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Climate change and socio-economic rights duties in Nigeria

Ademola Oluborode Jegede¹

ABSTRACT

Key global climate change instruments, in particular, the United Nations Framework Convention on Climate Change, Kyoto Protocol and the recently adopted Paris Agreement emphasise the importance of climate change mitigation actions in developing states. Generally, resolutions linking climate change to human rights, for instance, from the United Nations Human Rights Council and the African Commission on Human and Peoples' Rights also call upon states to ensure human rights in climate actions. While the implementation of mitigation actions has the potential to enhance the realisation of socio-economic rights in developing states, climate instruments which govern their implementation have not been articulated in terms of duties of states to ensure that end. This article clarifies states' duties under international climate change related instruments to ensure socio-economic rights in mitigation actions. It then contends legitimate expectation and the existence of complementary legislation and policies as legal bases for their application in Nigeria.

Keywords: Climate change instruments, legitimate expectation, mitigation measures, socio-economic rights, state's duties

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Podnebne spremembe in uresničevanje socialno-ekonomskih pravic v Nigeriji

POVZETEK

Ključni mednarodni dokumenti o podnebnih spremembah, zlasti Okvirna konvencija Združenih narodov o spremembi podnebja, Kjotski protokol in nedavno sprejet Pariški sporazum, poudarjajo pomen ukrepov za blažitev podnebnih sprememb v državah v razvoju. Na splošno resolucije, ki povezujejo podnebne spremembe s človekovimi pravicami, na primer Svet Združenih narodov za človekove pravice in Afriška komisija za človekove pravice in pravice ljudstev, prav tako pozivajo države, naj zagotovijo človekove pravice v podnebnih ukrepih. Medtem ko izvajanje omilitvenih ukrepov lahko izboljša uresničevanje socialno-ekonomskih pravic v državah v razvoju, podnebni instrumenti, ki urejajo njihovo izvajanje, niso bili artikulirani v smislu državnih obveznosti. Ta članek pojasnjuje državne obveznosti v okviru mednarodnih instrumentov, povezanih s podnebnimi spremembami, da bi zagotovili uresničevanje socialno-ekonomskih pravic pri ukrepih za blažitev posledic. Nato zagovarja legitimno pričakovanje in obstoj dopolnilne zakonodaje in politik kot pravnih podlag za njihovo uporabo v Nigeriji.

Ključne besede: instrumenti o podnebnih spremembah, legitimno pričakovanje, omilitveni ukrepi, socialne in ekonomske pravice, državne obveznosti

1. Introduction

Climate change is a major global challenge of the twenty-first century, despite the argument refuting its existence or contending that even if it exists, it is a natural phenomenon.² The scientific reports of the Intergovernmental Panel on Climate Change (IPCC)

² Climate change refers to some observable variations in the climate system that are attributable to human activities, see Chris Wold, David Hunter and Melissa Powers, *Climate Change and the Law* (LexisNexis 2009) 1-3; Greenpeace, *Dealing in Doubt: The Climate Denial Machine v Climate Science* (Greenpeace 2013); on climate change as a global challenge, see Damir Črnčec and Izvirni članek, 'Slovenia in Geopolitical and Geostrategic Environment of the 21st Century' (2010) 12(2) *The Bulletin of the Slovenian Armed Forces* 27, 52; Protection of global climate for present and future generations of mankind' UNGA. Res. 43/53, 70th plenary meeting 6 December 1988 (UNGA Resolution 43/53).

establish that climate change is real and due to human activities.³ In its report released in 2014, the IPCC affirms that ‘the warming of the earth is unequivocal’ and the vulnerability of population to its adverse effects is increasing.⁴ In response to the adverse impacts of climate change, the United Nations Framework on Climate Change Convention (UNFCCC) and subsequent instruments, namely the Kyoto Protocol, and Paris Agreement (referred to as climate pillar instruments) call on states parties to embark on adaptation and mitigation actions.⁵ While adaptation refers to immediate actions to moderate harm or adjust to climate change,⁶ mitigation denotes actions to either reduce the sources of greenhouse gases or enhance the planet’s capacity to absorb them.⁷

Global focus on mitigation actions is of fundamental importance not only because to adapt indefinitely to climate change is unrealistic, but also that reliance on adaptation alone cannot roll back the changing climate.⁸ Notable mitigation actions centre on the energy sector, and in particular, on alternative energy usage such as the switch to hydropower, recovery of gas that would have otherwise been flared, and bioenergy through biofuels initiatives.⁹ This is because the energy supply sector is the largest contributor to global greenhouse gas emissions.¹⁰ The energy related mitigation options generally fall under the Clean Development

³Established by the World Meteorological Organisation and the United Nations Environment Programme in 1988, the IPCC reviews and accesses the most recent scientific, technical and socio-economical information relating to climate change, see UNGA Resolution 43/53 (n 1); on the science of climate change, see Thomas Stocker and others (eds.), *The Physical Science Basis. Contribution of Working Group I to the 5th Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2013).

⁴Stocker and others (n 2) 8-15.

⁵United Nations Framework Convention on Climate Change (1992) ILM 851 (UNFCCC) art 4(1)(b); Kyoto Protocol to the United Nations Framework Convention on Climate Change (11 December 1997) 37 ILM art 10(b); the 1st commitment by Annex 1 countries of UNFCCC required by the Protocol ended in 2012 and was extended in Doha from 1 January 2013- 31 December 2020 <http://unfccc.int/kyoto_protocol/items/2830.php> accessed 23 July 2017; Paris Agreement under the United Nations Framework Convention on Climate Change (2015) FCCC/CP/2015/L.9/Rev.1

⁶Simon Caney, ‘Cosmopolitan Justice, Responsibility and Global Climate Change’ (2005) 18 *Leiden Journal of International Law* 747.

⁷Jouni Paavola and Neil Adger, ‘Fair Adaptation to Climate Change’ (2006) 56 *Ecological Economics* 594.

⁸CarbonBrief, ‘IPCC says adapt and mitigate to tackle climate risks’ <<http://www.carbonbrief.org/ipcc-says-adapt-and-mitigate-to-tackle-climate-risks>> 30 July 2017.

⁹Rajendra Pachauri and Andy Reisinger (eds.), *IPCC, 2007: Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2007) 17.

¹⁰Thomas Bruckner and others, ‘2014: Energy Systems’ in Ottman Edenhofer and others (eds.), *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014) 516.

Mechanism (CDM) of the Kyoto Protocol which seeks to promote sustainable development in developing states including Africa.¹¹ Outside the energy related mitigation options, other actions target forests due to their significance as a storehouse of carbon and contributor to its emission.¹² An important initiative in the forest sector is REDD+ which stands for efforts under the United Nations Reduced Emissions from Deforestation and Forest Degradation (UN-REDD) programme,¹³ to reduce deforestation and degradation and enhance the '+' which represents the promotion of conservation, sustainable management of forests and enhancement of forest carbon stocks.¹⁴

Under the CDM, the implementation of energy focused mitigation actions in developing states involves the developed states with commitment under the Kyoto Protocol,¹⁵ the host countries which are often developing states, and other external actors including international financial institutions such as the International Bank for Reconstruction and Development.¹⁶ The REDD+ project involves specialised agencies of United Nations such as the Food Agricultural Organisation (FAO), the United Nations Environmental Programme (UNEP) and United Nations Development Programme (UNDP) as well as developing states, which host the projects, through their agencies or representatives.¹⁷ If their effective implementation is ensured by host states, climate mitigation actions can deliver socio-economic benefits and therefore further the realisation of socio-economic rights, particularly of the rights to water, food, housing, health, and employment in the hosting communities.¹⁸ This is because these actions can bring

¹¹ Kyoto Protocol (n 4) arts 6, 12 and 17.

