

Human rights as legal basis for increased access to renewable energy in Africa

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Dedication

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Abstract

Africa is rich in renewable resources and could benefit from an increased use of renewable energy, such as wind and solar energy. These energy sources offer a clean alternative to traditional sources of energy, particularly to fossil fuels. The adoption of the exploitation of renewable energy sources for electricity generation in Africa would signal a shift to low-carbon development in the continent. Despite the abundance of renewable energy sources on the continent, Africa is energy-poor. One manifestation of this poverty is a lack of access to conventional modern energy sources. Without access to conventional modern energy, communities are dependent on traditional biomass such as wood, charcoal and animal waste for cooking and heating. Renewable energy is listed as a modern energy source but its exploitation in Africa is meagre, and this contributes to developmental challenges in Africa. The problem of access to energy is more pronounced in rural areas. The solution to the African continent's dilemma should be embodied in regional law and policy as mandated by the *Constitutive Act of the African Union 2000*. The Constitutive Act provides in Article 3(k) for the promotion of co-operation in "all fields of human activity to raise the living standards of African peoples", and in Article 3(l) for the "coordination and harmonisation of the policies of the existing and future Regional Economic Communities for the gradual attainment of the objectives of the African Union". To this end, regional initiatives aimed at increasing access to renewable energy were taken. Due to the fact that renewable energy technologies are capital intensive, inadequate regulatory and institutional environments in the African Union further impede the development of the renewable energy industry, thereby undermining the prospect of the fulfilment of the human rights enshrined in the *African Charter on Human and People's Rights 1986* (Banjul Charter). The challenge to the full realisation of these rights posed by the prevalence of energy poverty in Africa suggests the need for a normative response from AU law and policy-makers. This normative response should, in the opinion of the author, find its legal basis in existing human rights, specifically those contained in articles 22 and 24 of the Banjul Charter. This holds prospects of simultaneously addressing the twin issues facing the African continent, these are: under-development and environmental degradation

posed by energy poverty. This approach has its limitations but it is worth considering. The question posed in this study, therefore, is how human rights can serve as a legal basis for increasing access to renewable energy in Africa.

Key Words: Renewable energy, energy poverty, African Union, human rights, right to development.

Opsomming

Hernubare energiebronne is vrylik beskikbaar regoor Afrika en voordele verbonde aan die gebruik van energiebronne soos son- en winkrag is nie te betwyfel nie. Hierdie energiebronne bied 'n skoon alternatief tot tradisionele bronne van energie - veral fossielbrandstowwe soos steenkool. 'n Besluit om hernubare energiebronne te ontgin sal 'n oorgang na 'n lae koolstof ontwikkelingspad vir die kontinent aandui. Ten spyte van die oorvloed hernubare energiebronne teenwoordig in Afrika, bly die kontinent steeds 'n energie armoedige gebied. Energie armoede in Afrika manifesteer as 'n gebrek aan toegang tot moderne energiebronne. Gemeenskappe in Afrika is by uitstek afhanklik van tradisionele biomassa soos hout, houtskool en dierlike afval as primêre energiebron. Hernubare energiebronne word as moderne energiebron geklassifiseer, maar die minimale gebruik van hierdie vorm van energie dra by tot die ontwikkelingsagterstand van Afrika en haar mense - hierdie agterstand is veral merkbaar in landelike dele. Die gebrek aan toegang tot hernubare energiebronne moet aangespreek word in terme van regionale reg en -beleid soos vasgestel deur die *Constitutive Act of the African Union*, 2000. Hierdie dokument bepaal in artikel 3(k) dat samewerking in alle velde van menslike aktiwiteit aangemoedig moet word om die lewenstandaard van Afrikane te verbeter. Dan in artikel 3(l) word die harmonisering van die beleidsdokumente van huidige en toekomstige Regionale Ekonomiese Gemeenskappe as voorloper vir die nakoming van genoemde oogmerk gelys. Hierdie mandaat het sonder twyfel bygedra tot die totstandkoming van regionale en sub-regionale inisiatiewe gemik op verhoogde toegang tot hernubare energiebronne. Verskeie uitdagings verbonde aan die ontginning van hernubare energiebronne as moderne energiebron dra by tot lae vlakke van toegang tot hierdie vorm van energie en, by implikasie, tot die nie-nakoming van bepaalde menseregte vervat in die *African Charter on Human and Peoples' Rights*, 1986 (Banjul Charter). Hierdie impakte vereis 'n normatiewe antwoord vanuit 'n regionale oord en in die opinie van die skrywer behoort hierdie normatiewe antwoord beliggaam te word in regionale beleid gebaseer op bestaande menseregte. Artikels 22 en 24 van die Banjul Charter bevat die reg tot ontwikkeling en die reg tot 'n bevredigende omgewing. 'n Regionale beleid gemik op verhoogde

