



Nigeria's Ratification of International Human Rights Instruments and the Question of the Non-Justiciability of Chapter II of Its 1999 Constitution

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Abstract

This paper examined the implication of Nigeria's ratification of international human rights instruments in relation to enforcement of socio-economic rights in the country and debunked the age-long postulation that Chapter II of the Nigerian Constitution is non-justiciable. The paper proceeded to show that even if Chapter II of the said Constitution was to be held to be non-justiciable as generally believed, which the study argued against, it will not in any way affect the enforceability of socio-economic rights contained in international instruments binding on Nigeria. This is more so against the backdrop that the Nigerian Constitution places no limitation on the enforceability of socio-economic rights.

Keywords: Socioeconomic rights, Enforceability, Justiciability, Human Rights

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Introduction

The Universal Declaration of Human Rights¹ (UDHR or Declaration) brings together civil and political rights as well as economic, social and cultural (ESC) rights as one universal and indivisible body of rights;² examining the extent to which this is so in practice in Nigeria is the main thrust of this study. Although the UDHR recognises both civil and political rights (articles 3-21) as well as ESC rights (articles 22-26) as an indivisible body of rights, in transforming the provisions of the Declaration into instruments that States may ratify or accede to, the United Nations (UN) adopted two separate Covenants³ – namely, the International Covenant on Civil and Political Rights⁴ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights⁵ (ICESCR) – principally because states generally preferred a weaker duty to protect their citizens' ESC rights and were only willing to recognise these rights as long as the recognition did not entail strong accountability measures.⁶

Following that dichotomy, some scholars argue that whereas the provisions of the ICCPR are meant to be binding on States Parties, the reverse is the case with the provisions of ICESCR, which they contend to be mere aspirations to guide States' policies. That position is generally premised on the way the provisions of the ICESCR are couched.⁷ The position seems supported by article 2(1) of the ICESCR, which requires states "to take steps", based on their available resources and in a progressive manner, to implement the Covenant. The parameters set by the above provision are subjective and seem to be non-obligatory. Global Citizenship Commission (GCC) points out three different positions of scholars in respect of socio-economic rights,

¹UN Doc. A/RES 217 (III) (Paris, 1948)

² Fatyana Scheila Friedrich and Larissa Ramina, 'The Conviction of President Lula as a Violation of International Human Rights Law', in Carol Proner, Gisele Cittadino, Gisele Ricobom, João Ricardo Dornelles (eds), *Comments on a Notorious Verdict* (CLASCO, 2018) 206

³ Avinash Govindjee and Elijah Adewale Taiwo, 'Justiciability and Enforceability of the Fundamental Objectives and Directive Principles in Nigeria: Lessons from South Africa and India', *Nigerian Bar Journal* (2011) 7(1) 1, 65.

⁴ UN Doc. A/RES/2200 A (XXI) (adopted 16 December 1966); 999 UNTS 171 (entry into force 26 March 1976).

⁵ UN Doc. 993 UNTS 3 (adopted 16 December 1966 and entered into force 26 March 1976).

⁶ Koldo Casla, 'After 50 Years, It's Time to Close the Gap between Different Human Rights', *The Conversation* (15 December 2016) <<http://theconversation.com/after-50-years-its-time-to-close-the-gap-between-different-human-rights-70239>> accessed 11 February 2020.

⁷ See generally Govindjee and Taiwo (n 3) 1.



namely: those who resist the idea that they are as central as civil and political rights; those who argue that they are more central; and those who think of them as social and economic aspirations and doubt whether they should be treated as rights.⁸ But Ahmed and Bulmer argue that article 2(1) of the ICESCR does not imply that States can defer the implementation of socio-economic rights until they have reached a certain level of development and that even the poorest States have an immediate duty under ICESCR to “move as expeditiously and effectively as possible” to achieve socio-economic rights to the maximum extent possible.⁹ There is yet a fourth group of scholars who postulate that a country’s Constitution and municipal laws are the defining instruments when it comes to the justiciability of ESC rights or any other type of human rights. The paper begins with an in-depth examination of the argument for and against indivisibility of human rights and then proceeds to examine whether the provisions of Chapter II of the Nigerian Constitution are indeed non-justiciable as generally postulated. We thereafter argue for the need to shift the paradigm of the non-justiciability question in Nigeria. Finally, the study examines human rights customary international law with a view to establish the fact that socio-economic rights are enforceable in Nigeria and that there is no constitutional inhibition to their enforceability.