¹² Charlotte Streck and Sebastian Scholz, 'The Role of Forests in Global Climate Change: Whence We Come and Where We Go' (2006) 82 (5) *International Affairs* 861.

¹³ The REDD Desk, 'What is REDD+' <<http://theredddesk.org/what-redd>> 30 June 2017; Jan Willem den Besten, Bas Arts and Patrick Verkooijen 'The Evolution of REDD+: An Analysis of Discursive Institutional Dynamics' (2014) 35 *Environmental Science & Policy* 40.

¹⁴ Willem den Besten, Arts and Verkooijen (n 12) 40.

¹⁵ Kyoto Protocol (n 4) art 10.

¹⁶ Jeanette Schade and Wolfgang Obergassel, 'Human Rights and the Clean Development Mechanism' (2014) 27(4) *Cambridge Review of International Affairs* 717; see for instance, UNFCCC, 'Project 7726: Kainji Hydropower Rehabilitation Project, Nigeria', listing Belgium, Germany, Sweden and Italy as implementation parties and International Bank for Reconstruction and Development as the financial partner 3-4 <<http://cdm.unfccc.int/Projects/DB/AENOR1350296581.55/view>> accessed 30 June 2017.

¹⁷ UNREDD Programme 'The UN-REDD Programme Strategy 2011-2015' (UN-REDD Programme Secretariat 2011) 1-28.

¹⁸ Eva Filzmoser and others, 'The Need for a Rights-based Approach to the Clean Development Mechanism' (Centre for International Sustainable Development Law Working Paper Series 2015) 13; Schade and Obergassel (n 15).

about socio-economic benefits and uplift the welfare of populations, particularly those living in the communities which host the projects. For instance, the development of alternative energy source can prevent environmental degradation by coal and natural gas plants and the associated air and water pollution which undermine health and living standard.¹⁹ Also, due to the fact that it is labour intensive, biofuel initiatives along with projects associated with gas flaring and REDD+ initiative have the potential to create more jobs and increase incomes for engaged populations.²⁰ The realisation of these objectives is not, however, always the case as there have been reports which generally indicate how ineffective implementation of climate mitigation actions in some countries has adversely impacted the realisation of socio-economic rights of their populations.²¹

Nigeria, aside from being linked to serious environmental degradation involving non-state actors,²² is a site for the implementation of climate change mitigation actions such as the enhancement of alternative source of energies associated with prevention of gas flaring under the CDM in the Niger Delta region,²³ renewable energy projects through biofuel initiatives in states including Ekiti, Ogun, Benue, Jigawa, Anambra, Ondo and Nasarawa,²⁴ and REDD+ initiative in Cross River State (CRS).²⁵ The possibility that these mitigation actions will increase and impact either negatively

¹⁹ Ben Machol and Sarah Rizk, 'Economic Value of U.S. Fossil Fuel Electricity Health Impacts' (2013) 52 *Environment International* 75.

²⁰ Babajide Balogun and Ayobami Salami, 'Effects of Biofuel Production on Selected Local Communities in Nigeria' (2016) 7(3) *Journal of Petroleum Technology and Alternative Fuels* 8; Charleen Watson and others, *Integrating REDD+ into a Green Economy Transition: Opportunities and Challenges* (ODI 2013) 1-40.

²¹ United Nations, 'Report on the Impacts of Climate Change Mitigation Measures on Indigenous Peoples on their Territories and Lands' E/C 19/2008/10 (Unedited version).

²² Jernej Cernic, 'Corporate Obligations under the Right to a Healthy Living Environment' (2012) 3 *DANUBE-Law and Economics Review* 21; for a case law on this point, see Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria (Ogoniland case)*

²³ UNFCCC CDM 'Project 0553: Recovery of Associated Gas that would otherwise be flared at Kwale Oil-gas Processing Plant, Nigeria' <<http://cdm.unfccc.int/Projects/DB/DNV-CUK1155130395.3/view>> accessed 9 June 2017; UNFCCC CDM 'Project 3740 : Recovery and Marketing of Gas that would otherwise be flared at the Asuokpu/Umutu Marginal Field, Nigeria' <<http://cdm.unfccc.int/Projects/DB/SGS-UKL1274957530.75/view>> accessed 9 June 2017.

²⁴ Patrick Sekoai and Kelvin Yoro, 'Biofuel development initiatives in Sub-Saharan Africa: Opportunities and Challenges' (2016) 4(2) *Climate* 33; Friends of the Earth, *Exploitation and Empty Promises: Wilmar Nigerian Land Grab* (Friends of the Earth 2015); Segun Oshewolo, 'Designed to fail? Nigeria' Quest for Biofuel' (2012) 3(3) *Afro Asian Journal of Social Sciences* 1, 8.

²⁵ Department of Climate Change Federal Ministry of Environment, Abuja 'Mitigation' <<http://climatechange.gov.ng/division/mitigation/>> accessed 9 July 2017; UNREDD Programme 'Partner Countries' <<http://www.un-redd.org/partner-countries>> accessed 9 July 2017; Federal Republic of Nigeria 'REDD+ Readiness Preparation Proposal (R-PP)' (Federal Ministry of Environment 2013) 6.

or positively on populations and their socio-economic rights is high. This is in the advent of a global mitigation action endorsed by the Paris Agreement which requires developing countries to take voluntary actions to mitigate climate change.²⁶

Despite their relevance as the international legal framework for implementing climate mitigation actions, whether the key international instruments associated with climate change provide for states' duties to ensure that mitigation actions further the realisation of socio-economic rights and the legal bases to argue such duties in Nigeria are not clear. For instance, Nigeria is linked to climate pillar instruments and other instruments relating to climate change and human rights developed at the United Nations levels under the auspices of the UNFCCC and United Nations Human Rights Council (UNHRC) as well as at the African Union level through the African Commission on Human and Peoples' Rights (the Commission),²⁷ but, these instruments have not been articulated in terms of duties for socio-economic rights in mitigation actions. Even if so articulated, their application in Nigeria is legally problematic in that climate pillar instruments are not yet domesticated in terms of article 12 of the 1999 Constitution which requires a treaty to be domesticated by a prior legislation before it can have effect in Nigeria.²⁸ One cannot argue against the necessity for such a prior legislation, considering that climate pillar instruments are not self-executory. Their provisions on climate mitigation actions are general in nature and will require further domestic actions for implementation.²⁹ This is more so the case with Nigeria which in the article 12 of its Constitution does not distinguish the nature of treaty in its requirement of a prior legislation for one to take effect in Nigeria. Yet, there are other legal challenges. For instance,

²⁶ Paris Agreement (n 4).

²⁷UNHRC 'Climate Change and Human Rights' A/HRC/32/L.34 (2016) (Resolution 32/L.34); UNHRC 'Human Rights and Climate Change' A/HRC/26/L.33 (23 June 2014) (Resolution 23/33); UNHRC 'Human Rights and Climate Change' A/HRC/RES/18/22 (2011) (Resolution 18/22); UNHRC 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' A/HRC/10/61 (15 January 2009) (OHCHR Report); UNHRC 'Human Rights and Climate Change' (25 March 2009) 41st Meeting (Resolution 10/4); ACHPR 'Climate Change and Human Rights in Africa' ACHPR/Res 342(LVIII) (2016) 58th Ordinary Session (ACHPR Resolution 342); ACHPR 'Climate Change in Africa' Res 271 (2014) 55th Ordinary Session (ACHPR Resolution 271); ACHPR 'Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa' ACHPR/Res153(XLVI)09 (25 November 2009) (ACHPR Resolution 153).

²⁸ Constitution of the Federal Republic of Nigeria 1999.