toegang tot hernubare energiebronne wat gebaseer is op die verwesenliking van hierdie twee regte sal 'n tweeledige doel vervul. Eerstens sal die omgewingsimpakte van onvolhoubare energie ontwikkeling aangespreek word en tweedens sal die verhoogde toegang tot meer volhoubare energie verskeie ontwikkelingsvoordele meebring. Die sentrale vraag van die skrywer is dus: hoe kan menseregte dien as regsbasis vir verhoogde toegang tot hernubare energie in Afrika?

Sleutelwoorde: Hernubare energie, energie armoede. Afrika Unie, Menseregte, reg tot ontwikkeling

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List of abbreviations

AEC	African Economic Community
AU	African Union
GHGs	Greenhouse Gasses
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
IEA	International Energy Agency
IPCC	Inter-governmental Panel on Climate Change
IPP	Independent Power Producers
LDC	Least Developed Countries
MDG	Millennium Development Goals
NEPAD	New Partnership for Africa's Development
OAU	Organisation of African Unity
Para	Paragraph
RE	Renewable Energy
RECs	Regional Economic Communities
SADC	Southern African Development Community
SERAC	155/96 Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria
SSA	Sub-Saharan Africa

UNFCCC	United Nations Convention on Climate Change
WEHAB	Water, Energy, Health, Agriculture and Biodiversity
WSSD	World Summit on Sustainable Development

1 Introduction and problem statement

1.1 Problem statement

Africa has an abundance of renewable energy resources.¹ However, its inability to tap into and utilise these resources has contributed greatly to its being characterised as an energy-deficient continent, unable to meet the social, economic and developmental needs of its inhabitants.² The status of access to energy in Africa is currently described as energy poverty. Energy poverty is the lack of choice in accessing adequate, affordable, reliable, high quality, safe and environmentally-sustainable energy services to support economic and human development.³ There are two indicators of energy poverty. These are a lack of access to electricity at the household level and a heavy reliance on traditional biomass for cooking.⁴ According to the International Energy Agency survey,⁵ sub-Saharan Africa has the lowest level of access to electricity globally, with only 31% of the total population having access to electricity.

The increased need for and use of energy derived from fossil fuels is contributing in large part to increases in greenhouse gasses (hereafter GHGs) associated with the warming of the earth's surface.⁶ The use of renewable energy is therefore being promoted in order to curb global warming and to contribute to the protection of human health against air pollution. There is a greater appreciation of the role that

-
- 1 Renewable energy is energy generated from natural resources, such as sunlight, wind, rain, tides and geothermal heat, which are renewable (naturally replenished). Renewable energy technologies range from solar power, wind power, hydroelectricity/micro hydro, biomass and biofuels for transportation. Bilen *et al* 2008 *Renewable and Sustainable Energy Reviews* 1529, Karekezi and Kithyoma 2002 *Energy Policy* 1077.
 - 2 Karekezi and Kithyoma 2002 *Energy Policy* 1077.
 - 3 United Nations Development Programme 2014 World Energy Congress, World Energy Assessment: Energy and the Challenge of Sustainability 41.
 - 4 International Energy Agency Energy Poverty 2010 *How to make modern energy access universal?* 7.
 - 5 International Energy Agency Energy Poverty 2010 *How to make modern energy access universal?* 7.
 - 6 See chapter 2 below.

renewable energy can play in helping to move towards a low-carbon economy.⁷ In addition, energy efficiency can also play a role in increasing supply and moderating demand, thus reducing GHG emissions.⁸ The catastrophic implications of climate change⁹ induced by global warming should therefore, form the central feature of the continent's future energy policies and law.

The normative response to the above-highlighted challenges, in the mind of the author, should be embodied in regional law and policy as mandated by the *Constitutive Act of the African Union 2000* (hereafter Constitutive Act).¹⁰ The Constitutive Act provides in Article 3(k) for the promotion of co-operation in all fields of human activity to raise the living standards of African peoples, and in Article 3(l) for the coordination and harmonisation of the policies of existing and future Regional Economic Communities (hereafter RECs) for the gradual attainment of the objectives of the African Union.