The Argument for and against Indivisibility of Human Rights

The three arguments referred to by GCC above support hierarchy of human rights and represent the theory of divisibility. However, there is another theory that postulates the indivisibility of human rights irrespective of article 2 of the ICESCR referred to above. The GCC, on its part, believes that socio-economic rights are important and that “[t]hey reflect genuine human needs that every state has an obligation to attend to, within existing resources, in the interest of all those committed to their care.”¹⁰ The GCC’s position aligns with article 2(1) of the ICESCR but affirms that the rights are obligatory on the States Parties. The question that remains to be answered in the light of the GCC’s postulation is whether the correlative obligations created are legal or moral obligations on States Parties.

The theories of divisibility and indivisibility of human rights have also given rise to the question of justiciability of the species of these rights

⁸ Gordon Brown (ed), *The Universal Declaration of Human Rights in the 21st Century*, (Open Book Publishers, 2016) 63.

⁹ Deawood Ahmed and Elliot Bulmer, *Social and Economic Rights* (2nd edn, International IDEA, 2017) 21.

¹⁰ *ibid.*

that are socio-economic in nature. The singular act of having civil and political rights in a separate Covenant from the Covenant that contains ESC rights has been trumped up as a justification for creating a divide between the two. Another point that has been canvassed to support the dichotomy argument is States Parties' decision to elaborate the two species of rights separately. The last and very important reason why some scholars, like Govindjee and Taiwo, believe this dichotomy exists is because most countries, by their Constitutions, create a clear divide between the rights, by stating that the civil and political rights are justiciable while the ESC rights are adapted as fundamental objectives and directive principles of state policy; these objectives and directive principles are clearly stated in these Constitutions to be non-justiciable.¹¹

Whichever way the argument goes, Casla recommends that it was time the gulf between the two species of human rights was closed, which gap he considers as creating an "unfortunate hierarchy".¹² A comparative study of three jurisdictions, Nigeria, India and South Africa, will reveal different approaches by governments and their judiciaries towards the divisibility and justiciability questions. Nigeria and India toe the line of segmenting human rights into two and treating them entirely differently and under different Chapters of their Constitutions.

Under the Nigerian Constitution of 1999, for example, civil and political rights are contained in Chapter IV and headed "Fundamental Rights", while the ESC rights are adapted in Chapter II to adumbrate the country's "Fundamental Objectives and Directive Principles of State Policy", but are not referred to as "rights". On the contrary, the South African Constitution of 1996 does not distinguish between civil and political rights, and ESC rights. In other words, the South African Constitution leaves no room for argument as to the indivisibility of human rights.

Govindjee and Taiwo cite the South African Constitution as one of the most progressive Constitutions in the world that recognise as justiciable entitlements what Chapter II of the Nigerian Constitution recognises only as fundamental objectives and directive principles of State policy.¹³ Thus, whereas, in a country like South Africa, there is no contention as

¹¹ See Govindjee and Taiwo (n 3)

¹² Koldo Casla, 'After 50 Years, It's Time to Close the Gap between Different Human Rights', *The Conversation* (15 December 2016) <<http://theconversation.com/after-50-years-its-time-to-close-the-gap-between-different-human-rights-70239>> accessed 11 February 2020.