²⁹UNFCCC (n 4) art 4(1)(b); Kyoto Protocol (n 4) art 10(b); Paris Agreement (n 4) art 6(1); David Sloss, 'Non-self-Executing Treaties: Exposing a Constitutional Fallacy' (2002) 301(1) *University of California Davis Law Review* 1; Carwz Vázquezon, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 *American Journal of International Law* 714.

although socio-economic rights are guaranteed under the African Charter on Human and Peoples' Rights (African Charter),³⁰ which is a part of the law in Nigeria,³¹ the Constitution has no provision on socio-economic rights but only retains socio-economic objectives as directive principles of state policy (DPSP).³² Hence, some authors still dispute the justiciability of socio-economic rights in Nigeria, despite the domestication of the African Charter.³³ Other authors argue that justiciability can only be achieved where the legislature enacts a specific legislation seeking to implement any aspect of DPSP.³⁴ It is not clear whether the state has obligation under the foregoing instruments to ensure that climate mitigation actions deliver and not undermine socio-economic rights in Nigeria.

This article articulates states' duties under international climate change related instruments to ensure that mitigation actions further the realisation of socio-economic rights at the international level and contends the legal bases for the application of such duties in Nigeria. The focus of the article, it should be noted from the onset, is not on the adverse effects of climate change mitigation actions on socio-economic rights. Rather, the aim is to construct the argument that climate change related instruments can ground the legal basis for State's role in ensuring that the implementation of climate mitigation actions enhances, and not undermine, socio-economic rights. Following this introduction, section two of the article establishes that states' socio-economic rights duties in the implementation of mitigation actions under international climate change related instruments. Even though the instruments are not domesticated in Nigeria, section three argues the domestic legal bases for their application in Nigeria. Section four is the conclusion.

³⁰ African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

³¹ African Charter (Ratification and Enforcement) Act (Cap 10, Laws of Federation of Nigeria 2004).

³² 1999 Constitution (n 26) chapter II.

³³ Ebenezer Durojaye, 'Litigating the Right to Health in Nigeria: Challenges and Prospects' in Magnus Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press 2010) 149-171; Chelushi Onyemelukwe, 'Access to Anti-Retroviral Drugs as a Component of the Right to Health in International Law: Examining the Application of the Right in Nigerian Jurisprudence' (2007) 7 *African Human Rights Law Journal* 470.

³⁴ Akinola Akintayo, 'A Good Thing from Nazareth? Stemming the Tide of Neo-Liberalism against Socio-Economic Rights: Lessons from the Nigerian case of Bamidele Aturu v Minister of Petroleum Resources and Others' (2014) 15(2) *Economic Social Rights Review* 5; Stanley Ibe, 'Implementing Economic, Social and Cultural Rights in Nigeria: Opportunities and Challenges' (2010) 10 *African Human Rights Law Journal* 197.

2. States' Duties on Socio-Economic Rights in Global Climate Change Mitigation Actions

The obligation to comply with internationally recognised human rights under the United Nations instruments including the International Covenant on Economic, Social and Cultural Rights (ICESCR), requires three levels of duty from states: the duty to respect, protect and fulfil human rights.³⁵ The obligation to respect signifies that states must refrain from interfering with or hindering the enjoyment of human rights. The obligation to protect demands that individual and groups should be protected from human rights abuses, especially by non-state actors and provide for effective remedies should that happen. The obligation to fulfil requires states to take positive action to facilitate the enjoyment of basic human rights.³⁶ These duties are qualified in article 2 (1) the ICESCR which requires states 'to take steps' to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights. This provision, however, is not a blanket for states to do nothing, as they must take at least some steps toward the realisation of the rights in question immediately, with others to follow as soon as objectively possible.³⁷

Applied in the context of climate change mitigation actions, progressive realisation of socio-economic rights by developing states is virtually non-existent. They act as the hosts of mitigation actions funded by developed states and or through international financial institutions and in other instances, the United Nations Agencies. For instance, projects under the CDM are implemented by developed states with financial support from international financial institutions in developing states,³⁸ while REDD+ projects are financially anchored through the United Nations Agencies.³⁹ Essentially, duties required of developing states are both nega-

³⁵UNCHR 'General Comment 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. II).

³⁶ Christof Heyns and Danie Brand, 'Introduction to Socio-economic Rights in the South African Constitution' (1998) 9 *Law Democracy and Development* 153; Asbjørn Eide, 'Realisation of Social and Economic Rights and the Minimum Threshold Approach' (1989)10 (2) *Human Rights Law Journal* 37; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn Princeton University Press 1980) 52.

³⁷ Shade and Obergassel (n 15) 160.

³⁸ibid.

³⁹UNREDD Programme Strategy (n 16).

tive and positive in nature. For instance, the obligation to respect means that the state itself should not participate or allow a mitigation project which interferes with the existing enjoyment of socio-economic rights of its citizens. The duty to protect requires a positive commitment on the State to formulate appropriate legislation to protect the bearers of rights from unwarranted interference by private or non-state parties involved in the implementation of climate mitigation actions and where such rights are interfered with, that effective remedies are available. The obligation to fulfil is also of a positive nature in that it requires a state where climate mitigation measure is being implemented to ensure that communities hosting such projects ultimately receive its benefits as promised.

Development under the treaty monitoring body to the ICESCR, that is, the Committee of Economic Social Cultural Rights (CESCR) confirms the above layers of duty.⁴⁰ It shows that effective implementation of climate change mitigation actions is a core aspect of states' duties on socio-economic rights. This conclusion is based on General Comments and Concluding Observations of the CESCR which noted the negative effects that climate change may generally have, in particular, on the rights to water, food, adequate housing, and health. For instance, in delineating states' obligations in General Comment No 15, the CESCR urges states parties to adopt strategies and programmes that address developments such as climate change which may hamper the realisation of the right to water.⁴¹ On the right to food which General Comment No 12 explains, the CESCR urges states parties to note that normative elements of the right to food, that is, the availability, accessibility, acceptability and safety, can be adversely affected by climatic and ecological factors. It therefore urges states parties to adopt appropriate actions to ensure that climate change does not adversely affect the right to food.⁴² While setting out states' obligations un-

⁴⁰ The Committee was established to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the International Covenant on Economic and Social Cultural Rights, *see* OHCHR 'The Economic and Social Council Resolution 1985/17' (28 May 1985).

⁴¹ UN 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. II) para 28; Marcos Orellana, Miloon Kothari and Shivani Chaudhry, *Climate Change in the Work of the Committee on Economic, Social and Cultural Rights* (Friedrich Ebert Stiftung 2010) 21.

⁴² UN 'General Comment No 12: The Right to Adequate Food (Art. 11)' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. II) paras 4 and 7.

der General Comment No 4 on the right to adequate housing, the CESCR indicates that security of tenure, availability, accessibility, location, affordability, habitability and cultural adequacy of housing can be adversely affected by right to adequate housing may be adversely affected by climatic and ecological considerations.⁴³ In relation to the right to health, the CESCR once expressed the concern in its Concluding Observation dealing with Nigeria that environmental degradation can undermine the attainment of the right to health.⁴⁴ The general call on states by general comments and concluding observations to adopt strategies, programmes and measures suggests that they should ensure that climate change mitigation actions address and not contribute to the negative effects of climate change on socio-economic rights to water, food, adequate housing, and health.

The reference to climate change in the development on human rights law as further reinforced in climate related instruments, arguably, validates the latter as a normative basis for ensuring socio-economic rights in climate mitigation measures. To articulate the point in particular terms, the UNFCCC and Kyoto Protocol provisions for climate change mitigation actions in articles 4(1) (b) and 2 (1)(a) respectively do not refer to socio-economic rights, but, the Paris Agreement adopted by states in December 2015, leaves no doubt that in implementing mitigation actions, states have obligations toward socio-economic rights. It provides that 'Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights'.⁴⁵ Being a core category of human rights, not only has this provision inferentially accommodated socio-economic rights, but considering that the Paris Agreement is made in pursuit of the objective of the UNFCCC,⁴⁶ the provision cures the gap in the latter instruments in relation to duties of states on socio-economic rights. Arguably too, the UNFCCC and Paris Agreement are a product of negotiation by states and fall under the category of general and particular conventions (treaties) created by the consent of

⁴³UN 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' in 'Note by the Secretariat, Compilation of General Comments or General Recommendations adopted by Human Rights Treaty Bodies' (2004) HRI/GEN/1/Rev.7 para 18.