In terms of the provisions of the *African Charter on Human and Peoples' Rights, 1986* (hereafter the Banjul Charter), cooperation among the member states must be geared towards the fulfilment of the right to development. Article 22 of the Banjul Charter provides that development must be seen to include social, cultural and economic development, and these must be coupled with the enjoyment of the common heritage of mankind. In the same vein, Article 24 of the Banjul Charter provides that "all peoples shall have the right to a general satisfactory environment favourable to their development". In the year 2002 the New Partnership for Africa's Development (hereafter NEPAD), which constitutes a holistic and comprehensive integrated strategic framework for the socio-economic development of Africa, identified energy as one of the critical sectorial priorities promoting the process of development. With specific reference to energy, NEPAD recommends that African

7 See chapter 3.2 below; Miller and Cabraal (eds) *Catalysing Private Investment for a Low Carbon Economy: World Bank Group Progress on Renewable Energy and Energy Efficiency in Fiscal 2007*.

8 Miller and Cabraal (eds) *Catalysing Private Investment for a Low Carbon Economy: World Bank Group Progress on Renewable Energy and Energy Efficiency in Fiscal 2007*.

9 Tadesse <https://www.issafrica.org/uploads/Paper220.pdf>.

10 Article 3(k) and 3(l) of the Constitutive Act.

countries should focus on increasing access to reliable and affordable commercial energy, reversing the environmental degradation associated with the heavy reliance on traditional fuels in rural areas, and stimulating a stronger focus on sustainable energy sources.¹¹ It is to be noted that the regional initiatives that were implemented to address energy poverty did not address the issue on a stand-alone basis.

Despite these initiatives, providing affordable, adequate and reliable modern energy to many Africans remains a challenge. Renewable energy (hereafter RE) is, by and large, a modern energy source. The failure to generate modern forms of energy in Africa is a major impediment to sustainable development, as it exacerbates the vulnerability of the poor.¹² Energy can play a crucial role in improving the quality of the lives of the poor people around the world.¹³ Governments have historically made little effort to improve access to electricity in general particularly for the poor, because their energy policies and regulatory regimes have focused upon modern economic sectors such as industry, transport and urban infrastructure to the neglect of rural development.¹⁴ Africa is energy-poor, and one manifestation of this poverty is the lack of access to modern energy. RE is described as being generated from a modern energy sources. Without access to modern energy, communities are dependent on traditional biomass such as wood, charcoal and animal waste for cooking and heating.¹⁵ Access to RE is uncommon in Africa, and its lack contributes to developmental challenges in Africa.

The author postulates that there is a link between increased access to renewable energy and the realisation of human rights in Africa. This link supports the

11 Para 112 of NEPAD.

12 State of the Least Developed Countries 2013 <http://unohrrls.org/custom-content/uploads/2013/10/State-of-the-LDCs-2013.pdf> 13. *Role of the private sector in advancing the implementation of the IPoA: Focus on sustainable energy*. <http://unohrrls.org/custom-content/uploads/2014/01/Role-of-the-private-sector-in-advancing-the-implementation-of-the-IPoA.pdf> 2.

13 Report on Energy Services for the Millennium Development Goals, November 2005 www.energyandenvironment.undp.org accessed 13 March 2014.

14 *Energy Access Working Group 2006 Global Network on Energy for Sustainable Development, Theme Results: Summary of Policymakers* 6.

15 Kaygusuz 2011 *Renewable and Sustainable Energy Reviews* 937.

assumption that increased access to renewable energy should embody the AU normative response to the challenges related to energy poverty in rural African communities. While the topic of an AU legal framework aimed at increasing access to renewable energy will be touched upon, establishing the content of such a legal framework is not the main aim of this dissertation. Rather, focus will fall on the legal basis for establishing such a legal framework. In this regard, the author will focus on existing international and AU human rights and more specifically existing social, cultural and economic rights. The interpretation of these rights by international organisations as well as the African Commission on Peoples' Rights (hereafter African Commission) will prove extremely relevant in establishing human rights as the legal basis for increased access to renewable energy in Africa. Such an increase could address many of the developmental challenges faced by the African region. The Banjul Charter gives Africans the right to development, and this right should form the basis of an AU normative response to the issue of RE access in Africa.

The current state of access to modern energy induces one to pose the following question: how can human rights serve as the legal basis for the AU's response to the lack of access to renewable energy? The following is the framework of the dissertation, within which boundaries the author is going to address this question.

