of community service. He had two previous convictions for possession of cannabis contrary to an existing law. However, the complainant claimed that his use of this substance is inspired by his Rastafarian religion in which reasoning and meditation are essential elements. The African Commission ruled that South Africa had a legitimate interest in restricting the use and possession of cannabis which trumped the complainant's right to occupational choice. According to the Commission:

> Although he [complainant] has the right to choose his occupational call, the Commission should not give him or anyone a leeway to bypass restrictions legitimately laid down for the interest of the whole society. There is no violation, thus, of his right to choose his occupation as he himself chose instead to disqualify himself from inclusion by choosing to confront the legitimate restrictions.

A careful reading of this decision shows that, even though the African Charter does not place any restrictions on the enjoyment of certain economic and social rights, the Commission would not hesitate to apply restrictions where a pressing societal interest is implicated.

Although this decision does not appear to directly implicate the TREMF paradigm, it may be criticised on the basis that it is difficult to

65 (2004) AHRLR 105 (ACHPR 2004).

see how it conduces to the amelioration of poverty in South Africa and elsewhere in Africa. While this decision's pro-law enforcement, anti-drugs, ethic and instincts are understandable, and while no human right is immune from clashing with other rights and therefore being liable to abridgement on occasion, the decision has the obvious effect of denying Mr Prince his ability to practise the profession he has been trained in, and as such denying him his ability to earn a living. It may also have a similar effect on similarly-situated persons on the African continent.

The next set of cases deal both with social and economic rights as well as those solidaritarian and development rights that have significance for the conditions of the poor in Africa. Not only do they contain possibilities for ameliorating individual factors of deprivation, but they also treat such possibilities in relation to the conditions of the poor as groups within particular states.

In *Bakweri Lands Claims Committee v Cameroon*,[66] the complaint was filed on behalf of the people of Bakweri in Cameroon against the Cameroonian government. In it, they claimed that the government had through a presidential decree listed the Cameroon Development Corporation (CDC) which would result in the alienation into private hands of several hectares of lands belonging to the Bakweri. The complaints alleged that if this were allowed to happen, the rights and interests which they exercised in two-thirds of their total land area would be extinguished. This, they claimed, constituted a violation of their rights to property and freedom to dispose of their wealth as enshrined in the African Charter. In addition, it was their claim that the concentration of private Bakweri lands in non-native hands undermined the Bakweri people's right to development and could aggravate social tensions. The African Commission declared the complaint inadmissible on the ground that domestic remedies had not been exhausted. As such, it is not possible to determine whether or not the view of the Commission in this case would have undermined or promoted the TREMF paradigm, and as such either harmed or protected the interests of the poor.

Similarly, in the case of *Gunme and Others v Cameroon*,[67] also concerning the right to development under the African Charter, the complainants alleged economic marginalisation by the Cameroonian government as well as a denial to them of economic infrastructure. They contended that their lack of infrastructure, and in particular the relocation of an important sea port from their region, constituted a violation of their right to development under article 22 of the African Charter. The Commission's decision, not all that surprisingly, privileged the discretion of state parties on the allocation of scarce economic resources. It held that the respondent state was 'under obligation to invest its

66 (2004) AHRLR 43 (ACHPR 2004).

67 (2009) AHRLR 9 (ACHPR 2009).

resources in the best way possible to attain the progressive realisation of the right to development'.[68] The Commission, while agreeing that 'this may not reach all parts of its territory to the satisfaction of all individuals and peoples, hence generating grievances',[69] still concluded that this alone could not be a basis to find a violation of article 22. In other words, the Commission placed the right to development within the context of 'progressive realisation', a limitation more popular with economic, social and cultural rights in other international instruments but not under the African Charter.

Here, even as it ultimately decided against the petitioners who filed this particular matter, the African Commission still affirmed the significant role that African states must play in the development process of African societies. For example, its sense that the African state must 'invest its resources in the best way possible' in order to spread development 'progressively' around the relevant country is hardly a nod in favour of the TREMF paradigm's denial of a redistributive role for the state. It is in fact an affirmation, however modestly, of the state's redistributive role.

Even more remarkably, the decision of the African Commission in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[70] is perhaps one of the most directly anti-TREMF and pro-poor decisions that that regional human rights body has ever reached. In that matter, the case against Nigeria was that it had condoned the activities of the state-owned Nigerian National Petroleum Corporation (NNPC) and Shell Petroleum Development Corporation in which the NNPC held a majority equity stake over oil exploitation in Ogoniland. The Ogonis are a small minority ethnic group in Nigeria and it was alleged that the exploitation activities had been carried out without due regard to the environment and health of the Ogoni community. In addition, toxic waste was allegedly deposited into the local environment without proper efforts to ensure they did not affect the surrounding villages. With both air and water severely contaminated, long and short-term health conditions ravaged the communities, including skin infections, gastro-intestinal and respiratory ailments and increased risk of cancer. The complaint alleged a violation of the rights to property, health and family life. It also alleged that the right of the Ogonis to freely dispose of their wealth and natural resources was compromised as well as their right to a general satisfactory environment.

The African Commission found Nigeria liable for those violations and called upon its government to ensure the payment of adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government-sponsored raids. It also called on the government to undertake a comprehensive clean-up

68 *Gunme* (n 67 above) para 206.

69 *Gunme* (n 67 above).