⁴⁴UN Economic and Social Cultural Rights Committee 'Concluding Observations, Nigeria' (13 May 1998) E/C.22/1/Add.23 para 29.

⁴⁵Paris Agreement (n 4) preamble.

⁴⁶ibid.

states under international law.⁴⁷ Hence, based on the principle of *pacta sunt servanda*,⁴⁸ the instruments as well as decisions and guidelines emanating under them, in so far as they are relevant to socio-economic rights duties in climate change mitigation actions should have a binding effect of law on parties to the instruments.

Examples of such decisions and guidelines are not difficult to be highlighted. The evidence that in implementing climate mitigation measure, states have duties toward socio-economic rights can be inferred from the decisions of Conference of Parties (COP), the highest decision making of the UNFCCC at Cancun which set out the safeguards that should be respected at the national level while implementing REDD+. According to paragraph 2 of Appendix 1 of the Cancun Agreements,⁴⁹ the safeguards require 'respect for the knowledge and rights of indigenous peoples and members of local communities by taking into consideration relevant international obligations, national circumstances and laws,' and ensuring their 'full and effective participation'.⁵⁰ Arguably, the reference to 'relevant international obligations' in the instrument suggests that the duties to respect, protect and fulfill rights are not exempted. Supporting this understanding, a subsequent decision of the COP requires that states parties should through national communications and other channels, indicate their level of compliance with these safeguards.⁵¹ In effect, the decision signifies that compliance with the terms of the safeguards in relation to socio-economic rights while implementing REDD+ safeguards at the national level is required. A similar evidence can be drawn from the Sustainable Development Tool (CDM SD Tool) which is designed to guide the implementation of mitigation projects under the CDM.⁵² The CDM SD Tool emphasises a range of socio-economic objectives which

⁴⁷ UN 'Statute of the International Court of Justice' (18 April 1946) art 38(1).

⁴⁸ Vienna Convention on the Law of Treaties (23 May 1969) 331 UNTS 1155 art 26(1).

⁴⁹ UNFCCC 'Conference of Parties' <<http://unfccc.int/bodies/body/6383.php>> accessed 9 July 2017; UNFCCC 'The Cancun Agreements: Outcome of the work of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention' (Decision 1/CP.16) FCCC/CP/2010/7/Add.1.

⁵⁰ Decision 1/CP.16 (n 47) paras c and d.

⁵¹ UNFCCC CP 'Guidance on Systems for Providing Information on How Safeguards are addressed and respected and Modalities relating to Forest Reference Emission Levels and Forest Reference Levels as referred to in Decision 1/CP.16' Decision 12/CP.17, FCCC/CP/2011/9/Add.2 (Decision 12/CP.17); also see UNFCCC CP 'The Timing and the Frequency of Presentations of the Summary of information on how all the Safeguards referred to in Decision 1/CP.16, appendix I, are being addressed and respected' Decision 12/CP.19, FCCC/CP/2013/10/Add.1 (Decision 12/CP.19).

⁵² Voluntary Tool for describing sustainable development co-benefits of CDM project activities or programmes of activities (POA) Version 01.1 (CDM SD Tool) <http://cdm.unfccc.int/sunsetcms/storage/contents/stored-file-20140401114548484/reg_tool01.doc> accessed 9 July 2017.

should guide stakeholders while implementing projects. These include the delivery of social economic goods in terms of enhancing food,⁵³ health,⁵⁴ employment,⁵⁵ and environment,⁵⁶ and property security.⁵⁷ The logical conclusion that can be drawn from the foregoing is that states including those hosting mitigation actions associated with CDM and REDD+ are expected to be guided by the socio-economic standards under the CDM Tool and the Cancun Safeguards in the implementation of actions.

The above position is further strengthened by the resolutions of the UNHRC and the Commission dealing with climate change and human rights which suggest that states' duties toward socio-economic rights exist in climate change mitigation actions.⁵⁸ The UNHRC report which was produced pursuant to its first resolution in 2009 describes the effects of climate change and ineffective implementation of response actions on a range of socio-economic rights including, the right to adequate food, the right to adequate water, the right to health, and the right to adequate housing.⁵⁹ Against that backdrop, UNHRC Resolution 18/22 of 2011, Resolution 26/33 of 2014 and Resolution 32/34 of 2016 affirm the necessity for states to integrate human rights, which necessarily includes socio-economic rights in climate change mitigation actions.⁶⁰ At the AU level, the Commission expressed a clear indication of the potential link of climate change mitigation measure to human rights in its Resolution 153 of 2009.⁶¹ In that Resolution, the Commission expressed the concern that human rights standards are lacking in 'various draft texts of the conventions under negotiation' and that this lack could jeopardise 'the life, physical integrity and livelihood of the most vulnerable members of society notably isolated indigenous and local communities, women, and other vulnerable social groups'.⁶² The resolution has been fol-

⁵³ *ibid* 6-8.

⁵⁴ *ibid* 6.

⁵⁵ *ibid*.

⁵⁶ *ibid* 3.

⁵⁷ *ibid* 4-6.

⁵⁸ John Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477; Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 *Harvard Environmental Law Review* 439.

⁵⁹ OHCHR Report (n 25) paras 21-38, 65-68.

⁶⁰ Resolution 32/L.34 (n 25) preamble; Resolution 23/33 (n 25) preamble; Resolution 18/22 (n 25) preamble.

⁶¹ ACHPR Resolution 153 (n 25).

⁶² *ibid* preamble.

lowed by Resolution 127 of 2014⁶³ and Resolution 342 of 2016.⁶⁴ In particular, Resolution 342 does not only reiterate the provisions of articles 22 and 24 of the African Charter dealing with the right of peoples to economic, social and cultural development and the right of peoples to a satisfactory environment favourable to their development, it urges every state to ensure climate change actions which safeguard the rights of the present and future generations of Africa.⁶⁵

One may argue that the resolutions above are generally not legally binding on states, however, there can be exception in terms of their legal effect depending on a number of factors including the source of the resolutions or subsequent use by domestic courts.⁶⁶ For instance, while the General Assembly (GA) resolutions are recommendatory as a rule,⁶⁷ especially regarding external relations with member states,⁶⁸ same cannot be submitted regarding the legal weight of resolutions of the United Nations Security Council in relation to international peace and security,⁶⁹ or on the enforcement under Chapter VII of the UN Charter which carries more political weight and are binding due to the global premium placed on peace and security,⁷⁰ and its acceptable status as obligation *erga omnes*.⁷¹ A parallel analogy can be made in relation to resolutions on climate change and its mitigation actions. They are as important as resolutions dealing with international peace in that the subject of climate change constitutes a well acknowledged global threat to mankind.⁷² Hence, the obligations imposed under the resolutions including those dealing with socio-economic rights in climate change mitigation context can constitute obligations *erga omnes* in respect of which all states

⁶³ ACHPR Resolution 127 (n 25).

⁶⁴ ACHPR Resolution 342 (n 25).

⁶⁵ *ibid.*

⁶⁶ Frans Viljoen, *International Human Rights Law in Africa* (2nd edn Oxford University Press 2012) 31.

⁶⁷ *South West Africa (Ethiopia v S. Africa; Liberia v S. Africa) (Second Phase)* [1966] ICJ Rep 6 (*South West Africa*) para 98; see Marko Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16(5) *The European Journal of International Law* 879-906.