1.2 Framework

Chapter 1 contains the problem statement. Chapter 2 gives the theoretical framework for the need to increase access to renewable energy in Africa and the need for development. Chapter 3 discusses the role of regional law and policy in increasing renewable energy access. In this connection the author will analyse the regional law and policy available to cater for energy poverty in Africa. The chapter is not meant to exhaustively analyse each and every relevant law and policy. Special focus will be directed on those that aim at increasing modern energy services.

Chapter 4 then focuses on how human rights can serve as the legal basis for an AU renewable energy legal framework. In this chapter the author will focus on the interpretation of social, economic and cultural rights by the African Commission.

Chapter 5 will thereafter present a set of recommendations and draw the dissertation to a conclusion.

1.3 Research methodology

This study is based mainly on a literature review. The sources of the relevant information are journal articles, textbooks and the internet, which describe international and regional measures relevant to increasing access to renewable energy.

1.4 Relevance for the focus area

This study falls under the research project Development in a Constitutional State. Therefore the study aims at addressing Africa's needs in its endeavours to bring about the socio-economic transformation envisaged in the Constitutive Act. Article 3k of the Constitutive Act includes the promotion of co-operation in all fields of human activity to raise the living standards of African peoples. Furthermore, Article 3l provides for the coordination and harmonisation of the policies of the existing and future RECs for the gradual attainment of the objectives of the AU. South Africa is a member to the AU and will stand to benefit from this research as it addresses its broad socio-economic predicament, which is exacerbated by the lack of access to modern forms of energy.

2 Energy poverty and its impact on development in Africa

2.1 Introduction

Over the years, economic growth has been based on the generation of non-renewable energy.¹⁶ At present, about 80% of the global primary energy is derived from fossil fuels.¹⁷ In developed and developing countries, the growing demand of energy sources for the production, distribution and commercialisation of goods and services is putting enormous pressure on the energy sector.¹⁸ For instance, the IEA has projected that world primary energy demand will increase by almost 60% between 2002 and 2030, reaching 16.5 billion tonnes of oil equivalent.¹⁹ Two-thirds of the increase will come from developing countries.²⁰ The growing demand for energy, the reduction in the availability of non-renewable energy sources, and the emergence of other serious influencing drivers such as climate change and population growth have prompted the international community to explore new, efficient and environmentally friendly energy sources.

Compelling evidence has shown that the rising global average temperature at the surface of the earth stems from the increasing consumption of fossil fuels, since they give rise to the release of greenhouse gases into the atmosphere.²¹ This complex phenomenon adversely affects ecosystems and the ecological interrelations which support, in turn, the economic and social development of individuals.²² According to the 2007 Report of the Inter-governmental Panel on Climate Change (IPCC) the largest growth in GHG emissions between 1970 and 2004 has come from the energy supply sector, transport and industry (IPCC, 2007). In its 2008 World Energy

16 Leon-Moreta 2011 *European Journal of Legal Studies* 102-120.

17 Meadowcroft J
http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2009/05/19/000158349_20090519144015/Rendered/PDF/WPS4941.pdf 4

18 European Environmental Agency 2005
http://www.eea.europa.eu/publications/eea_report_2005_9

19 Bilen *et al* 2008 *Renewable and Sustainable Energy Reviews* 1534.

20 International Energy Agency 2014
<http://www.worldenergyoutlook.org/docs/weo2004/WEO2004.pdf>

21 Brandbrook and Ottinger (eds) 2003 *Energy Law and Sustainable Development*.

22 Leon-Moreta 2011 *European Journal of Legal Studies* 102-120.

Outlook,²³ the International Energy Agency (IEA) cautions that the current global trends in energy supply and consumption are patently unsustainable – environmentally, economically and socially. It is not an exaggeration to claim that the future of human kind depends on how successfully we tackle the two central energy challenges facing us today: securing the supply of reliable energy and effecting a rapid transformation to a low-carbon, efficient and environmentally benign system of energy supply. Yet Africa is rich in renewable resources and could benefit from the increasing use of renewable energy, such as hydro-power and solar energy. Such energy sources offer a clean alternative to traditional sources of energy, particularly fossil fuels. Thus, the adoption of renewable energy sources for electricity generation in Africa would signal a shift to low-carbon development in the continent.

