

Fiat Lux! Deriving a right to energy from the African Charter on Human and Peoples' Rights

*Michelle Barnard**

*Werner Scholtz***

1 Introduction

The African continent is plagued by energy poverty,¹ which refers to the lack of access to electricity and a reliance on traditional biomass for cooking. The linkage between access to modern energy services and development is well established, and the lack of access to modern energy sources constitutes an impediment to the promotion of sustainable development in Africa. In this regard, it is important to recall that the African Charter on Human and Peoples' Rights (Banjul Charter) expressly provides for an African right to development under article 22. Furthermore, article 24 (the right to a generally satisfactory environment) includes a reference to development. The relationship between the right to development and a right to a generally satisfactory environment is not clear from the wording of the Banjul Charter. However, the recognition of the importance of sustainable development in the African Union (AU) normative framework allows for an integrative approach that affirms that articles 22 and 24 are important components in the promotion of sustainable development which means that AU human rights law needs to respond to the challenge of energy poverty on the African continent. The time has come to derive a right to modern energy from articles 22 and 24 as components of sustainable development. General Comment 15 of the UN Committee on Economic, Social and Cultural Rights (UN Committee on ESCR) on the right to water² (at the international

*LLB, LLM, LLD (North-West University, Potchefstroom). Lecturer, Faculty of Law. North-West University, Potchefstroom Campus.

**BA *cum laude* LLB (PU for CHE) Doctor in Law (Leiden). Professor of Law. University of the Western Cape.

¹Energy poverty generally refers to a situation characterised by a lack of access to modern energy sources and an intense reliance on traditional biomass as primary energy source.

²General Comment 15 (2002): The Right to Water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 29th session, Agenda Item 3, UN Doc E/C 12/2002/11 (20 January 2003) (General Comment 15).

level) provides a useful matrix in this regard.³ We therefore affirm the importance of a right to energy not only for the laudable objective of sustainable development of the African continent, but also for the achievement of the Millennium Development Goals (MDGs)⁴ as contained in the United Nations Millennium Declaration, 2000.⁵ We argue that a right to energy constitutes an important point of departure for an AU normative response to energy poverty on the continent.

2 Development and energy poverty in Africa

In terms of its over-all development status, the African continent can be labelled as least developed. This is so because according to the United Nations Conference on Trade and Development's (UNCTAD) list of Least Developed Countries (LDCs), 34 of the 54 states on the African continent are considered LDCs.⁶ The UN uses three criteria for categorising a state as a LDC: a low per capita income; weak human assets; and economic vulnerability.⁷ African LDCs suffer from extreme and persistent poverty, weak and volatile economic growth, poor infrastructural capacity, and inadequate social services.⁸ Poverty is not a concept which is easily definable, mainly because it cannot be regarded as a static or fixed condition, but is rather a multi-dimensional concept involving social, economic and environmental aspects. Accordingly, the 2010 United Nations Development Programme Report (UNDP)

³Deriving an implicit right to energy or electricity from explicit human rights has enjoyed attention at the national level in the South African Constitution Court (CC). In *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC) (*Joseph*) followed a decision by Johannesburg power to terminate the supply of electricity to the petitioners (the applicants), without direct notice to them as tenants. The applicants relied principally on the right of access to adequate housing in s 26(1) of the Constitution of the Republic of South Africa, 1996 to argue that certain social services such as energy or electrification are indispensably linked to the fulfilment of the aforementioned right. Invoking the decision in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 1 BCLR 78 (CC) par 34, the applicants contended that the termination of electricity supply constituted a retrogressive measure which violated the negative obligation to respect the right of access to adequate housing. See *Joseph* pars 32 and 34. Using existing human rights as a basis to derive rights implicit to their realisation has been applied successfully by notable writers such as Chirwa and Liebenberg. In this regard see in general Chirwa 'The right to health in international law: Its implications for the obligations of the state and non-state actors in ensuring access to essential medicine' (2003) *South African Journal of Human Rights* 541-566 and Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 190.

⁴The eight MDGs are the eradication of extreme poverty and hunger; the achievement of universal primary education; the promotion of gender equality and the empowerment of women; the reduction of child mortality; the improvement of maternal health; success in combating HIV/AIDS, malaria and other diseases; environmental sustainability; and membership of a global partnership for development.

⁵Third United Nations Conference for Least Developed Countries *Outline for the modalities of the Fourth United Nations Conference on the Least Developed Countries and its preparatory process* (2008) 2.

⁶See <http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/LDC-Map.aspx>.

⁷See <http://www.unctad.org>.

⁸United Nations Economic Commission for Africa 'Challenges and Opportunities for African Least Developed Countries Progress Report on the Implementation of the Brussels Programme of Action for African Least Developed Countries', Mid-Term Review 2001-2005; and par 1.1 of the 'Programme of Action for the Least Developed Countries for the Decade 2011-2020' (Istanbul Programme of Action) drafted at the Fourth United Nations Conference for Least Developed Countries held in Istanbul, Turkey, 9 - 13 May 2011.

identifies a Multi-dimensional Poverty Index (MPI) as a measure recognising the multiple areas of deprivation which overlap and finally constitute poverty. The MPI is important in the sense that it acknowledges non-income dimensions of poverty such as health, education, and living standards as being as important as income-based dimensions such as average income and wages.⁹ Within its list of non-income dimensions of poverty, the UNDP identifies the lack of access to reliable energy. The two energy indicators for the non-income dimension of lack of access to energy, are electricity and cooking fuels. In the context of multi-dimensional poverty, these energy indicators should translate into energy poverty being understood as a situation characterised by no access to electricity and a reliance on traditional biomass such as wood, charcoal, and dung for cooking.¹⁰ In applying the MPI, the UNDP defines energy poverty as the 'inability to cook with modern cooking fuels and the lack of a bare minimum of electric lighting to read or for other household and productive activities at sunset.'¹¹ The definition attributed to the concept of energy poverty by the International Energy Agency (IEA)¹² stipulates that energy poverty has two main elements: lack of access to electricity on the one hand, and a reliance on traditional biomass fuels for cooking, on the other.¹³ According to the IEA, the situation surrounding energy in African states is one characterised by lack of access to electricity combined with a heavy reliance on the traditional use of biomass for cooking – in other words – energy poverty.¹⁴

The statistics associated with the energy situation in Africa are staggering, taking into consideration that 589 million Africans have no access to electricity and 657 million are reliant on the traditional use of biomass for basic cooking needs.¹⁵ This translates

⁹'United Nations Development Programme Report' (2010) 7.