¹³ Govindjee and Taiwo (n 3).

to the jurisdiction of municipal courts to entertain claims arising out of the socio-economic rights, in countries like Nigeria and India the arguments for and against the justiciability of the socio-economic rights are a recurring decimal. The question then is what the role of a municipal court in countries like Nigeria and India should be in implementing socio-economic rights. As opined by Michelman and Ibe, domestic courts [in Africa] have contributed very little to socio-economic rights accountability because of their inherent limitations¹⁴ which, in our opinion, usually result from governmental pressure and lack of judicial will. We will now narrow the issue down to a comparative analysis between the approaches of the Indian courts and the Nigerian courts in order to try and establish the fact that human rights are indivisible and justiciable once a State has ratified the ICESCR, the African Charter on Human and Peoples' Rights¹⁵ (African Charter) or other relevant international treaties that provide for these rights; in such a case, the state is legally bound to respect, promote, protect, and fulfil the socio-economic rights of their citizens¹⁶ insofar as there are no Constitutional limitations.

Before examining the effect of ratification of international human rights legal instruments by Nigeria, it is important to first conclude the comparative analysis between the Nigerian and Indian jurisdictions. Although, Chapter II of the Nigerian Constitution was a transplantation of Part IV of the Indian Constitution of 1950, the judiciaries of the two countries approach human rights interpretation differently. Govindjee and Taiwo observe that through "expansive interpretation tagged 'judicial activism', the Indian judiciary has been able to put life into Part IV of the Indian Constitution (directive principles of state policy) by way of a broad reading of the fundamental rights contained in Part III.¹⁷ It is significant to note that though India was once a poorer country than

¹⁴ Michelman, 'The Constitution, Social Rights and Liberal Political Justifications' in Barak- 9 Erez & Gross (eds) *Exploring Social Rights: between Theory and Practice* (2011) 21, 23; and Ibe 'Beyond Justiciability: Realizing the Promise of Socio-economic Rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 197, both cited in Ayebaesin Jacob Beredugo and Frans Viljoen, 'Towards a Greater Role and Enhanced Effectiveness of National Human Rights Commissions in Advancing the Domestic Implementation of Socioeconomic Rights: Nigeria, South Africa and Uganda as Case Studies', *The Comparative and International Law Journal of Southern Africa* (November 2015) 48(3) 401, 403.

¹⁵ OAU Doc. CAB/LEG/67/3 (1982).

¹⁶ Ayebaesin Jacob Beredugo and Frans Viljoen, 'Towards a Greater Role and Enhanced Effectiveness of National Human Rights Commissions in Advancing the Domestic Implementation of Socioeconomic Rights: Nigeria, South Africa and Uganda as Case Studies', *The Comparative and International Law Journal of Southern Africa* (November 2015) 48(3) 401, 402.

¹⁷ Govindjee and Taiwo (n 3) 69.

Nigeria and the former is over six times larger than the latter in population, as at 2018 the latter, which is rich in several natural resources but does not recognise socio-economic rights, had become the poverty capital of the world, having more poor people than the former.¹⁸

The approach of the Indian judiciary is necessary if domestic courts must serve the end of justice and lest the majority of citizens of “low-income and middle-income” nations remain continually denied of the basic amenities of life even in the midst of plentiful resources at the disposal of political office holders. It is submitted that in Nigeria, for instance, the lack of accountability at the various levels of government remains the singular reason for the level of corruption in the country today¹⁹ and the total failure of distributive justice, which socio-economic rights seek to protect. As Udombana aptly puts it:

[T]oo many employable youths remain unemployed, with some turning to crime, prostitution, and other vices to fight destitution. For those who manage to find jobs, their wages lag behind inflation. The economic walls are closing in; walls of underdevelopment and walls that deprive people of their most basic rights and consign whole sectors of society to an existence barely worth the name.²⁰

Apart from the development that socio-economic rights engender, they also aim in their essence at protecting the weak and providing for the needy in society. These rights hold our governments accountable for the collective well-being and quality of life that is rightfully part of every government's promise to its citizens.²¹ As O'Higgins, CJ, held in *State (Healy) v. Donoghue*:²²

It is justice which is to be administered in the Courts and this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the

¹⁸ Yomi Kazeem, 'Nigeria has Become the Poverty Capital of the World', Quartz Africa (25 June 2018) <qz.com/africa/1313380/nigerias-has-the-highest-rate-of-extreme-poverty-globally/> accessed 11 February 2020.