Africa is the continent most thoroughly deprived of modern energy, despite the fact that it has an abundance of renewable energy resources. Regrettably, its inability to tap into and utilise these resources has characterised it as an energy-deficient continent, unable to meet the social, economic and developmental needs of its inhabitants.²⁴ Having vast renewable energy resources does not mean that power will be accessible, affordable and reliable.²⁵ Improving access to affordable and sustainable energy services is absolutely central to broader development efforts to reduce poverty, improve education, health, gender equality and environmental sustainability.²⁶ Energy poverty manifested as a lack of access to modern energy services and heavy reliance on traditional biomass as primary energy source hampers the promotion of sustainable development in Africa.²⁷

Understanding the distribution of current and future energy needs is an important goal for research and policy. On the one hand, lack of access to reliable energy is believed to hamper economic growth in poor economies. On the other hand, energy demands met with the current fossil fuel-based energy mix lead to emissions of

23 World Energy Outlook, 2010 *Energy Poverty – How to make modern energy access universal* 7.

24 Karekezi and Kithyoma 2002 *Energy Policy* 1077

25 Karekezi and Kithymoma 2002 *Energy Policy* 918.

26 Vandeweerd 2013 www.undp.org.

27 Barnard *Nuclear energy in Africa: A legal framework for sustainable energy access* 25

greenhouse gases, which are accumulating in the atmosphere and are the major source of global climate change.²⁸ Analysing the extent to which these two global problems interact with each other would allow us to better understand which policy instruments should be put in place if both problems are to be tackled.

Effective regulatory and policy frameworks are needed to expand access to renewable energy in Africa. The AU's normative response should revolve around increasing access to modern energy services. This normative response should take into consideration the promotion of a sustainable environment and the need to increase access to energy in Africa.

This chapter focuses specifically on energy poverty in Africa and the effect thereof on the development of the continent. In elaborating this theme a variety of interrelated topics will be discussed. In the first instance energy poverty in the African context will be defined and contextualised. This will be done by focusing on the two most prominent manifestations of energy poverty, namely: the lack of access to modern energy and the heavy reliance on biomass as the primary energy source. Thereafter, the status of access to renewable energy in Africa will be touched upon, and lastly the significance of access to renewable energy in meeting developmental needs will be discussed. Finally, a conclusion will be drawn regarding the current levels of access to renewable energy in Africa and the impact thereof on development.

2.2 Energy poverty in Africa

The current situation in the provision of energy in Africa has led to what can be described as energy poverty.²⁹ Energy poverty does not have a precise definition, and therefore certain indicators have been attributed to the concept in a bid to explain what it entails. The main reason why energy poverty is incapable of being easily defined is the fact that energy poverty cannot be regarded as static or fixed

28 Chakravarty and Tavoni 2013 <http://www.feem.it/userfiles/attach/2013451059464NDL2013-025.pdf>

29 Barnard and Scholtz 2015 *South African Year book of International Law* 10.

but is rather a multi-dimensional concept related to social, economic and environmental factors. Attempts to define the concept have been made, however. For example, the Asian Development Bank states that energy poverty is “the absence of sufficient choice in accessing adequate, affordable, reliable, high quality, safe and environmentally-benign energy services to support economic and human development.”³⁰ On the other hand, the IEA defines the concept energy poverty as comprised of two main elements, which are a lack of access to electricity and a reliance on traditional biomass fuels for cooking.³¹ These definitions are reflected in the following analysis of the available statistics regarding global energy access.

2.2.1 Reliance on traditional biomass as primary energy source

The consequences of the heavy reliance on traditional biomass as the primary energy source on the African continent vary. These consequences include the following: it impedes health care, gender equality, education and poverty alleviation, and also negatively affects the global climate.³² Based on World Health Organisation projections in the context of the traditional use of biomass in cooking, the number of people who die prematurely each year from the indoor use of biomass could be expected to increase to over 1.5 million per annum.³³ The burden of this traditional energy use falls disproportionately on women and children. The majority of the people who are still dependent on traditional fuels and use primitive and inefficient technologies live in rural areas.³⁴ For many, this combination barely allows the fulfilment of the basic human needs for nutrition, warmth and light, let alone the possibility of harnessing energy for productive uses which might be relevant to permit an escape from the cycle of poverty.³⁵

30 Masud, Sharan and Lohani *Energy for all: Addressing the energy, environment and poverty nexus in Asia Manila* 14.

31 Jones 2010 *Energy poverty* 10.

32 World Health Organisation 2006 <http://www.who.int/indoorair/publications/fuelforlife/en/>.

33 World Health Organisation 2006 <http://www.who.int/indoorair/publications/fuelforlife/en/>; World Energy Outlook 2006. <https://www.iea.org/publications/freepublications/publication/cooking.pdf> 424.