¹⁰As above.

¹¹Gaye 'Access to energy and human development' UNDP Office Occasional Paper (2007) 4.

¹²The IEA was established in 1972 by the member states of the Organisation for Economic Co-operation and Development (OECD). Its mandate is to promote energy security amongst its member states and to advise member states on sound energy policy. For more information on this organisation visit <http://www.oecd.org>.

¹³International Energy Agency *Energy Poverty: How to make modern energy access universal? Special early excerpt of the World Energy Outlook 2010 for the UN General Assembly on the Millennium Development Goals* (2010) 10 (World Energy Outlook 2010); and Sovacool *et al* 'What moves and works: Broadening the consideration of energy poverty' (2012) *Energy Policy* 42 .

¹⁴Africa's energy sector is best understood as three distinct regions: North Africa, which is heavily reliant on oil and gas, followed by South Africa, which depends on coal, and the rest of sub-Saharan Africa, which is largely reliant on biomass. South Africa and North Africa account for over 50% of the continent's total modern energy production. In terms of installed capacity for electricity generation, South Africa is estimated to account for about half the continent's total. The reliance on traditional biomass energy is particularly high in sub-Saharan Africa, accounting in some countries for 70-90% of primary energy supply, and up to 95% of the total consumption. Even oil-rich sub-Saharan African countries continue to rely on biomass energy to meet the bulk of their household energy requirements: in Nigeria, it is estimated that about 91% of the household energy needs are met by biomass. See Karekezi 'Access to modern energy – a view from Africa' in World Bank *Energy after the Financial crisis – energy and development report* (1999) 12; World Energy Outlook 2010 n 13 above 9.

¹⁵World Bank *Addressing the electricity access gap: Background paper for the World Bank Group Energy Sector Strategy* (2010) 8.

into the whole of Africa having an electrification rate of 40%. 66% of those with electricity are urban dwellers and 22% are rural. The situation in sub-Saharan Africa is even more dire. Of the 589 million people in Africa lacking access to electricity, 587 million live in sub-Saharan Africa. This translates into an electrification rate of only 28% for the sub-Saharan Africa region. The reliance on biomass for cooking is also extremely high in sub-Saharan Africa, with 653 million people being almost exclusively dependent upon this traditional source of energy.¹⁶ Applying the definition of energy poverty provided by the IEA, it is abundantly clear that the African energy situation is one characterised by energy poverty.

Universal access to modern energy¹⁷ services, though not specifically listed as one of the MDGs, is as fundamental to the promotion of socio-economic development as it is to mitigating the effect of a lack of access to modern energy.¹⁸ Efforts to improve access to electricity and modern energy as a means by which to achieve economic development, date back at least to the 1950s. The United Nations (UN) articulated the supply of electricity as a means of achieving ‘development first’, as it improved the economic status of populations living in rural areas by increasing human productivity and welfare.¹⁹ In order to address many of the current global development challenges closely related to the MDGs, access to these modern energy services must be reliable and affordable,²⁰ sustainable, and, where feasible, from low greenhouse gas (GHG) emitting energy sources. These challenges are well-known and range across the economic, social and environmental spheres and include poverty, gender inequality, climate change, food security, health, and education.²¹ This sentiment regarding the

¹⁶World Energy Outlook 2010 n 13 above 9.

¹⁷Access to modern energy services should be understood as household access to electricity and clean cooking facilities. See World Energy Outlook 2010 n 13 above 8.

¹⁸The impacts related to the lack of access to modern energy cut across the social, economic and environmental spheres and are especially challenging to LDCs. The social impacts related to low or non-existent levels of access to modern energy relate to issues such as gender inequality, healthcare, education, and overall poverty alleviation. With reference to the economic impacts, the ability of low income communities or LDCs to make productive use of their natural resources, time and human energy is severely hampered by the lack of mechanical power. On the environmental front, the most prominent challenge related to the situation of lack of access to modern energy is the exacerbating effects it has on the challenges related to global climate change. In this regard, access to modern energy services is important, but so is access to climate-friendly or low-emissions technologies. For an overview of these and other developmental impacts related to the lack of access to modern energy, see Bazilian and Nussbaumer ‘UNIDO Contribution to the 4th UN Conference on LDCs Energy Services’ (Background Paper delivered at the 4th UN Conference on LDCs Energy Services in Istanbul, Turkey 9-13 May 2011) 3-4; UNDP/WHO *The energy access situation in developing countries: A review focusing on the Least developed countries and sub-Saharan Africa* (2009) <http://www.undp.org/energy>.

¹⁹Sovacool ‘The political economy of energy poverty: A review of key challenges’ (2012) 16 *Energy for Sustainable Development* 275.

²⁰‘Affordable’ in this context means that the cost to end users is compatible with their income levels and no higher than the cost of traditional fuels. In other words, what they would be willing and able to pay for the increased quality of energy supply in the long run. The Secretary-General’s Advisory Group on Energy and Climate Change (AGECC) *Energy for a sustainable future: Summary report and recommendations* (2010) 9; International Energy Agency *World Energy Outlook* (2012) 532-535.