¹⁹ See generally Jędrzej George Frynas, 'Corporate and State Responses to Anti-Oil Protests in the Niger Delta', 100 AFR. AFF. no. 398, Jan. 2001, at 27 cited in Scheagbe Mayumi Grigsby, 'Enforcing Economic, Social and Cultural Rights: A Stark Dichotomy', *Northeastern University Law Review* (3 May 2017)

²⁰ Nsongurua J. Udombana, 'Mission Accomplished? An Impact Assessment of the UDHR in Africa' *Journal of Public Law & Policy* (2008) 30, 367.

²¹ Penny Wakefield, 'Human Rights are our Rights, Too', *Human Rights* (2015) 41 (2) 1, 16

²² [1976] IR 284, 348



individual. No court under the Constitution has jurisdiction to act contrary to justice.

Are the Provisions of Chapter II of the Nigerian Constitution Really Non-Justiciable?

We will now turn to the important issue of the justiciability or otherwise of the provisions of Chapter II of the Nigerian Constitution. Although those provisions are not human rights provisions, it is important to examine them in the light of the ongoing conversation that erroneously regards them as non-justiciable and attempts to use Chapter II provisions as a basis for propounding the non-justiciability of socio-economic rights and divisibility of human rights in Nigeria and other jurisdictions that have a similar constitutional approach. As stated above, the Nigerian judiciary generally takes the position that the provisions of Chapter II are not justiciable.²³

It is important to interrogate that judicial position in the light of the Nigerian Constitution itself in order to establish whether or not the Nigerian judiciary is right in its stance. It is also important to examine whether the non-justiciability of Chapter II provisions, if founded, amounts to non-justiciability of socio-economic rights in Nigeria in the light of international human rights instruments duly ratified by the country. The argument of those who believe that the provisions of Chapter II of the Nigerian Constitution are not justiciable is not premised on the Chapter itself (sections 13 - 24 of the Constitution), but on section 6(6)(c) that provides that the judicial powers vested in the courts shall not, except as otherwise provided for by the Constitution, extend to any issue or question as to whether any act or 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 set out in Chapter II of the Constitution.

Two important issues arise from the above Constitutional provision, namely: whether, reading the Nigerian Constitution as a whole, the above provision effectively ousts the jurisdiction of the courts to entertain claims arising from Chapter II; and, more importantly, whether Chapter II provisions are human rights provisions in the first place. Many scholars, including Govindjee and Taiwo, view section

²³ See, for example, *Uzoukwu v Ezeonu II and Ors* [1991] 6 NWLR (Pt 200) 708, at 761-762 (CA) and *Attorney-General, Ondo State v Attorney-General, Federation of Nigeria* [2002] 9 NWLR (Pt 772) 222 (SC).

6(6)(c) of the Constitution as an ouster provision which effectively makes the provisions of Chapter II non-justiciable, but recommend judicial activism that would result in “a broad reading of the fundamental rights”²⁴ in Chapter IV of the Constitution and extending them to cover socio-economic rights. In other words, Govindjee and Taiwo support that civil and political rights should be interpreted wide enough to include socio-economic rights as the Indian judiciary has done. The UN, which is the custodian of both the ICCPR and ICESCR, upholds the indivisibility theory. The UN Committee on Economic, Social and Cultural Rights emphasises that National Human Rights Commissions (institutional mechanisms responsible for advancing the domestic implementation of socio-economic rights) have a duty to uphold the indivisibility of human rights by prioritising the consideration of socio-economic rights.²⁵ There is no doubt that Govindjee and Taiwo's prescription in the preceding paragraph provides a laudable solution, but an examination of section 13 of the Nigerian Constitution would reveal that section 6(6)(c) does not effectively oust the jurisdiction of the courts after all.