70 (2001) AHRLR 60 (ACHPR 2001).

of lands and rivers damaged by oil operations and to ensure that appropriate environmental and social impact assessments are prepared for any future oil development. The Commission urged Nigeria to ensure that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry and to provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

Clearly, the decision sides with the largely poor Ogoni population against the property interests of global and local capital as represented by Shell, powerful international investors, the NNPC, the Nigerian government, and many of the powerful rich/elite Nigerians that have formal or informal (but nevertheless hugely profitable) stakes in the Nigerian oil industry. And not only does the decision affirm the rights of the poor to a number of economic and social and solidaritarian rights, but the African Commission went out of its way to 'read in' two such rights into the African Charter, rights which were hitherto not explicitly guaranteed within the African system. This decision is anti-TREMF and pro-poor *par excellence*.

A similarly impressive and salutary decision was reached by the African Commission on the application of article 22 of the African Charter, on the right to development, in *Centre for Minority Rights Development and Others v Kenya* (*Endorois* case).[71] This case is quite remarkable since it was the first complaint of its kind where the African Commission found that article 22 of the African Charter had been violated. The main grievance of the Endorois community was that Kenyan authorities ignored them in a development process that had a pervasive impact on them. Specifically, they claimed first that they had not been consulted before a major developmental project that impacted their lifestyle was embarked upon. Second, they were denied compensation for the adverse consequences of that project on their lifestyle. The project in question was the conversion of the Lake Bogoria land on which the pastoral Endorois community grazed livestock as well as performed religious ceremonies into government game reserves.

In its decision, the Commission placed the burden of 'creating conditions favourable to a people's development'[72] on the government of each African state. It held that it is not the responsibility of the Endorois community to find alternative places to graze their cattle or partake in religious ceremonies. Continuing, it held:[73]

> The respondent state [Kenya] ... is obligated to ensure that the Endorois are not left out of the development process or [its] benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the respondent

71 (2009) AHRLR 75 (ACHPR 2009).

72 *Endorois* case (n 71 above) para 298.

73 *Endorois* case (n 71 above) (Commission's emphasis).

> state did not adequately provide for the Endorois in the development process. It finds against the respondent state that the Endorois community has suffered a violation of article 22 of the Charter.

There is much to commend in the position of the Commission in this case. In addition to its satisfactory decision on behalf of the Endorois community, the Commission quite significantly developed what it describes as a two-part test for the right to development. It held that the right enshrined in article 22 of the African Charter 'is both constitutive and instrumental,[74] or useful as both a means and an end'.[75] According to the Commission:[76]

> A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.

Here again, there can be little reasonable argument as to the anti-TREMF and pro-poor character and quality of this already much-celebrated decision. It seeks to protect the property interests of a relatively poor population in Kenya, to bolster their capacity to resist their dispossession by both the government and global/local capital, and to aid them in their struggle to control their own economic affairs and uplift their socio-economic conditions. And against the TREMF paradigm's denial of a redistributive role to the state, it affirms in fairly robust fashion the central and *active* role that the state must play in 'creating the conditions favourable to a peoples' development' and in providing alternative grazing grounds (property) to the Endorois community.

From the foregoing analysis of its economic and social rights jurisprudence, it is undeniable that the African Commission has, in general, shown appreciable sensitivity to the claims of Africa's poor. Importantly, for our purposes in this article, it is crystal clear from this analysis that the Commission's reasoning in the relevant cases has generally undermined rather than affirmed the emergent TREMF human rights paradigm that, as Baxi has argued, has tended to function in ways that produce and/or accentuate poverty.

5 Conclusion

The main goal of the article was to assess the extent to which the norms and jurisprudence of the African system have been pro-poor. The study was limited by its explicitly-justified focus (i) on the African Charter

74 Commission's emphasis.

75 *Endorois* case (n 71 above) para 277.

76 *Endorois* case (n 71 above).

and the African Commission to the exclusion of the African Court of Human and Peoples' Rights; and (ii) on the economic and social rights norms and jurisprudence of the African system (the type of human rights norms that are most directly and immediately connected to the amelioration of poverty in most parts of the African continent) to the exclusion of the civil and political rights norms and jurisprudence of that system. Following a definition of the conception of poverty that frames this particular study as in essence a 'serious lack of basic needs', the nature of the conceptual framework of the analysis that was conducted in the article, which was in the main provided by Baxi's theory on the emergence of a trade-related market-friendly human rights paradigm, was explained. Thereafter, the relevant norms and jurisprudence of the African system were analysed and conclusions reached as to the extent to which they were anti-TREMF and pro-poor, or pro-TREMF and anti-poor. The conclusion that was reached was that, on the whole, the analysed norms and jurisprudence of the African system have tended to be animated by an anti-TREMF (and pro-UDH paradigm) sensibility, ethic and politics, and have for this and other reasons been more or less pro-poor in orientation.

While these findings show that the TREMF paradigm has not completely eaten away at the pro-poorness of the textual affirmations of human rights that guide, and have been produced, by such international human rights systems and, although such texts are important enough in 'loosely' framing and shaping human rights that their character must be carefully studied, it must still be cautioned that such textual affirmations of rights are not self-executing. They must, as we all know, be implemented in a really concrete sense by governments, peoples, corporations, institutions and other agents for them to really matter to the average person. It should therefore be kept in mind that it is at this level, that is, the level of the 'living' human rights law (or the law as it is actually experienced by ordinary people) that the TREMF paradigm's ultimate impact is to be observed. This suggests that the TREMF paradigm may have exerted more influence in the actual/living world that lies beyond texts and textual interpretation than this study (focused as it almost completely is on 'the text') might suggest.