⁶⁸ *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, 178.

⁶⁹ Öberg (n 65) 885.

⁷⁰ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* [1962] ICJ Rep 151, 163; confirmed by *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ para 26.

⁷¹ Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligation Erga Omnes' (1996) 59(4) *Law and Contemporary Problems* 63.

⁷² UNGA Resolution 43/53 (n 2).

should have interest in addressing. At any rate, even if such resolutions are merely recommendatory, in so far as they deal with duties affecting socio-economic rights, they qualify as soft law, a valid source of international law.⁷³ In sum, the foregoing analysis shows that states' duties toward socio-economic rights derive from instruments including treaties, decisions and resolutions associated with climate change mitigation actions. It remains to be argued the legal bases for the application of states' duties on socio-economic rights while implementing climate mitigation actions in Nigeria.

3. Nigeria: The State's Socio-Economic Rights Duties in Climate Change Mitigation Context

This section argues that duties required of states at the international level in relation to socio-economic rights in implementing climate change mitigation context apply in Nigeria on two legal bases: duties can give rise to legitimate socio-economic expectation of affected populations in Nigeria; and duties can be complemented by existing domestic legislation and policies.

3.1 Legitimate Expectation as a Legal Basis for the Application of Duties

The application in Nigeria of international instruments which ground the duties of states to integrate socio-economic rights in climate change mitigation is problematic. Article 12 (1) of the Constitution provides that 'No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly'. Agreeing with the earlier viewpoint of Nwapi on the application of article 12,⁷⁴ the position of Enabulele and Bazuaye is that the provision requires a prior act of parliament before both a bilateral or multilateral treaty can be enforceable in Nigeria.⁷⁵ In another writing on the subject, Enabulele contends that a national

⁷³Hennie Strydom, 'International Law Making as an Attribute of State Sovereignty' in Hennie Strydom (ed.), *International Law* (Oxford University Press 2016) 63-100, 94.

⁷⁴Chilenye Nwapi, 'International Treaties in Nigerian and Canadian Courts' (2011) 19 (1) *African Journal of International and Comparative Law* 38, 48.

⁷⁵Amos Enabulele and Bright Bazuaye, *Teachings on Basic Topics in Public International Law* (Ambik Press 2014) 94-95.

measure such as the formulation of policy instead of legislation can satisfy the requirement of article 12, with the caveat that such policy has to be through the decision of the national assembly.⁷⁶ So interpreted, it means that except climate change pillar instruments relevant to the integration of socio-economic rights in climate change mitigation actions are domesticated, it is impossible for their provisions to assume binding effects on organs of state in Nigeria. Also, at best, the decisions and resolutions affecting socio-economic rights in the context of climate change mitigation actions can only be recommendatory in legal status.

Despite the above, it is contended that without their domestication, international instruments relating to climate change mitigation actions and socio-economic rights, and even if only recommendatory, the resolutions by UNHCR and the Commission on climate change and human rights have an applicable legal value in Nigeria. They can translate into a legitimate expectation of populations whose communities host mitigation actions that the government in Nigeria will implement duties arising at the international level in relation to socio-economic rights and climate change mitigation actions. Traditionally, under the English administrative law, a legitimate expectation arises 'as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority.'⁷⁷ The doctrine has procedural and substantive connotations. The procedural aspect was judicially introduced in *Schmidt v Secretary of Home Affairs*⁷⁸ which recognizes the 'right, interest, or legitimate expectation' of an individual to be heard in an administrative action affecting his interest, but the substantive aspect of the doctrine clarifies the possibility that an individual can found a claim on an administrative action affecting his interest.⁷⁹ For instance, in *R v North and East Devon HA ex p Coughlan*, the England Court of Appeal affirmed that if an individual had been led to expect one end, the implementation of the policy direction of governmental authority cannot point at a different end. It will amount

⁷⁶ Amos Enabulele, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts' (2009) 17(2) *African Journal of International and Comparative Law* 326, 332-333.

⁷⁷ *R v Inland Revenue Commissioners, ex p. Camacq Corp.* [1990] 1 WLR 191.

⁷⁸ *Schmidt v Secretary of State for Home Affairs* (1969) 1 All ER 904.

⁷⁹ Paul Craig, 'Substantive Legitimate Expectations in Domestic and Community Law' (1996) 55(2) *Cambridge Law Journal* 289.

to an abuse of power for such to be allowed.⁸⁰ In fact, Cranwell explains that administrative action can extend to treaty obligation, even where such a treaty is not yet domesticated. It is a source of a legitimate expectation that administrative choices of government officials will not negatively affect the rights of people under the given treaty.⁸¹

Contending legitimate expectation as a basis for the application of climate change pillar instruments, decisions and resolutions in Nigeria stems from certain reasons. Without the domestication of climate pillar instruments, the government of Nigeria is officially involved in international decision making process on climate change mitigation and implementation of mitigation actions. As part of the African Group of Negotiators on Climate Change, Nigeria has engaged in the negotiation of climate pillar instruments relevant to mitigation actions.⁸² It ratified the UNFCCC in 1994,⁸³ it is represented at COP, which as earlier observed, is the highest decision making body of the UNFCCC that takes decisions necessary to promote the effective implementation of climate mitigation actions.⁸⁴ It acceded in 2004 to the Kyoto Protocol.⁸⁵ In response to the obligation under the UNFCCC, Nigeria has submitted its First National Communication in 2003⁸⁶ and a Second National Communication in February 2014 in which it lists climate change mitigation as a priority.⁸⁷ Equally, it is connected with the resolutions both of the UNHRC and the Commission, by virtue of its membership of the United Nations,⁸⁸ which established the UNHRC in which it presently serves as a member,⁸⁹ and membership of the

⁸⁰ *R v North and East Devon HA ex p Coughlan* [2001] QB 213.

⁸¹ Glen Cranwell, 'Treaties and Australian law - Administrative Discretions, Statutes and the Common Law' (2001) 1 *Queensland University of Technology Law and Justice Journal* 49.

⁸² The African Group Negotiators on Climate Change (AGN) meets to discuss the African Position for COP17 / CMP7' <https://www.environment.gov.za/mediarelease/africangroup_negotiators_cop17cmp7> accessed 19 July 2017.

⁸³ It ratified the Convention on 29 August 1994, see 'Status of Ratification of the Convention' <http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php> accessed 19 July 2017.

⁸⁴ UNFCCC Conference of parties (n 47).

⁸⁵ n 81.

⁸⁶ Federal Republic of Nigeria 'Nigeria's First National Communication under the United Nations Framework Convention on Climate Change' (Federal Ministry of Environment 2003).

⁸⁷ Federal Republic of Nigeria 'Nigeria's Second National Communication under the United Nations Framework Convention on Climate Change' (Federal Ministry of Environment 2014).

⁸⁸ Nigeria became a member of United Nations on 7 October 1960, see United Nations 'Member states' <<http://www.un.org/en/member-states/>> accessed 19 July 2017.