Section 13 of the Constitution provides in imperative terms that:

It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution.

Besides the fact that the above provision is couched in an imperative manner, it has no proviso and it is not qualified in any subsequent provision of the Constitution. So, we can safely juxtapose it with section 6(6)(c). The general rule of interpretation is that, where there is or there seems to be contradictions between two provisions of the same law, the latter provision supersedes the earlier one because the lawmakers are deemed to be aware of the existence of the earlier provision before making the later one,²⁶ and the court “must presume that a legislature says in a statute what it means and means in a statute what it says

²⁴ Govindjee and Taiwo (n 3).

²⁵ Ayebaesin Jacob Beredugo and Frans Viljoen, ‘Towards a Greater Role and Enhanced Effectiveness of National Human Rights Commissions in Advancing the Domestic Implementation of Socioeconomic Rights: Nigeria, South Africa and Uganda as Case Studies’, *The Comparative and International Law Journal of Southern Africa* (November 2015) 48(3) 401, 406.

²⁶ See Larry M. Eig, ‘Statutory Interpretation: General Principles and Recent Trends’, *Congress Research Service* (September 2014) 15.

there”.²⁷ Thus, since section 13 of the Nigerian Constitution is the later provision, it supersedes the provision of section 6(6)(c) and, therefore, since all organs of government are under duty and responsibility to conform to, observe and apply the provisions of Chapter II, the citizens have the correlative right to bring claims to enforce those provisions, which includes challenging any tier of government for lopsided appointments in violation of section 14(1), (3) and (4) of the Constitution.

Another pertinent issue to consider is if the provisions of Chapter II are actually human rights provisions as claimed by scholars like Dada who hold that “[t]he Nigerian Constitution makes unmistakable distinction between civil and political rights on the one hand and economic, social and cultural rights on the other hand”.²⁸ Are there really two classes of human rights in Nigeria or they are merely different types of rights that are indivisible as envisioned by UDHR and the African Charter? The answer to that question is clear from Chapter II itself, from the heading to the last section of the Chapter. The Chapter is headed “Fundamental Objectives and Directive Principles of State Policy”. The Chapter was not intended to provide for a species (let alone, a class) of human rights but to set forth the fundamental objectives and principles that must direct or drive the policy of the Nigerian State, which all organs and tiers of government must “conform to, observe and apply”.

The effect of the foregoing postulation is that should it be argued, though wrongly, that the provisions of Chapter II are not justiciable, and should the courts uphold that argument as Nigerian courts have generally done, it still will not affect the human rights themselves that were used as the basis for formulating the fundamental objectives and directive principles. The fact that the ‘fundamental objectives’ provisions were influenced by socio-economic rights does not transmute them into human rights provisions. In other words, the non-justiciability of Chapter II provisions (if that position was to be correct) does not affect the applicability of ESC rights in Nigeria.

Shifting the Paradigm of the Non-Justiciability Question in Nigeria

²⁷ See *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) cited in Eig (n 26) 6.

²⁸ Jacob Abiodun Dada, ‘Human Rights under the Nigerian Constitution: Issues and Problems’, *International Journal of Humanities and Social Science (June 2012)* 2 (12) 33, 39.

What then are the legal instruments that regulate human rights, including ESC rights, in Nigeria? The first, but not the only, legal instrument that regulates human rights in Nigeria is Chapter IV of the Nigerian Constitution, which is in tandem with the ICCPR. The said Chapter IV provides for right to life,²⁹ right to dignity of the human person,³⁰ right to personal liberty,³¹ right to fair hearing,³² right to private and family life,³³ right to freedom of thought, conscience and religion,³⁴ right to freedom of expression and the press,³⁵ right to peaceful assembly and association,³⁶ right to freedom of movement,³⁷ and the right to acquire and own immovable property anywhere in Nigeria.³⁸

Apart from Chapter IV of the Nigerian Constitution, there are several treaties on human rights to which Nigeria is a party, two of which are of particular importance because they have been ratified through the process of domestication and, by virtue of section 12 of the 1999 Constitution, Nigeria is bound by them. The two relevant international human rights instruments are: the African Charter, which was ratified in 1983 vide the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act³⁹ (Ratification Act); and the Convention on the Rights of the Child 1989⁴⁰ (CRC), which was ratified vide the Child's Right Act 2003 (CRA).⁴¹ These two human rights instruments, which are now part of Nigerian laws, contain ESC rights.⁴² In fact, the African Charter is more extensive than any other international human rights instrument as it provides for peoples' rights as well.