²¹Bazilian and Nussbaumer n 18 above 1; and AGECC n 20 above 9.

important role which access to modern energy plays in promoting sustainable development, is echoed in the provisions of the Johannesburg Plan of Implementation on the World Summit on Sustainable Development (JPOI).²² In terms of the provisions of the JPOI, joint action must be taken to improve access to reliable and affordable energy services for sustainable development sufficient to facilitate the achievement of the MDGs.²³

3 Articles 22 and 24 and sustainable development

In terms of the provisions of the Constitutive Act of the African Union of 2000 (Constitutive Act), one of the objectives common to AU member states relates to promoting the sustainable development of the continent.²⁴ The Treaty Establishing the African Economic Community of 1992 (Abuja Treaty) reiterates this objective in relation to the establishment of the African Economic Community (AEC). The objectives of the AEC include: promoting economic, social and cultural development and the integration of African economies; establishing a continental framework for the development, mobilisation and utilisation of the human and material resources of Africa; promoting cooperation in all fields of human endeavour; and coordinating and harmonising policies among existing and future economic communities.²⁵ The Abuja Treaty further states that activities related to the achievement of these objectives should contribute to the endogenous, self-sustained, and self-reliant development of the continent.²⁶ The important notion of sustainable development²⁷ is entrenched in various other instruments of the AU.²⁸ The central position of sustainable development in the AU normative framework must be viewed from the perspective of how it provides a link between articles 22 and 24 of the Banjul Charter.²⁹ Therefore, it is imperative to reflect briefly on the relationship between articles 22 and 24 and sustainable development within the AU.

²²UN Doc A/CONF 199/20 (2002).

²³Paragraphs 7 and 9 of JPOI.

²⁴In this regard art 3(j) of the Constitutive Act states as one of the objectives of the AU the promotion of sustainable development at the economic, social and cultural levels. For an overview of the general objectives of the AU see art 3 of the Constitutive Act.

²⁵Article 4(1) of the Abuja Treaty.

²⁶Article 4(1)(a) of the Abuja Treaty.

²⁷See, eg, Beyerlin 'The concept of sustainable development' in Wolfrum (ed) *Enforcing environmental standards: Economic mechanisms as viable means* (1996) 112. For a critical analysis see Viñuales 'The rise and fall of sustainable development' (2013) 22 *Review of Comparative and International Environmental Law* 3-13.

²⁸For example, the New Partnership for Africa's Development (NEPAD) of 2001 is a blueprint for sustainable development on the African continent as it aims to pursue 'sustainable growth and development'. Paragraph 1 of the NEPAD Declaration (2001) <http://www.iss.co.za/AF/RegOrg/nepad/nepaddoc.pdf>. NEPAD has been integrated into the structures of the AU via an endorsement by the AU Assembly – Assembly/AU/Dec.283(XIV) (January/February 2010). Another example is found in the Preamble to the African Convention on the Conservation of Nature and Natural Resources of 2003 (Revised Version) as it reiterates its aim to include 'elements related to sustainable development'.

²⁹For a comprehensive analysis see Scholtz 'Human rights and the environment in the African Union context' in Kotze and Grear (eds) *Research handbook on human rights and the environment* (2014).

The Banjul Charter is the first and the only legally binding international human rights treaty to include the right to development.³⁰ Article 22 embodies a right to development as it states that in terms of sub-article (1):

[A]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

Sub-article (2) affirms that:

[S]tates shall have the duty, individually or collectively, to ensure the exercise of the right to development.

It is necessary briefly to reflect on the content of article 22. It is interesting to note that the right to development does not merely relate to economic development, but reflects a broad approach which encompasses cultural and social development pursuant to the well-being of peoples. The *Endorois* case affirmed the justiciable nature of article 22.³¹ In this case the African Commission found that to establish the violation of the right to development, a two-pronged test, which is both ‘constitutive’ and ‘instrumental’ must be applied. Finding a violation of the right to development is based on matters of procedure (‘means’) and substance (‘end’).³² Therefore, a violation of either one of the elements will result in a violation of article 22.³³ The Commission also declared that the right to development must be ‘equitable, non-discriminatory, participatory, accountable, and transparent’.³⁴ In this regard, equity and choice are overarching requirements of article 22.³⁵ The Commission emphasised the fact that ‘freedom of choice must be present as a part of the right to development’,³⁶ and affirmed that the participation of affected communities is

³⁰The right to development is, however, not a universally recognised international human right as it was coined in the (non-binding) Declaration on the Right to Development, 1986. See General Assembly Resolution 41/128, 4 December 1986. The Vienna Declaration and Programme of Action (A/CONF 157/23, 12 July 1993) reaffirmed the right to development. The UN Commission on Human Rights established a ‘Global Consultation on the Realisation of the Right to Development’ in 1989, which consisted of experts, representatives of the UN, regional intergovernmental organisations, and NGOs. The Working Group on the Right to Development and the High-level Task Force on the Right to Development, are tasked with efforts pursuant to the implementation of the right to development. The Working Group was established by the Commission on Human Rights (Resolution 1998/7) and by the Economic and Social Council (Decision 1998/269). The High-level Task Force was established by the Commission on Human Rights (Resolution 2004/7) and the Economic and Social Council (Decision 2004/249).

³¹Communication 276/2003 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* ‘27th Annual Activity Report’ pars 1-21 contain the relevant facts.

³²Paragraph 277.

³³As above.

³⁴As above.

³⁵As above.

³⁶Paragraph 278.

associated with the right to development.³⁷ The state has an active duty to consult with the community before taking a decision that affects it. This consultation must be 'in good faith, through culturally appropriate procedures and with the objective of reaching an agreement'.³⁸ Any developments or investments that have a 'major impact' on the community would result in an additional requirement to obtain 'their free, prior, and informed consent, according to their customs and traditions'.³⁹

Regarding the substantive element of the two-pronged test, the Commission held that development should result in the empowerment of the Endorois community.⁴⁰ This means that the capabilities and choices of the community should improve – especially as a further substantive component of article 22 is the improvement of the well-being of the community through development action.⁴¹ Furthermore, benefit sharing is vital to the development process and in this instance, the Commission decided that the community has a 'right to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival'.⁴²

Article 24 also contains a reference to development. This provision reads that: '[A]ll peoples shall have the right to a general satisfactory environment favourable to their development'. The African Commission clarified the meaning and scope of the environmental right in the Banjul Charter in the renowned *SERAC* case.⁴³ The African Commission stated that the right requires a government 'to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.⁴⁴ It further declared that articles 16 and 24 imply the following obligations: to order, or at a minimum to permit, independent scientific monitoring of threatened environments; to require and publish environmental and social impact studies prior to major industrial developments; to provide information to communities exposed to hazardous materials and activities; and to provide meaningful opportunities to be heard and to participate in development decisions.⁴⁵ The African Commission did not clarify the extent of the relationship between the right to development and the

³⁷Paragraph 289.