34 Masekoameng; Simalenga and Saidi 2005 *South Africa Journal of Energy in Southern Africa* 4-9

35 United Nations Habitat, BBC World, 19 September 2004.

2.2.2 Lack of access to modern energy

Statistics indicate that some 1.4 billion people have no access to electricity and a billion more have access to unreliable electricity networks only. About 3 billion people rely on solid fuels (traditional biomass and coal) to meet their basic needs. Currently, the largest concentrations of the energy-poor, that is, people who are both poor and lack access to sustainable modern energy, are in sub-Saharan Africa. Recent projections suggest that the problem will not only persist but in fact deepen in the longer term without an international recognition of the problem and a commitment to effect change. The rural poor in developing countries account for the vast majority - which amounts to nearly 80% of the households – of those in Africa without access to electricity, with Ethiopia, Kenya, Mali and Sierra Leone being among the most severely under-powered.³⁶

In analysing the provisions of a number of AU legal instruments, one can ascertain that renewable energy is considered as a modern energy source in Africa. Specifically, article 55 of the Treaty Establishing the African Economic Community, 1992 (Abuja Treaty) states the following:

1. Member States shall cooperate in the following fields:

- (a) Mineral and water resources;
- (b) Nuclear energy;
- (c) New and renewable energy.

2. They shall further:

- (a) Seek better knowledge and undertake an assessment of their natural resources potential;
- (b) Reduce progressively their dependence on transnational enterprises in the development of such resources, particularly through mastering exploration techniques; and
- (c) Improve methods of pricing and marketing raw materials.

36 African Development Bank 2012 <http://www.afdb.org/>

Having established that the AU views renewable energy as a modern energy source, the following conclusion is possible: that a strong link exists between a lack of access to modern energy as a manifestation of energy poverty in Africa, and the current low levels of access to renewable energy in Africa.

2.3 The status of access to renewable energy in Africa

The continent's significant endowment with renewable energy sources suggests that there are plausible solutions to address the existing power problem. Indeed, Africa's reserves of renewable energy resources are the highest in the world and are enough to meet the continent's projected energy needs.³⁷ 18 of the 35 developing countries ranked highest in renewable energy reserves, normalised by annual domestic energy consumption, are located in Africa.³⁸ Hence, for many African countries an opportunity exists to generate electricity in a clean and sustainable manner. Most African countries are rural, and this context makes the use of renewable sources of energy appealing, as they can provide cost-effective off-grid solutions to solve the issue of poor rural electrification.³⁹

Socio-political considerations also function as a constraint on the development of renewables on the continent. Many African states are tied by policies in which fuel subsidies play an important role. Fossil fuel subsidies are a powerful political tool and an impediment to the growth of renewables.⁴⁰ Although they are a costly way to protect the poor, eradicating them has a high political cost and significant political economy implications, as witnessed in Nigeria over the past years, for instance.⁴¹ The modalities of energy provision are also important for investment and growth. Bearing in mind that over 70% of SSA countries are energy (fossil fuel) importers, they are at the mercy of international price fluctuations, supply constraints and

37 World Energy Council 2010 <http://www.worldenergy.org/documents/ser2010report1pdf>.

38 Mukasa *et al* 2015 *Energy Research and Social Science* 90.

39 Deichman *et al* *The economics of renewable energy expansion in rural sub-Saharan Africa, policy research working paper no. 5193*.

40 International Institute for Sustainable Development 2014 *Fossil-fuel subsidies: a barrier to renewable energy in five Middle East and North African countries*.

41 Mukasa *et al* 2015 *Energy Research and Social Science* 92.

exchange rate arrangements.⁴² Empirical evidence indicates that oil price fluctuations have a substantial impact on economic performance and investment.⁴³ For instance, price increases exert inflationary pressures, reduce output and intensify unemployment.⁴⁴ In the environmental context, renewable energy sources produces very low CO² emissions and their use contributes significantly to curbing climate change, as compared to the use of non-renewable energy.⁴⁵ Conventional power plants also require large quantities of water for cooling and cleaning purposes. A coal-fired power plant is estimated to require 0.49 gallons of water per kWh, as compared to wind generation, that requires only 0.001 gallons of water per kWh.⁴⁶

The availability of renewables and their ability to contribute to different energy sectors are among the main drivers behind their deployment. Apart from that, governments' interest in deployment is driven by three principle reasons: improving energy security; encouraging economic development, particularly development associated with rural and agricultural sectors or with innovation, and last but not least, protecting the climate and the wider environment from the impacts of fossil fuels.⁴⁷

Renewable energy can play a vital role in the provision of modern energy services to those still depending on traditional energy sources, especially those located in remote and rural areas in Africa where electrification is limited, while providing countries with the opportunity to accelerate the transition to modern energy services in urban areas.