Ordinarily, by domesticating the African Charter⁴³ and CRC, there should have been no argument as to whether ESC rights are justiciable

²⁹ Section 33

³⁰ Section 34

³¹ Section 35

³² Section 36

³³ Section 37

³⁴ Section 38

³⁵ Section 39

³⁶ Section 40

³⁷ Section 41

³⁸ Sections 43 and 44

³⁹ Cap. A9 LFN 2004.

⁴⁰ 1577 U.N.T.S. 3 (1989).

⁴¹ Cap. A50 LFN, 2010.

⁴² See, for example, African Charter, arts 15, 16.2, 17.1 and 2, 21.1, and CRC, arts 9, 18 and 24.

⁴³ Section 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act provides that the provisions of the African Charter shall have force



in Nigeria but for the twist introduced by the wrong interpretation of what Chapter II provisions are. All those who come to the conclusion that Chapter II provisions are human rights provisions and also fail to consider that section 13 of the Constitution must, by virtue of the rule of interpretation, override section 6(6)(c) unavoidably project divisibility of human rights and the non-justiciability of socio-economic rights. Dada discusses the landmark case of *General Sani Abacha v Gani Fawehinmi*,⁴⁴ where the Supreme Court held that the Constitution takes precedence over treaties and that ratified treaties enjoy equality and parity of status with domestic legislation, but that where there is any conflict between a treaty and a domestic law, the provisions of the treaty would prevail.⁴⁵ Specifically referring to the African Charter, the court stated that: “[i]t is a statute with international flavour. ... The Charter possesses ‘a greater vigour and strength’ than any other domestic statute but that is not to say that the Charter is superior to the Constitution.”⁴⁶

The Supreme Court went ahead and in unambiguous terms condemned the attempt by the Court of Appeal to elevate the African Charter to a higher pedestal than other federal municipal laws.⁴⁷ We, however, submit that the relevant issue is not that of hierarchy of laws, but in trying to create a non-existent hierarchy of human rights into the Nigerian legal system and reading that concept of hierarchy into the Constitution; and this error is based on treating the fundamental objectives and directive principles of state policy in Chapter II as human rights provisions, which they are not. This is what the Supreme Court did in the *Abacha’s* case and as does Dada who postulates that “[i]n the hierarchy of human rights, civil and political right have taken primacy being usually referred to as the ‘first generation rights’ and the economic, social and cultural rights constitute the ‘second generation rights’”.⁴⁸

When the provisions of Chapter II is put in its right perspective as fundamental objectives and directive principles, the correct conclusion would be that the Nigerian Constitution provides for only civil and political rights, while ESC rights are provided for by federal municipal laws “with international flavour”, namely, the Ratification Act and the CRA. It was based on this fact that the Court of Justice for the Economic

of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

⁴⁴ (2000) FWLR (pt 4) 533 at 585-586.

⁴⁵ Dada (n 28) 39.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ *ibid.*

Community of West African States (ECOWAS Court) rightly held in *Social and Economic Rights Advocacy Project v. Federal Republic of Nigeria (SERAP cases)*⁴⁹, that economic and even “third generation” group rights are justiciable in Nigeria.