³⁸As above.

³⁹Paragraph 291.

⁴⁰Paragraph 283.

⁴¹Paragraph 294.

⁴²Paragraph 295.

⁴³*Social and Economic Rights Action Centre v Nigeria* 2001 *AHRLR* 60. This case has evoked considerable attention from legal scholars. See, eg, Van der Linde and Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in the light of the SERAC Communication' (2003) 3 *African Human Rights Law Journal* 167; Ebeku 'The Right to a Satisfactory Environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 149; and Shelton 'Decision regarding Communication 155/96' (2002) 96 *American Journal of International Law* 937.

⁴⁴Paragraph 52.

⁴⁵Paragraph 53.

environmental provision in the Banjul Charter. It merely affirmed the ecological element of sustainable development as a substantive component of article 24, but did not elaborate on the implications.⁴⁶

It is important to recall that sustainable development requires an integrative approach⁴⁷ to its three pillars: economic development; social equity; and environmental protection.⁴⁸ Sustainable development is an umbrella concept that acts as a conceptual and legal framework for the right to development and the right to a satisfactory environment in the Banjul Charter.⁴⁹ Sustainable development, therefore, reconfigures the right to development in order to ensure that environmental protection constitutes an integral part of the development process.⁵⁰ The wording of articles 22 and 24 reflects the specific circumstances of the African continent in relation to the urgency for development of the continent. These circumstances must however be seen in conjunction with the realization that development must meet the requirements of intergenerational equity. The interpretation of articles 22 and 24 accordingly necessitates a comprehensive, integrative approach which takes full cognisance of the role of sustainable development in international and regional law. Accordingly, sustainable development serves as a conceptual and normative bridge between article 22 and article 24 and the rights contained therein need to be interpreted as components of this overarching concept.

4 Sustainable development, the MDGs and human rights: Establishing the link

The structural weaknesses characterising African LDCs' economic, institutional, and human resources lead to high levels of poverty which can be described as probably the most definitive indicator of the non-achievement of the MDGs. The MDGs represent a concrete expression of the attempt to pursue integration of the economic, social and environmental pillars of sustainable development, and also focus especially on the needs of the world's poor and developing nations to replace insecurity and vulnerability with access to opportunities.⁵¹ The Millennium Declaration acknowledges the link between the achievement of the MDGs and the promotion of sustainable development, thereby implicitly linking the non-achievement of one set of objectives to the non-realisation of

⁴⁶Paragraph 52.

⁴⁷Principle 4 of the Rio Declaration provides that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. This principle of integration is the most 'fundamental and operationally significant' element of sustainable development. Voigt *Sustainable development as a principle of international law: Resolving conflicts between climate measures and WTO law* (2009) 36.

⁴⁸See World Commission on Environment and Development *Report of the World Commission on Environment and Development: Our Common Future* (1987) 46.

⁴⁹Hajjar Leib *Human Rights and the environment philosophical, theoretical and legal perspectives* (2011) 115.

⁵⁰Scholtz n 29 above.

⁵¹Adger and Winkles 'Vulnerability, poverty and sustaining well-being' in Atkinson *et al* (eds) *Handbook of sustainable development* (2007) 194.

the other.⁵² The preceding discussion clearly established the link between sustainable development and, in particular, the right to development and the environmental right in the Banjul Charter. Consequently, the relationship between MDGs and sustainable development also presupposes an important nexus between the achievement of MDGs and the protection of articles 22 and 24 in the African human rights framework.

This view is in line with the argument that the relationship between the MDG initiative and human rights is mutually reinforcing in terms of their respective objectives and processes.⁵³ The 2003 UN Human Development Report clearly states that the MDGs not only 'mirror the fundamental motivation for human rights', but they also 'reflect a human rights agenda – rights to food, education, health care and decent living standards.'⁵⁴ The nature of the relationship between the MDGs and international human rights has been described by Alston as ranging from 'potentially complementary, not necessarily inconsistent, duplicative, or competing alternatives', to 'not just significantly overlapping and mutually reinforcing, but fully compatible and complementary'.⁵⁵ Jahan describes it as a 'natural fit, driven by the same objectives, using very similar means, facing common obstacles, and relying on closely related constituencies and political dynamics in order to make progress'.⁵⁶

5 Energy poverty as a challenge to human rights

Values, principles and standards of human rights must guide and permeate the entire development programming process, thereby forging and re-establishing the inter-relatedness of the realisation of human rights and the promotion of sustainable development. The success of human rights-based development strategies will rest on the recognition of the primacy of universal human rights *vis-à-vis* the development process as a whole.⁵⁷ Furthermore, existing human rights must be interpreted to include other rights which are indispensable to their realisation.

⁵²Pars 6 and 22 of the Millennium Declaration. Other international legal instruments (albeit non-binding) confirm the complementary nature of the relationship between the MDG initiative and sustainable development. The 'Johannesburg Declaration on Sustainable Development' (2002) cites poverty eradication (MDG 1) as both an objective and an essential requirement for the promotion of sustainable development (pars 7 and 11 of the Johannesburg Declaration). The text of the Declaration therefore views sustainable development as an holistic concept which integrates and reflects the development objectives of the Millennium Declaration. This conception of a complementary relationship existing between the MDGs and sustainable development is reiterated in the text of the JPOI which goes further by including access to energy as a prerequisite for the fulfilment of both normative goal-sets.

⁵³The UN High Commissioner for Human Rights reported in 2002 that 'the strategies to reach the Millennium *human rights* goals and the MDGs reinforce and complement each other'. See 'Report of the UN High Commissioner for Human Rights to the Economic and Social Council' UN ESCOR, 40th Session, Agenda Item 14(g), par 10. UN Doc E/2002/68 (2002).