⁸⁹ The UNHRC was established by the United Nations General Assembly on 15 March 2006, see UNGA 'Human Rights Council' A/RES/60/251 (2006); Nigeria membership on this round expires in 2017, see UNHRC 'Current membership of the Human Rights Council, 1 January - 31 December 2016 by

AU which established the Commission.⁹⁰

More importantly, Nigeria is a site of climate mitigation projects as acknowledged in its Intended Nationally Determined Contribution (INDC) which affirms that the implementation of mitigation actions will potentially reduce emissions profile,⁹¹ and aims at eliminating gas flaring.⁹² The INDC recognises that mitigation actions can empower populations that are socio-economically disadvantaged,⁹³ while in a document titled the National Environmental, Economic and Development Study for (NEEDS) for Climate Change in Nigeria, it identifies the energy sector as well as the oil sectors as important focus of climate change mitigation.⁹⁴ Accordingly, it is involved in climate mitigation actions under the CDM which include the recovery of gas that would have otherwise been flared,⁹⁵ effective fuelwood for stoves,⁹⁶ use of alternative fuels in cement industry facilities,⁹⁷ and hydropower project.⁹⁸ Outside the CDM regime, it is a site for plantations involving vast amount of land on sugar cane, palm oil and Jethropa which aim at generating biofuels by local and foreign companies in Nigeria.⁹⁹ It is participating in REDD+ through its pilot project in Cross River State (CRS).¹⁰⁰

Based on the foregoing, it is legitimate for communities hosting projects to expect that a developing state such as Nigeria which participates in the political process and implements projects prescribed under international climate pillar instruments should apply provisions and perform the required role of ensuring that

year when term expires' <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/MembersByYear.aspx>> accessed 13 July 2017.

⁹⁰ It became a member on 25 May 1963, see AU 'Member States of the AU' <http://www.au.int/en/AU_Member_States> accessed 13 July 2017.

⁹¹ Federal Republic of Nigeria 'Nigeria's Intended Nationally Determined Contribution' (Federal Ministry of Environment 2015).

⁹² *ibid* 13.

⁹³ *ibid* 16.

⁹⁴ Federal Republic of Nigeria 'National Environmental, Economic and Development Study (NEEDS) for Climate Change in Nigeria' (Federal Ministry of Environment 2010) 18.

⁹⁵ Project 0553 (n 21); UNFCCC CDM 'Project 9163: Recovery and Utilization of Associated Gas from the Obodugwa and neighbouring oil fields in Nigeria' <<https://cdm.unfccc.int/Projects/DB/RINA1356376663.73/view>> accessed 16 July 2017.

⁹⁶ UNFCCC CDM 'Project 2711: Efficient Fuel Wood Stoves for Nigeria' <<https://cdm.unfccc.int/Projects/DB/RWTUV1245685309.5/view>> accessed 13 July 2017.

⁹⁷ UNFCCC CDM 'Project 8747: Lafarge WAPCO Partial Substitution of Alternative Fuels in Cement Facilities Project in Nigeria' <<https://cdm.unfccc.int/Projects/DB/ERM-CVS1355402819.14/view>> accessed 13 July 2017.

⁹⁸ Kainji Hydropower Rehabilitation Project (n 15).

⁹⁹ n 22.

¹⁰⁰ n 23.

climate mitigation actions achieve, and not undermine the realisation of socio-economic rights envisaged under such instruments. To argue otherwise is indeed logically and legally inconceivable in view of section 7(c) of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA).¹⁰¹ Without drawing distinction between environmental instruments that are domesticated or not, section 7(c) empowers its Agency to enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment, including climate change, desertification and forestry in Nigeria. Arguably, this provision suggests that the non-domestication of international instruments on climate change, and the status of other instruments relating to climate change mitigation actions constitute no hindrance to their implementation in Nigeria.

Nigerian courts have not clarified the application of the doctrine of legitimate expectation in relation to treaties which are not incorporated as part of the domestic law or content of resolutions and decisions made, as in this case, in relation to climate mitigation actions. However, there is evidence of its recognition in *Abacha v Fawehinmi*.¹⁰² In that case, while considering the legal status of the African Charter vis a vis the Constitution, the Supreme Court relied on the case of *Higgs & Anor v Minister of National Security & Ors*,¹⁰³ (Higg case) and accepted the position of the Privy Council that even when not incorporated as part of national law, treaties 'might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty'. This means that citizens can have legitimate expectation that a government committed at the international level to the implementation of climate change mitigation actions which require regard for realisation of socio-economic rights will not act contrary at the domestic level.

That resolutions and decisions can be used in clarifying such duties is not difficult to imagine. The approach by courts in Nigeria show that international instruments can be used in informing and clarifying claims even if they have not been domesticat-

¹⁰¹ National Environmental Standards and Regulations Enforcement Agency (NESREA) Establishment, Act No. 25 (2007).

¹⁰² *Abacha v Fawehinmi* (2000) 6 NWLR (Part 660) 228.

¹⁰³ *Higgs & Anor. v Minister of National Security & Ors* (2000) 2 AC 228, PC.

ed.¹⁰⁴ In *Mojekwu & Others v Ejikeme & Others*,¹⁰⁵ the Court of Appeal made reference to the Convention on the Elimination of Discrimination Against Women (CEDAW),¹⁰⁶ an undomesticated instrument, in support of its finding of violation of women's rights to non-discrimination. Hence, there is a legal basis for inferring legitimate expectation, not only in relation to the application of climate change pillar instruments, but also in decisions and resolutions on the integration of socio-economic rights in climate mitigation actions in Nigeria. In any event, the instruments can be complemented by existing legislation and policies relating to climate mitigation actions and socio-economic rights in Nigeria.

3.2 Domestic Legislation and Policies as basis for the Application of Duties

For government to effectively govern, it needs instruments through which it can pursue public purposes and defined objectives.¹⁰⁷ Generally, laws follow and help the actualisation of policies,¹⁰⁸ and both have been identified as some of the types of instruments used by government to govern.¹⁰⁹ Both policies and legislation are useful tools in ensuring a government vision of addressing environmental challenges.¹¹⁰ Unlike legislation, policies are generally non-binding.¹¹¹ However, in so far as they clarify duties of government in existing legislation on concrete rights or entitlements they are important tools in the enforcement of rights.¹¹² This is necessary considering that there is no stand-alone legislation or policy which specifically imposes duties on socio-economic rights in the implementation of climate change mitiga-

¹⁰⁴ Durojaye (n 31)161.

¹⁰⁵ *Mojekwu & Others v Ejikeme & Others* (2000) 5 NWLR 402.

¹⁰⁶ Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) 13 UNTS 11249.

¹⁰⁷ Lester Salamon, 'The New Governance and the Tools of Public Action: An Introduction' (2000) 28(5) *Fordham Urban Law Journal* 1611.

¹⁰⁸ Yinka Omorogbe, 'Policy, Law and the Actualisation of the Right to Access to Energy Services' in Kim Talus (ed.), *Research Handbook on International Energy Law* (Edward Elgar 2014) 361.

¹⁰⁹ Nico Steytler, 'The Legal Instruments to raise Property Rates: Policy, By-laws and Resolutions' (2011) 26(2) *Southern African Public Law* 484.

¹¹⁰ Zarina Patel, 'Tools and Trade-offs in Environmental Decision Making' in Edgar Pieterse and others (eds.), *Consolidating Developmental Local Government: Lessons from the South African Experience* (UCT Press 2008) 357.

¹¹¹ Oliver Fuo, 'Constitutional Basis for the Enforcement of "executive" Policies that give effect to Socio-Economic Rights in South Africa' (2013) 16(4) *Potchefstroom Electronic Law Journal* 1.

¹¹² Marius Pieterse, 'Legislative and executive translation of the right to have access to health care services' (2010) 14 *Law, Democracy and Development* 1, 4.

tion actions in Nigeria.¹¹³ This is not unexpected as responding to climate change mitigation requires different strategic approaches backed up with effective legislation and policy.¹¹⁴ Arguably, there are relevant domestic legislation and policies on climate change mitigation actions which complement international focus on the realisation of socio-economic rights in climate change mitigation context.