The current African continent energy outlook is challenging to say at least. Whether governments are chiefly concerned with economic growth, environmental protection

42 Mukasa *et al* 2015 *Energy Research and Social Science* 92.

43 Kammen, Bailis and Herzog *Clean energy for development and economic growth: biomass and other renewable energy options to meet energy and development needs in poor nations. Policy discussion paper for the environmentally sustainable development group of the United Nations Development Program and the climate change clean development mechanism. 7th conference of the parties.*

44 Mukasa *et al* 2015 *Energy Research and Social Science* 92.

45 Saidu *et al* 2011 *Energy Research and Social Science* 2425.

46 Saidu *et al* 2011 *Energy Research and Social Science* 2425.

47 IEA 2013 <http://www.iea.org/>

or energy security, it is clear that a simple continuation of the current energy trends would have many undesirable consequences and pose a grave risk to human well-being. In this context, the most immediate energy priority for Africa should be to expand access to renewable energy. Providing safe, clean, reliable and affordable energy to those who currently have no access is widely viewed as being critical for advancing other development objectives.⁴⁸ This state of affairs therefore needs to be addressed by increasing access to renewable energy.

2.4 Access to renewable energy and development in Africa

The problem of access to energy is more pronounced in rural areas of Africa because the topography of most rural landscape makes the transmission and distribution of power generated from fossil fuels is very costly. This is particularly true of sub-Saharan Africa where it is estimated that 68% of the inhabitants reside in rural areas.⁴⁹ The provision of energy services to this large segment of Africa's population is therefore of paramount importance. The problem of low income and poverty is also acute in rural areas which in turn hamper the capacity of the population to pay for connection and consumption. Development, however, entails the improvement in people's level of living, their incomes, health and well-being. These are serious issues the development programs have to address if they are serious about development - in particular, about rural development.

In terms of development, the position in Africa and more specifically in sub-Saharan Africa is lagging at best static. According to list of Least Developed Countries (LDCs) of the United Nations Conference on Trade and Development (UNCTAD), 33 states out of the 53 member states comprising the AU are regarded as LDCs. LDCs are a category of states that are highly disadvantaged in their development process and face more than other countries the risk of failing to come out of poverty. The United

48 IRENA reports 2014 http://www.irena.org/DocumentDownloads/Publications/IRENA_REPowerCosts2014report.pdf.

49 World Bank 2011 *African Development Indicators* 88.

Nations uses as criteria for categorising a state as an LDC based its low *per capita* income, its weak human assets and its economic vulnerability.⁵⁰ African LDCs are vulnerable to extreme and persistent poverty; weak economic growth; poor infrastructure capacity and inadequate social services.⁵¹ 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 definite indicator of the non-achievement of the Millennium Development Goals.⁵² From the above, one can deduce that energy plays a vital role in the promotion of development. This should be viewed in the AU normative response to development in Africa. This normative response should aim to increase access to renewable energy in order to promote development in the African continent.

The AU normative response to the developmental impacts arising from lack of access to renewable energy should revolve around increasing the exploitation of renewable energy sources. At the heart of the AU ideals of “freedom, equality, justice and dignity” is the realisation of human rights in Africa.⁵³ The Banjul Charter provides for the realisation of the right to development which, as contained in Article 22 of the Banjul Charter, is vital to achieving these objectives.⁵⁴ Development in the context of the Banjul Charter includes social, cultural and economic development, coupled with the enjoyment of the common heritage of mankind.⁵⁵ The provision moreover tasks member states with the obligation to ensure the exercise of the right to development either individually or collectively.⁵⁶ The inclusion of the right to development in the Banjul Charter is meant to facilitate African sustainable development by means of the progressive realisation of human rights.⁵⁷ Closely

50 <http://unohrlls.org/custom-content/uploads/2013/10/State-of-the-LDCs-2013.pdf> 13.

51 United 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* (Draft 1:2006).

52 Third 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) (A/63/248)2.

53 Preamble of the Organisation of the African Unity 1963.

54 Article 22 of the Banjul Charter.

55 Article 22(1) of the Banjul Charter.

56 Article 22(2) of the Banjul Charter.

57 Barnard and Scholtz 2015 *South African Year Book of International Law* 1.

associated with the right to development as contained in Article 22 of the Banjul Charter is Article 24, which contains the right to live in a satisfactory environment favourable to development.