⁵⁴See pars 27 and 29 of the 'United Nations Development Programme (UNDP) Report' (2003).

⁵⁵Alston 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 759.

⁵⁶Jahan 'Millennium Development Goals and human rights' in Dettmann-Busch (ed) *Human rights in developing countries: How can development cooperation contribute to furthering their advancement* (2003) 85.

⁵⁷UNDPR 2003 n 54 above 9.

According to Tomuschat, the human rights which qualify as universal customary legal norms⁵⁸ should not be based on ‘actual stock-taking of the relevant state practice but rather on deductive reasoning: If human life and physical integrity were not protected, the entire idea of a legal order would collapse’.⁵⁹ The revised test (as put forward by Alston) holds that existing human rights must be interpreted in such a manner as to include other rights which are indispensable to their realisation. To elaborate, no right should be excluded as a human rights norm if that norm is dependent on the following two requirements: (i) the right is indispensable to a meaningful notion of human dignity; and (ii) the satisfaction of the right is demonstrably within the reach of the government in question.⁶⁰

Considering the first component of this revised test, it should theoretically be possible to derive a right from existing international economic and social rights so long as the existing social and economic right is intrinsically linked with human dignity. The derivative right finds its status and application within the normative status of the social and economic right it was derived from. Stated differently, any existing social or economic right – whether provided for in legal instruments at the international or regional level – can form the basis for the formulation of derivative rights which are indispensable to a meaningful notion of human dignity.

Based upon the principle of the indivisibility of the different rights comprising the international human rights regime, a (non-binding) statement made during the 1993 Vienna World Conference on Human Rights drew attention to the following

... that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights, which if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights ... Statistical indicators of the extent of deprivation, or breaches, of economic, social and cultural rights have been cited so often that they have tended to lose their impact. The magnitude, severity and constancy of that deprivation have provoked attitudes of resignation, feelings of helplessness and compassion fatigue. Such muted responses are facilitated by a reluctance to characterise the problems that exist as gross and massive denials of economic, social and cultural rights.⁶¹

Under the 2003 UNDP report, violations of economic and social rights should be seen as being synonymous with extreme poverty, and as the most serious form of

⁵⁸These include the right to life, the prohibition of torture, the protection of personal freedom, and the prohibition of racial discrimination.

⁵⁹Tomuschat *Human rights: Between idealism and realism* (2003) 23.

⁶⁰Tomuschat as above 35, and Alston n 55 above 774.

⁶¹Quote from the UN Committee on Economic, Social and Cultural Rights at the Vienna World Conference on Human Rights held in Vienna, Austria, 14-25 June 1993. See UN Doc. E/1993/22, Annex III, pars 5 and 7.

infringement of international human rights.⁶² In legal terms, this viewpoint can be acceptable only to the extent that a government has failed to take measures which would have been feasible and which could have had the effect of avoiding or mitigating the plight of the poor.⁶³ This proviso relates directly to the principle of progressive realisation as embodied in the text of the CESC. ⁶⁴ In terms of this principle, it is acknowledged that, while in practice some rights are much harder to achieve than others, their realisation still necessitates action in the form of legislative measures. The principle imposes both a continuing obligation on states to work towards the realisation of each right, as well as minimum core obligations imposed by the attempt at realisation.⁶⁵ Consistent with this legal analysis are the legally non-binding provisions contained in the Vienna Declaration and Programme of Action, 1993 which hold that the 'existence of widespread poverty inhibits the full and effective enjoyment of human rights' and that 'extreme poverty and social exclusion constitute a violation of human dignity'.⁶⁶ The application of these provisions, which relate strongly to Tomuschat's test⁶⁷ and Alston's interpretation thereof,⁶⁸ would lead to the deduction that poverty is incompatible with human dignity, which is the foundation of human rights.⁶⁹ Therefore it is argued that where the non-realisation of certain economic and social rights contributes towards exacerbating extreme poverty, one should be able to deduce that those economic and social rights are indispensable to human dignity.

This argument, however progressive it may be, is not the message contained in either the carefully negotiated language of the Vienna Declaration or the provisions of the Millennium Declaration. Neither one of these instruments classifies poverty as a

⁶²UNDPR 2003 n 54 above iv.

⁶³In a country or region with adequate resources this proposition will almost always be valid. In a country or region with very limited resources it will also be valid in the sense that the government has failed to take steps which were available to it to improve the situation and has instead opted to devote scarce resources to other objectives which do not directly address the realisation of basic economic and social rights. Alston 'A human rights perspective on the Millennium Development Goals' Paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development (2005) 12 www.ohchr.org/english/issues/millennium-development/alston.doc.

⁶⁴Article 2 of the CESC. It must be borne in mind that the progressive realisation of fundamental rights on the AU level is restricted to the minimum-core approach which holds that: 'States parties have an obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the economic, social and cultural rights contained in the Banjul Charter'. See art 29(6) of the Banjul Charter.

⁶⁵The nature of state parties' obligations (art 2, par 1). See in this regard CESC General Comment 3 <http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664>. For an authoritative discussion on the relationship between 'minimum core obligations' and the 'progressive realisation' catchphrases. See Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio economic rights* (2007) 186.

⁶⁶See the Vienna Declaration and Programme of Action at par 5 in 'Report of the World Conference on Human Rights: Report of the Secretary-General' UN doc A/CONF.157/24 pars 14 and 25, respectively.

⁶⁷Note 59 above.

⁶⁸Note 60 above.