3.2.1 Applicable Legislation

The key legislation which are relevant to the discussion of climate change mitigation actions in the context of socio-economic rights are the Constitution and African Charter (Ratification and Enforcement) Act.¹¹⁵ The Constitution neither guarantees socio-economic rights nor reference climate change mitigation. There are socio-economic aspirations forming part of DPSP which are of relevance to climate change mitigation actions, though. These are sections 17 and 20 of Constitution which commit the state to economic and environmental objectives, the latter including the protection and improvement of the environment, water, air and land, forest and wild life of Nigeria. Nonetheless, the DPSP do not enjoy the legal value equal to creating socio-economic rights in the constitution. The judicial basis for this position in Nigeria is the oft-cited decision of the Appeal Court in *Archbishop Anthony Okogie and Others v The Attorney-General* of Lagos State which held that no court has 'jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles'.¹¹⁶

On the other hand, domesticated as part of the Nigerian law, the African Charter guarantees the right to equitable and satisfactory conditions of work, the right to health, the right to education and the right to culture.¹¹⁷ It complements these rights with other

¹¹³ The Bill for an Act to establish the National Climate Change Commission and for Other Matters Connected Therewith has been before the National Assembly since 2008, and nothing concrete has emerged up till the time of writing this article, 'A Bill for an Act to establish the National Climate Change Commission and for Other Matters Connected Therewith' < <http://nass.gov.ng/document/download/973> > accessed 13 July 2017.

¹¹⁴ NEEDS (n 92) 4.

¹¹⁵ n 29.

¹¹⁶ *Archbishop Anthony Olubunmi Okogie & Ors v. the Attorney General of Lagos State* (1981)2 NCLR 337; see also *Uzoukwu v Ezeonu II* (1991) 6 NWLR Part 200.

¹¹⁷ African Charter (n 28) arts 2, 3, 5, 7 & 15-17.

rights as the right to property, the right to protection of the family, the right to economic, social and cultural development and the right to a satisfactory environment.¹¹⁸ Despite the foregoing, the domestication of the African Charter has not pushed the debate around the justiciability of socio-economic rights in Nigeria beyond the confines of chapter II of the Constitution and section 6(6)(c). Some authors still argue that the decision of the Supreme Court in *Abacha v Fawehinmi* indicating that the Constitution is supreme to the African Charter in the hierarchy of domestic laws,¹¹⁹ appears to foreclose the justiciability of socio-economic rights in Nigeria.¹²⁰ Their reasoning is that the constitution leaves no doubt that socio-economic rights are not guaranteed and manifests this intent through section 6(6) (c) which excludes DPSP from judicial enforcement. Being the supreme law of the land, it then must mean that its provisions trumps the justiciability of socio-economic rights guaranteed by the African Charter.¹²¹ The argument is strengthened by section 1(1) and (3) of the Constitution which affirms the constitution as the supreme law in Nigeria.¹²² Other writers acknowledge the non-justiciability of DPSP, but based on the decision of courts in cases such as *Attorney General of Ondo State v Attorney General of the Federation*,¹²³ contend that provisions of Chapter II of the Constitution can be made justiciable via legislation.¹²⁴ If these arguments stand, it means that provisions of the DPSP of significance to the realisation of socio-economic rights in climate change mitigation measure may have other legal use but not justiciability purpose even if complemented with duties emanating from international instruments on climate change and human rights.

On four grounds, the foregoing position appears untenable. First, the problem is that academic analysis on section 6(6)(c) of the Constitution and justiciability of DPSP often excludes the pro-

¹¹⁸ *African Charter* (n 28) arts 14, 18, 22 & 24 ; see Alemahu Yeshanew, 'Approaches to the Justiciability of Economic, Social and Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples' Rights: Progress and Perspectives' (2011) 11(2) *African Human Rights Law Journal* 317.

¹¹⁹ n 100.

¹²⁰ Durojaye (n 31)160; Onyemelukwe (n 31) 449.

¹²¹ Durojaye (n 31) 161; also see Edwin Egede, 'Bringing Human Rights Home: An Examination of Domestication of Human Rights Treaties in Nigeria' (2007) 51(2) *Journal of African Law* 249, 254.

¹²² n 119.

¹²³ *Attorney General of Ondo State v Attorney General of the Federation* (2002) 9 NWLR (Pt. 772) 222; also see case of *Bamidele Aturu v Minister of Petroleum Resources and Others* Suit No: FHC/ABJ/CS/591/09

¹²⁴ n 32.

vision of section 13 of the constitution. Section 6(6)(c) provides:

the exercise of judicial powers ‘shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy.

However, the use of the word “except as otherwise provided by this Constitution” suggests that the application of that section may be limited by other provisions elsewhere in the Constitution. Arguably the provision of section 13 which mandates all organs of the state including the executive and judiciary to apply DPSP would appear an exception to the application of section 6(6)(c). This connotes that organs of state including the judicial arm can apply DPSP. For instance, by virtue of section 13, it means that the judiciary is not exempted from applying DPSP to matters brought before it or assessing legal issues in the light of DPSP. Therefore, at the very least, the court can be guided by DPSP while entertaining claims based on duties of state in the implementation of climate change mitigation actions.

It may be argued that even if section 13 allows organs of government to apply DPSP, in so far as the provision falls within the scope of Chapter II which is exempted from judicial power under section 6(6)(c), courts cannot make a judicial pronouncement on DPSP at all, or for that matter, on claims based on the duties of state to ensure socio-economic rights in climate change mitigation actions. However, such an interpretation will amount to limiting the significance of section 13 in terms of the power it confers on organs of governance including the judiciary. For a nation that has subsequently made the African Charter which guarantees socio-economic rights as part of its law, and is committed to mitigation actions, such an argument is logically inconceivable.

Secondly, such reasoning will undermine article 27 of the Vienna Law of Treaty which recognises that ‘a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.¹²⁵ In so far as a constitution is an internal legislation, to allow its provisions dealing with non-justiciability of directive principles to trump the justiciability of socio-economic rights under a regional treaty such as the African Charter would appear

¹²⁵ Vienna Convention (n 46) art 27.

incompatible with the position of the Vienna Law of Treaty. It will exclude the application of vital instruments that can ensure socio-economic rights in climate mitigation actions. Thirdly, since the Constitution as in the case of Nigeria derives its authority from ‘the people’ which connotes popular sovereignty,¹²⁶ it would seem self-conflicting and misconceived to interpret its provisions in a manner that deprives the people of socio-economic rights clearly enshrined in a treaty ratified and domesticated by the State. Erroneously, such an interpretation would signify that ‘the people’ of Nigeria could never have intended to be holders of socio-economic rights even if guaranteed under a treaty ratified and made part of the national law, or supported by instruments governing climate change mitigation actions in which the State is involved. Lastly, the decision has not yet been made by any court that the combined readings of section 1(1) and (3) and section 6(6)(c) render socio-economic rights provisions of the African Charter unenforceable in Nigeria. Rather, aside from the ratification of the African Charter, subsequent approach suggests that it cannot be the intention of courts to hold that socio-economic rights are non-justiciable. In particular, for instance, the Fundamental Rights Enforcement Procedure Rules (FREPR) which was adopted in 2009 enjoins courts to ‘expansively and purposely’ apply the provisions of human rights instruments such as the African Charter and the United Nations instruments such as the ICESCR and its General Comments.¹²⁷ The logical inference that can be drawn from the provision is that the FREPR supports the application of the relevant provisions of these instruments in so far as they deal with climate change mitigation actions.

3.2.2 Applicable Policies

Policies related to climate change mitigation actions which create socio-economic entitlements can be found in the 2014 National Communications on climate change.¹²⁸ In the main, these

¹²⁶ 1999 Constitution (n 26) preamble; a similar expression ‘we the people’ is in the preamble of the constitution of United States interpreted in some writings as connoting popular sovereignty, see Andrew Kilbera, ‘We the People: The Original Meaning of Popular Sovereignty’ (2014) 100 *Virginia Law Review* 1061.

¹²⁷ Fundamental Rights Enforcement Procedures Rules (2009) issued pursuant to s 46(3) of the Nigerian Constitution (FREPR) (1999) para 3(b).