An important case that contrasts with the *Abacha's* case is *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*⁵⁰ (SERAC case), which was in the form of a complaint to the African Commission on Human and Peoples' Rights (African Commission). In that case Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) filed a complaint with the African Commission on behalf of the Ogoni people against Nigeria on the allegation of the former's failure to monitor the operations of and required standard safety measures by its company, Nigerian National Petroleum Corporation (NNPC) and a joint venture, Shell Petroleum Development Company, in which it has majority shareholding. The complaint further alleged that governmental involvement and the oil companies' operations led to the violation of Ogoni people's ESC rights under the African Charter.

The African Commission found that Nigeria was in violation of several ESC rights, including the rights to health, property, and protection of family.⁵¹ The Commission also found that Nigeria failed in its obligations under the African Charter to take necessary steps for the “improvement of all aspects of environmental and industrial hygiene”.⁵² An important issue that arises from the above case, besides establishing Nigeria's obligation to implement ESC rights, is that government itself may have interests in the contravening businesses and may decide to side “against its own citizens”⁵³ and turn a blind eye to the plight of those whose rights are being violated by the businesses. This state of affairs coupled with the fact that domestic courts have contributed very little to socio-economic rights accountability “because of their inherent limitations”⁵⁴ calls for some legal activism and human rights advocacy to protect rights provided for by municipal laws and applicable international instruments.

In a nutshell, it is our submission that Chapter II of the Nigerian Constitution is justiciable by virtue of section 13 of the Nigerian

⁴⁹ GENERAL LIST N° ECW/CCJ/APP/08/09; JUDGMENT N° ECW/CCJ/JUD/18/12

⁵⁰ Communication 156/96

⁵¹ Ibid, 10.

⁵² Ibid, 9.

⁵³ Scheagbe Mayumi Grigsby, ‘Enforcing Economic, Social and Cultural Rights: A Stark Dichotomy’, *Northeastern University Law Review* (3 May 2017).

⁵⁴ Beredugo and Viljoen (n 13).



Constitution, and that Chapter II provisions are not human rights provisions. The implication of the second limb of the foregoing submission is that should it be held that Chapter II provisions are non-justiciable, it does not in any way affect the validity of international human rights instruments applicable in Nigeria that make provisions for ESC rights and that, in particular, the Ratification Act and the CRA do not in any way stand in contradiction to the Nigerian Constitution and, therefore, are enforceable by municipal courts in Nigeria.

Customary International Human Rights Law

This section focuses on international human rights instruments that relate to socio-economic rights which have been transformed into international customary law and therefore binding on all countries of the world, including Nigeria. Two of such human rights instruments that would be discussed here are the UDHR and the CRC.

UDHR

The UDHR, the foremost international soft law on human rights which, as Eleanor Roosevelt foresaw, has “become the Magna Carta for all mankind”.⁵⁵ Article 2 of the UDHR states the fact that everyone is entitled to all the rights and freedoms set forth in the Declaration; these rights, as discussed above, include socio-economic rights. Although a Declaration based on a Resolution of the UN General Assembly does not in itself constitute international law, such Declarations do at times play a profound role in the creation of both treaties and custom.⁵⁶ It is common knowledge that the UDHR is the precursor of several human rights treaties, including the African Charter and the CRC under discussion. Here, therefore, we want to examine if the UDHR has also played any role in creating an international custom.

To begin that important enquiry, we note section 28 of the Statement of Principles Applicable to the Formation of General Customary International Law 2000, which provides that “United Nations resolutions may in some instances ... contribute to the formation of new customary law.”⁵⁷ For a soft law, such as the UDHR, to create new rules of customary law, it must satisfy two conditions of *usus* (consistent state practice) and *opinio juris* (states’ acceptance or willingness to be bound

⁵⁵ Vineeta Pathak, ‘Promoting Human Rights: The UN Record’, *The Indian Journal of Political Science* (2009) 70(1) 151, 155.