⁶⁹The relationship between poverty and human rights has been the source of vigorous discourse, and we shall not discuss this topic. See, eg, Pogge *World poverty and human rights* (2008) and Salomon *Global responsibility for human rights: World poverty and the development of international law* (2007).

human rights violation *per se*, but rather refers to poverty as a human rights challenge which necessitates international efforts directed to its eradication.⁷⁰ In much the same fashion, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights drafted in 2011 (Maastricht Principles) only very tentatively link poverty to the non-realisation of social, economic and cultural rights, but stop short of labelling poverty as an outright human rights infringement.⁷¹

The definition of poverty is steadily moving towards a human rights-based vision highlighting its underlying multitude of causes. The increased awareness that respect for human rights is an essential requirement for socio-economic development outcomes, challenges the notion that income is a sufficient proxy indicator for measuring poverty.⁷² A result of a more holistic analysis is the definition of poverty contained in the Millennium Project Task Force 1 on Poverty and Economic Development Report, which embraces three forms of ‘human poverty’:

- (1) income poverty, as typically defined by lack of private household income (so-called dollar-a-day poverty); (2) social service poverty, including the lack of public provision of education, health, water and other services; (3) environmental poverty, including the lack of, or degradation of, core environmental resources needed for human well-being.⁷³

Considering this broad definition of poverty together with the two issues included in the concept of energy poverty, it is clear to see that the concept of energy poverty may fall within social service poverty as well as environmental poverty. The social service component of energy poverty relates to the low levels of access to modern energy sources which prevails throughout Africa, while the environmental component refers to the detrimental environmental impacts associated with a heavy reliance on biomass as the primary energy source.

Applying to energy poverty the same arguments as those which serve as the conceptual basis for the proposition that poverty constitutes a challenge to the full realisation of all international human rights, one would be able to argue as the following. The detrimental developmental impacts related to energy poverty in Africa constitute a challenge to the full realisation of human rights. Furthermore, access to energy should be seen as an economic and/or social right which is indispensable to the notion of human dignity. In addition, if the first component of the revised Tomuschat test⁷⁴ – which holds that no right indispensable to a meaningful notion of human dignity should be excluded – is applied to energy poverty, a right to energy does not seem far-fetched. It is accordingly submitted that the right to energy (as proposed by the authors) should be seen to fall within the ambit of what is considered

⁷⁰Alston n 63 above 12.

⁷¹Preamble to the Maastricht Principles.

⁷²UNDP Report n 54 above 2.

⁷³Pangestu and Sachs *An enhanced strategy for reducing extreme poverty by the year 2015: Interim Report of the Millennium Project Task Force on Poverty and Economic Development* (2004) 4.

⁷⁴Note 59 above.

a right which is indispensable to the notion of human dignity – in other words, a human right. The proposed right to energy should, however, find its basis within the normative framework of international and regional human rights instruments – specifically the right to development and the right to an adequate environment as existing human rights in the Banjul Charter.

6 Deriving a right to energy from the right to a general satisfactory environment favourable to development at the AU level

Access to modern energy is mentioned neither as one of the MDGs nor as an economic or social right. This notwithstanding, its importance in facilitating the achievement of the MDGs, the subsequent promotion of sustainable development, and the promotion of the international human rights agenda has been established. The challenge to the full realisation of human rights posed by the prevalence of energy poverty in Africa begs for a normative response from AU law and policy-makers. This normative response should, in the opinion of the authors, find its legal basis in existing human rights, specifically those contained in articles 22 and 24 of the Banjul Charter, and should result in the formulation of a right to energy as an independent human right. The proposal that a right to energy be distilled from existing human rights contained in the Banjul Charter will find its conceptual basis embodied in the approach of the UN Committee on ESCR followed in General Comment 15, 2002 pertaining to the formulation of a right to water as an independent international human right.

Not until the UN Committee on ESCR issued General Comment 15⁷⁵ on the human right to water in 2002⁷⁶ was the right to drinking and sanitation water authoritatively defined as a human right.⁷⁷ References to the right to water in international human rights instruments are fleeting,⁷⁸ and the right is also not expressly referred to in the texts of the CESC⁷⁹ or the Universal Declaration of Human Rights.⁸⁰ Due to the lack of reference

⁷⁵General Comments are authoritative interpretations by expert human rights monitoring bodies of the content of human rights treaty provisions that they are established to monitor. While highly persuasive, they are not legally binding.

⁷⁶According to par 2 of General Comment 15, the human right to water 'entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.

⁷⁷Narain 'Water as a fundamental right: A perspective from India' (2010) *Vermont Law Review* 34; McCaffrey 'The human right to water' in Brown-Weiss *et al* (eds) *Fresh water and international economic law* (2005) 101.

⁷⁸The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW), and the Convention on the Rights of the Child, 1989 (CRC) respectively contain reference to the right to water. The CEDAW provides in art 14(2)(h) that state parties are bound to ensure that women have the right to 'enjoy adequate living conditions', particularly in relation to water supply, while the CRC provides in art 24(2)(c) that states must combat disease and malnutrition 'through the provision of adequate nutritious food and clean drinking water'.

⁷⁹The CESC is the international human rights instrument which involves, specifically, the protection and promotion of economic, social and cultural rights. In terms of the provisions of the CESC, each person should enjoy these rights on the basis of his/her inherent human dignity.

⁸⁰Universal Declaration of Human Rights, GA Res 217(III) A, UN GAOR, 3rd Comm, 3rd sess, 183rd plenary meeting, Agenda Item 58, UN Doc A/RES/217(III) A (10 December 1948).

to an express right to water in the text of the CESCER, the UN Committee on ESCR had to read in⁸¹ the right from implicit or existing provisions. In this regard, the UN Committee on ESCR referred to articles 11 and 12 of the CESCER, which respectively provide for the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health. According to the UN Committee on ESCR, these existing provisions implicitly contain an autonomous human right to water.⁸²