¹²⁸ Second National Communication (n 85)

include the National Policy on the Environment,¹²⁹ National Energy Policy,¹³⁰ National Water Policy,¹³¹ Nigerian Bio-Fuel Policy and Incentives,¹³² Nigeria Vision 2020,¹³³ and the National Strategic Action Plan on the Great Green Wall for the Sahara and Sahel Initiative (GGWSAP).¹³⁴

In addition to their relevance to climate change mitigation actions, that they delineate role for state in delivering socio-economic benefits is a strong indication that existing policies offer the legal basis for the State to ensure that climate mitigation actions achieve the realisation of key socio-economic rights. Existing policies speak to the role of the State to promote alternative sources of energy,¹³⁵ conservation of the environment for the for present and future generation,¹³⁶ and touch on socio-economic rights in that they emphasise the aims of improving the health of peoples,¹³⁷ socio-economic conditions,¹³⁸ in particular, housing,¹³⁹ food security,¹⁴⁰ and water,¹⁴¹ education,¹⁴² and promotion of job creation.¹⁴³ In particular, the strategic goal of the GGWSAP is to foster low-carbon, high growth economic development through the implementation of mitigation actions.¹⁴⁴ The National Energy Policy indicates the intention of the state to improve the living standards of people in oil producing communities through the provision of socio-economic infrastructure,¹⁴⁵ and develop potential sites for hydropower, gas and coal-fired power plants for electricity generation.¹⁴⁶ The Nigerian Bio-Fuel Policy and Incentives

¹²⁹ Federal Republic of Nigeria, National Policy on Environment, Act 42 1988.

¹³⁰ Federal Republic of Nigeria, National Energy Policy 2003.

¹³¹ Federal Republic of Nigeria, National Water Policy 2004.

¹³² Federal Republic of Nigeria, Nigerian Bio-Fuel Policy and Incentives 2007.

¹³³ Federal Republic of Nigeria, Nigeria Vision 20: 2020 Abridged Version 2010.

¹³⁴ Federal Republic of Nigeria 'Great Green Wall for the Sahara and Sahel Initiative National Strategic Action Plan' (GGWSAP) (2012) 10.

¹³⁵ National Policy on Environment (n 127) para 4(9)(k); GGWSAP (n 132) section 2(b); National Energy Policy (n 128) 37; Nigerian Bio-Fuel Policy and Incentives (n 130) 22.

¹³⁶ GGWSAP (n 132) section 2(b); Nigeria Vision 20: 2020 Abridged Version (n 131) 21.

¹³⁷ National Policy on the Environment (n 127) para 4(16); GGWSAP (n 132) para 2(a); National Energy Policy (n 128) 45; Nigeria Vision 20: 2020 Abridged Version (n 131) 9

¹³⁸ National Policy on the Environment (n 127) para 4(16)(d); Nigeria Vision 20: 2020 Abridged Version (n 131) 12, 20-21; National Water Policy (n 129) 14.

¹³⁹ GGWSAP (n 132) section 2(a); Nigeria Vision 20: 2020 Abridged Version (n 131) 9.

¹⁴⁰ Nigeria Vision 20: 2020 Abridged Version (n 131) 9; GGWSAP (n 132) 9-10.

¹⁴¹ National Water Policy (n 129); Nigeria Vision 20: 2020 Abridged Version (n 131) 9

¹⁴² Nigeria Vision 20: 2020 Abridged Version (n 131) 9

¹⁴³ Nigerian Bio-Fuel Policy and Incentives (n 130) 5, 7; GGWSAP (n 132) 10; Kainji Hydropower Rehabilitation Project (n 15) 3

¹⁴⁴ GGWSAP (n 132) v.

¹⁴⁵ National Energy Policy (n 128) 12, 36

¹⁴⁶ *ibid* 37.

requires the Federal Government to provide infrastructure including roads, electricity and power supply and facilities to communities where Bio-fuel companies operate and support State and Local Governments for infrastructure requirements of areas identified for Bio-fuel Operations.¹⁴⁷ The overall objective of the National Forestry Policy is to achieve sustainable forest management, leading to sustainable increases in the economic, social and environmental benefits from forests and trees, for present and future generations, including the poor and vulnerable groups.¹⁴⁸ The policy specifically seeks to support schemes that facilitate access to carbon markets,¹⁴⁹ and encourage forest-dependent people, farmers and local communities to advance their livelihoods through novel methods to forestry.¹⁵⁰ It aims at assisting the poor in adapting to the impacts of climate change and benefiting from evolving carbon markets, through tree cultivation of forests.¹⁵¹ It also provides that the aim of the policy is to guarantee tree ownership rights within the enabling laws and traditional practices and customs.¹⁵²

While generally, policies are not legally-binding as they only reveal and advance actions of the executive in relation to their subject matter, the above policies can strengthen and be strengthened by states' duties toward socio-economic rights in climate change mitigation actions as envisaged at the international level. For instance, in so far as they deal with climate change mitigation actions and socio-economic objectives, the policies are a reflection of the State's endorsement of international instruments on climate change mitigation actions calling for the observance of socio-economic rights in the implementation of actions. Also, for implementation purpose, these policies and their socio-economic content fall within the scope of the application of section 7(a) of NESREA which empowers the agency to enforce their compliance. Section 7(c) of NESREA also provides for enforcement of international agreements and treaties on issues including climate change. This suggests that dissatisfied populations can have the option with NESREA to require the application or enforcement of

¹⁴⁷ Nigerian Bio-Fuel Policy and Incentives (n 130) 22.

¹⁴⁸ National Forestry Policy 1988 section 3(i)

¹⁴⁹ *ibid* section 3(10)(ii)

¹⁵⁰ *ibid* section 3(1)(v)

¹⁵¹ *ibid* sections 3(3), (10)(2)(vi)

¹⁵² *ibid* section 3(2) and(27)

compliance in line with policies as supported by international instruments relevant to climate change mitigation. Where NESREA fails to perform the required task, section 1(2)(c) allows the agency to sue and be sued provided that requisite notice is given,¹⁵³ a provision which offers a window to bring the government into terms with its obligations to ensure that climate change mitigation actions enhance and not undermine socio-economic rights duties in Nigeria.

4. Conclusion

Climate change pillar instruments and other instruments relating to climate change and human rights at the international level, as discussed, provide for the implementation of climate change mitigation actions such as alternative energy usage, the recovery of gas that would have otherwise been flared, biofuels initiatives under the CDM and forest based REDD+. The implementation of these actions which involves different actors including developing states can aid the realisation of socio-economic rights. However, climate change instruments have not been articulated to demonstrate states' socio-economic rights' duties in climate change mitigation actions. Applying such duties in Nigeria, a site for mitigation actions, can be problematic considering the legal challenges, namely, the non-domestication of climate change pillar instruments and uncertainty as to the justiciability of socio-economic rights.

The article demonstrated that climate pillar instruments and other instruments such as decisions and resolutions relating to climate change and human rights at the international level are a legal source of duty to respect, protect and fulfil socio-economic rights while implementing climate change mitigation actions. While discussing the legal bases for the application of duties in Nigeria, the article argued that these instruments have applicable legal value, despite the lack of domestication of treaty based instruments and the recommendatory nature of instruments such as resolutions and decisions dealing with climate change and human rights. It contended that instruments can translate into a legitimate expectation that the State will implement socio-economic rights' duties

¹⁵³ NESREA (n 99) section 32(1).

arising from international instruments. The contention was based on the grounds of the involvement of government in the international decision making process on climate change mitigation and implementation of mitigation actions, despite non-domestication of applicable instruments and the recommendatory nature of resolution and decisions. The article further demonstrated that despite the arguments against the justiciability of socio-economic rights, there are legislation and policies with applicable provisions that can strengthen and be strengthened by international instruments in ensuring the application of socio-economic rights duties while implementing climate change mitigation actions in Nigeria.

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