⁵⁶ Michèle Olivier, ‘The Relevance of “Soft Law” as a Source of International Human Rights’, *The Comparative and International Law Journal of Southern Africa* (November 2002) 35(3) 289, 290

⁵⁷ See *ibid.* 292-293.

by the norm). Olivier points out that the UDHR is arguably “a prime example of the capacity of a non-binding, soft law instrument to influence both hard law (treaties and custom) and practice” and “exerts a moral, political and legal influence”, far exceeding its original purpose.⁵⁸ The UDHR remains till date the primary source of global and municipal human rights standards,⁵⁹ so much so that it has been rightly argued that rights recognised in the Declaration have obtained the status of customary international law, having the attributes of *jus cogens*,⁶⁰ and as such has become a legal instrument binding on all countries,⁶¹ including Nigeria. Based on that premise, the Nigerian state cannot be exempted from its obligations to protect the socio-economic rights provided for under the UDHR.

To validate the above argument, the International Court of Justice (ICJ) in its Opinion in *'Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)'* (Namibia case),⁶² per Judge Amman, remarked that the UDHR binds States on the basis of custom within the meaning of article 38.1(b) of the ICJ Statute, whether because they constituted a codification of customary law as was said in respect of article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of article 38.1(b) of the ICJ Statute. And as we have also mentioned above, there is no constitutional restraint on the Nigerian judiciary from inquiring into socio-economic rights issues provided for under international human rights law.

Convention on the Rights of the Child (CRC)

Another international instrument of equal importance in this regard is the CRC. The CRC is by nature a legally binding document on all States Parties to the Convention. What is of importance here is the proposition

⁵⁸ *ibid* 298-299.

⁵⁹ Committee on the Enforcement of Human Rights Law, 'Final Report on the Status of the Universal Declaration of Human Rights in National and International Law' in *Report of the Sixty-Sixth Conference*, Buenos Aires, Argentina (1994) 526 cited in Olivier (n 56) 300.

⁶⁰ See R. B Lillich 'The Growing Importance of Customary International Human Rights Law' (1995/96) 25 GJICL 1; A. D'Amato 'Human Rights as Part of Customary International Law: a Plea for a Change of Paradigms' (1995/96) 25 GJICL 47; and M. S. McDougal, H. D. Lasswell and L. Chen Rights and world public order (1980) 274, all cited in Olivier (n 56) 301-302.

⁶¹ J. P. Humphrey 'The international Bill of Rights: scope and implementation' (1976) 17 William and Mary Law Review 527 cited in Olivier (n 56) 302.

⁶² (1971) ICJ Reports 16, 57 (Advisory Opinion of June 21).



that the CRC, which contains socio-economic rights that have bearing on children, has become a customary international human rights law. It is our submission that the CRC has indeed become such on the following premises: 1) it has been adopted by all nations of the world besides the United States that is still in the process of ratifying it, thereby fulfilling the requirement of *opinio juris*; 2) states all over the world have persistently asserted their commitment to promoting the rights of the child in their totality,⁶³ thereby fulfilling the requirement of *usus*; and 3) it has *omnes erga* element, so that besides transforming into a customary international law, its provisions are such that are non-derogable by States. The right of the child to food, medical care and education, for instance, are all social rights universally recognised as non-derogable rights. These rights must, of necessity, be enforceable by Nigerian municipal courts.

Conclusion

Two important things arise from the position taken in this article. The first is that international human rights instruments are not adopted and, especially, ratified to serve no purpose. When treaties are duly ratified, the obligations under such treaties are binding on the ratifying States. The paper avoided arguing along the line of hierarchy of norms that places international law above municipal law, but rather emphasized the point that the Nigerian Constitution does not in any way limit enforceability of socio-economic rights. Secondly, the article considered the importance of the UDHR's transformation from a mere soft law when it was adopted in 1948 to customary international human rights law binding on all countries of the world, with the implication that the socio-economic rights therein create correlative obligations on all States. In the same vein, the CRC, having been transformed into international custom with *erga omnes* elements create legally enforceable socio-economic rights for every child in the world, including Nigerian children, thus strengthening the argument that socio-economic rights are enforceable in Nigeria.

⁶³ The Nigerian government as enacted a federal law to ratify the CRC and, as at October 2020, 25 States of the Federation have also enacted state laws in that regard.