The lack of an explicit protection of the human right to water in the CESCER meant that the UN Committee on ESCR was forced to find innovative ways to ground the right in the elastic and inclusionary terms of the CESCER through the use of teleological (purposive) interpretation.⁸³ This interpretative approach dictates that ambiguities and *lacunae* in treaty provisions should be interpreted in a way that best serves the object and purpose of the treaty. Teleological interpretation is used, *inter alia*, to promote the objectives for which the rule of law was designed and to fill legal gaps in a given legal order.⁸⁴ The UN Committee on ESCR's approach in its General Comment 15 serves these two purposes. By defining the right holders' entitlements and the duty bearers' obligations in the realisation of the human right to water, it expanded and promoted the human rights guaranteed under the CESCER. More importantly, by explicating the latent content of the CESCER in relation to the human right to water, it attempted to fill the gap in the protective regime relating to the human right to water that had been missing from the explicit terms of the CESCER.⁸⁵ The UN Committee on ESCR thus derived a free-standing right to water *inter alia* from the provisions of article 11 of the CESCER. In the process of deriving this right to water, the UN Committee on ESCR placed special emphasis on the usage of the word 'including' in the wording of article 11(1). Despite the lack of explicit reference to the right to water, the UN Committee on ESCR viewed the manner in which the word 'including' heads up the list (food, clothing and housing), as indicative of the fact that the catalogue of rights in article 11(1) is not exhaustive. Since article 11 seeks to guarantee the right to an adequate standard of living to right-holders, the prerequisites of which comprise food, housing and clothing, the inclusion of the right to water in the list is in consonance with the object and purpose of article 11(1).⁸⁶

⁸¹Spigelman *Statutory interpretation and human rights* (2008) 133-134.

⁸²Bulto 'The emergence of the human right to water in international human rights law: Invention or discovery' (2011) 12 *Melbourne Journal of International Law* 10; Bulto 'The human right to water in the corpus and jurisprudence of the African human rights system' (2011) 11 *African Human Rights Law Journal* 341; and Langford 'The UN concept of water as a human right: A new paradigm for old problems?' 2005 *Water Resources Development* 275.

⁸³This approach to interpretation dictates that primary importance should be given to the object and purpose of a legal provision, rather than giving the instrument a narrow and restricted meaning. The overall effect is that a court or quasi-judicial body is to prefer a construction that would promote the purpose of legislation in all stages of the process of interpretation. See Bulto *Melbourne Journal of International Law* (2011) n 82 above 10.

⁸⁴Delmas-Marty *The European Convention for the Protection of Human Rights: International protection versus national restrictions* (1992) 292; Schermers and Waelbroeck *Judicial protection in the European Union* (2001) 21-22.

⁸⁵Bulto (2011) *Melbourne Journal of International Law* n 82 above 10.

⁸⁶As above.

However, for all its innovative approaches to carving the human right to water out of other more explicit rights of the CESC, the UN Committee on ESCR and its General Comment 15 have been criticised as being 'revisionist'⁸⁷ and the UN Committee on ESCR's approach to the interpretation of articles 11 and 12 of the CESC has been criticised as 'unreflective'.⁸⁸ Tully especially criticises the manner in which the UN Committee on ESCR relies on the word 'including' in order to add the right to water to the list of rights contained in article 11 of the CESC. He enumerates a seemingly endless list of possible candidates for inclusion in the list in article 11, and argues that if one were to follow the approach of the UN Committee on ESCR, the list would include such things as access to the internet and postal delivery services.⁸⁹ A further point of criticism is that the UN Committee on ESCR simply invented a novel right to water,⁹⁰ which – to these commentators – is at odds with or ahead of state practice or what state parties envisaged upon their ratification of or accession to the CESC.⁹¹

These points of criticism can, however, be rebutted. In the first place, his criticism of the reliance on the word 'including' as the basis for including the right to water does not hold water (so to speak!) as the use of 'including' is hardly novel in law-making. It allows for the incorporation of emerging fundamental rights that eluded the explicit list of the law-making body at a particular time. In instances where a treaty is fluid along its margins, the clarification of the normative content is the proper task of treaty interpreting bodies such as the UN Committee on ESCR. Such ambiguities allow room for the updating and elaboration of treaty norms in keeping with emergent international problems without the need to resort to rigorous treaty amendment procedures.⁹² Furthermore, Tully's concern that 'including' other rights might lead to the inclusion of any and all rights is also misplaced. The wording used by the UN Committee on ESCR in General Comment 15 is crafted carefully so as to incorporate only such rights that are fundamental and that can clearly fit within the list of rights.⁹³ The UN Committee on ESCR's approach obviates the possibility of including an endless list of relatively less essential categories under the guise of the imprecision built into article 11(1) through the use of the word 'including'.⁹⁴

The approach followed by the UN Committee on ESCR in deriving the right to water

⁸⁷Dennis and Stewart 'Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?' (2004) *American Journal of International Law* 462.

⁸⁸Tully 'Flighty purposes and deeds: A rejoinder to Malcolm Langford' (2006) *Netherlands Quarterly of Human Rights* 461.

⁸⁹Tully 'A human right to access water? A critique of General Comment No 15' (2005) 23 *Netherlands Quarterly of Human Rights* 37-38.

⁹⁰As above 35.

⁹¹While thus far state parties to the Covenant have not objected to the interpretation contained in General Comment 15, state practice takes place more through accretion than avulsion. It may, therefore, take some time for countries to react, one way or the other. See McCaffrey n 77 above 94.

⁹²Bulto (2011) *Melbourne Journal of International Law* n 82 above 11.

⁹³Paragraph 3 of General Comment 15.

⁹⁴Grönwall 'Access to water: Rights, obligations and the Bangalore situation' (unpublished PhD thesis, Linköping University, 2008) 215.

from existing rights contained in the CDESCR is of central relevance. We shall apply the UN Committee on ESCR's methodology in order to indicate that just as a right to water is indispensable for the realisation of the right to an adequate standard of living, so too is a right to energy indispensable for the realisation of existing African human rights, in particular articles 22 and 24.

The UN Committee on ESCR's approach of deriving latent human rights from other related and more explicit guaranteed human rights has been accepted by other tribunals. The African Commission, for example, has used the same approach of locating implicit human rights in explicit provisions of the Banjul Charter.⁹⁵ One example is the *SERAC* communication where the African Commission dealt with a wide array of rights and followed a creative interpretation to infer rights not expressly guaranteed in the Banjul Charter.⁹⁶ The final decision in *SERAC* focused on the violation of the right to food (as an implicit right to several violated provisions, including the right to development).⁹⁷

It is important to recall that the Banjul Charter reaffirms the central importance of the realisation of the right to development, and furthermore acknowledges the indivisibility and universality of economic, social, cultural, political and civil rights.⁹⁸ The Banjul Charter adheres to the principles of the international human rights instruments comprising the UN human rights regime, which is founded on human dignity and aims to protect and promote the human rights of all African peoples.⁹⁹ The observance of the human rights contained in the Banjul Charter therefore correlates directly with the promotion and protection of the human dignity of Africans. The Banjul Charter expressly notes that the diverse human rights are causally linked and should therefore be seen to be mutually reinforcing. The different human rights create synergies that contribute to the poor securing their rights, enhancing their human capabilities, and escaping poverty. Social and economic rights should therefore not be separated from civil and political rights as the realisation of one set of rights is dependent upon the realisation of the other.¹⁰⁰

⁹⁵See generally Bulto (2011) *African Human Rights Law Journal* n 82 above 344.

⁹⁶Some of these rights not expressly provided for in the Charter but which the Commission 'read' into the instrument, involve rights to food, hunting, etc. With this progressive interpretation, *SERAC* expanded the scope and range of the rights which states are bound to uphold under the Charter. The African Commission decided that contamination of sources of drinking water by state or non-state actors was a violation of arts 16 and 24 of the Banjul Charter. See Hansungule 'African courts and the ACHPR' in Bösl and Diescho *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 233.

⁹⁷Kamga 'Human rights in Africa: Prospects for the realisation of the right to development under the New Partnership for Africa's Development' (unpublished LLD thesis, University of Pretoria, 2011); Kamga 'The right to development in the African human rights system: The *Endorois* case' (2011) *De Jure* 389.

⁹⁸Preamble to the Banjul Charter. With regard to the universality of the human rights contained in its text, the Banjul Charter states that 'the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.

⁹⁹Preamble to the Banjul Charter.

¹⁰⁰Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' 1999 *Journal of African Law* 12.

The decisions of the African Commission and the interpretation of existing international human rights by the UN Committee on ESCR provide a sound conceptual basis for arguing in favour of deriving a right to energy from existing African human rights. The right to energy so distilled is referred to as a derivative right, the status of which depends upon the socio-economic rights it is derived from.¹⁰¹ The rights to development and to a generally satisfactory environment favourable to peoples' development as contained in articles 22 and 24 of the Banjul Charter, are the existing rights from which the right to energy may be derived. The Banjul Charter makes no reference to rights pursuant to the realisation of the rights contained in articles 22 and 24 – as is the case in article 11 of the CDESCR. It is therefore not possible to rely on the use of the word 'including' in order to read in the right to energy as a right indispensable to the realisation of either article 22 or 24. The conceptual basis for proposing an African right to energy, in our opinion, can be derived from the interpretation of existing economic, social and cultural rights as applied by the UN Committee on ESCR in General Comment 15 and the *SERAC* and *Endorois* decisions. The conclusion is that in order to achieve the objective of the promotion of sustainable development via the realisation of articles 22 and 24, the formulation of a right to energy as an independent African human right might prove beneficial. Accordingly, we offer the following postulate: The realisation of the right to a generally satisfactory environment favourable to development and the right to development in Africa, is dependent upon the formulation and fulfilment of the derivative right to energy (among others). The fulfilment of both these rights will culminate in the protection and promotion of human dignity and furthermore serve to promote both sustainable development on the African continent and the MDGs.

7 Concluding remarks

The challenge to the realisation of the right to development by addressing energy poverty in Africa serves as the backdrop for proposing that a right to energy be derived from existing African human rights. In the first instance it was established that the lack of access to modern energy falls within the ambit of social service poverty, while the reliance on traditional biomass resorts under environmental poverty. The detrimental impacts related to these two issues should be seen to constitute a situation which undermines not only the achievement of the MDGs, but also the capacity of Africans to lead a dignified human existence. Secondly, the relationship between the achievement of the MDGs, access to modern energy, and the relevant social and economic rights, served as the basis for indicating the extent to which access to modern energy is indispensable to a notion of human dignity. The revised form of Tomuschat's test provided the theoretical basis for the argument that it is possible to derive a right from existing international economic and social rights provided that the existing social and economic right is intrinsically linked to human dignity. The derivative right will find its status and application within the normative status of the social and economic right from which it was derived.

¹⁰¹Chociejski 'The human right to water and water security' (Masters dissertation, McMaster University, 2011) 50; Bluemel 'The implications of formulating a human right to water' (2004) 31 *Ecology Law Quarterly* 957, 968, 971.

The legal approach to the formulation of a right to energy as an African human right exists within General Comment 15 of the UN Committee on ESCR at the international level, and in several communications of the African Commission at the African regional level.

The methodology applied by the UN Committee on ESCR in reading in the right to water by means of a teleological interpretation of articles 11 and 12 of the CDESCR, provided the conceptual basis for our argument. It was established that certain rights, though not expressly mentioned in the texts of human rights instruments, may be read in, in order to ensure the full realisation of explicit rights. In other words, the apparent omission of a specific right should not be taken as an indication that the right does not exist or should not be included in the text of treaties. If it can be indicated that the omitted right is demonstrably indispensable to the realisation of an explicit right, the omitted right should be read in.

On the strength of the methodology applied by the UN Committee on ESCR and the African Commission, we argue that the right to energy is indispensable to the realisation of the right to development as well the right to a general satisfactory environment favourable to development, which are important components of the promotion of sustainable development. The right to energy should, therefore, be read into the provisions of the Banjul Charter as a right congruent to the realisation of the explicit rights mentioned above. The proposed right to energy should furthermore serve as the legal basis for the AU's normative response to the challenge of energy poverty, namely increasing access to modern energy in Africa. It is concluded that the full realisation of the right to development and the right to a generally satisfactory environment favourable to development depends upon the promotion, protection, and implementation of the proposed right to energy at the AU level. The emergence of a derivative right to energy is necessary to highlight the importance of access to modern energy as a prerequisite for sustainable development on the African continent. We hope that this publication may kindle the development of a human right that will bring light to the people of Africa.