In terms of the Constitutive Act, promoting the sustainable development of the African continent is one of the objectives common to the member states of the AU.⁵⁸ The AEC established in terms of the provisions of the Constitutive Act reiterated this objective in the provisions of the Treaty Establishing the African Economic Community 1992 (hereafter the Abuja Treaty). The Abuja Treaty's objectives 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 for Africa; promoting cooperation in all fields of human endeavour; and coordinating and harmonising policies among existing and future economic communities.⁵⁹ The Abuja Treaty also required that the activities related to the achievement of the aforementioned objectives should contribute to the indigenous, self-sustained and self-reliant development of the continent.

2.5 Conclusion

Given the grave consequences of energy poverty, the most immediate priority for the African Union should be to expand access to renewable energy. Providing safe, clean, reliable and affordable energy to those who currently have no access is widely viewed as being of paramount importance for advancing development objectives. Energy is regarded as a means to achieve such development, as stated by UN Energy/Africa:⁶⁰ "whatever its focus, each agency understands that energy is important, not as an end in itself, but rather a means to tackle the major

58 Article 3(j) of the Constitutive Act provides that one of the objectives of the AU is the promotion of sustainable development at the economic, social and cultural levels.

59 Article 4(1) of the Abuja Treaty.

60 UN Energy/Africa- a *UN collaboration mechanism and UN sub-cluster on energy in support of NEPAD, Energy for Sustainable Development: Policy Options for Africa*.

developmental challenges that exist in Africa today". Having vast energy resources, which Africa possesses, does not mean that the provision of power will be accessible, affordable and reliable. Effective regulatory frameworks are needed to expand access to energy in Africa. In order to reach a conclusion as to what should be the effective regulatory framework aimed at expanding access to energy; one needs first to elucidate the role of regional law and policy in increasing access to renewable energy. This will be the task of the next chapter.

3 The role of regional law and policy in increasing renewable energy access

3.1 Introduction

The provision of reliable, secure, and affordable energy services is central to addressing many of today's global development challenges, including poverty, inequality, climate change, food security, health, and education.⁶¹ The implication is that the AU urgently needs to initiate a transition to sustainable energy if it is to meet the imperatives of reducing its emissions,⁶² increasing access to electricity, and realising the enormous job creation potential of a low-carbon economic future.⁶³ The issues of sustainable energy development such as energy security and reliability, environmental protection and economic viability may be better advanced in a regional context.⁶⁴

Regional organisations may be the best conduits for encouraging these policies.⁶⁵ Regional cooperation can enable the uptake of renewable power projects throughout African countries, sustainably transforming the energy mix.⁶⁶ This view is supported by Ferreira-Snyman,⁶⁷ who indicates that:

The growing interdependence between states with regard to issues as diverse as trade, security, human rights and the environment, as well as a number of attendant international problems, has compelled the creation of international and regional organisations as instruments to regulate newly emerging international issues. These institutions, often with supranational characteristics, provide a system of law that could pierce the veil of sovereignty and influence the internal affairs of states.

61 Moss, Pielke and Bazilian 2014 <http://www.cgdev.org/publication/balancing-energy-access-and-environmental-goals-development-finance-caseopic-carbon-cap>.

62 *United Nations Framework Convention on Climate Change 1992* provides that states should align themselves with the global objective of stabilizing the concentrations of GHGs in the atmosphere at a level that would prevent dangerous human interference with the global climate system.

63 IRENA 2011 <https://www.irena.org/DocumentDownloads/Publications/RenewableEnergyJobs.pdf>.

64 Ferreira-Snyman 2009 *The Comparative and International Law Journal of Southern Africa* 185.

65 Mukasa *et al* 2015 *Energy Research & Social Science* 102.

66 Saadi *et al* 2015 *Energy Research & Social Science* 130.

67 Ferreira-Snyman 2009 *The Comparative and International Law Journal of Southern Africa* 185.

In terms of Article 22 of the Banjul Charter, cooperation among the member states must be geared towards the fulfilment of the right to development.⁶⁸ In the year 2002, the NEPAD, which is Africa's clear and bold initiative for socio-economic development, identified energy as one of the critical sectorial priorities promoting the process of development.⁶⁹ In that regard, NEPAD emphasises that African States should pay attention to increasing access to reliable and affordable commercial energy, reversing the environmental degradation related to dependence on traditional fuels in rural areas and stimulating a stronger focus on sustainable energy sources.⁷⁰ Scarcity of modern forms of energy is therefore a major impediment to achieving sustainable development in Africa, as it aggravates the vulnerability of the poor.⁷¹ Furthermore, there is a consensus that energy is directly linked to the key global challenges, such as climate change, and also that there is a link between the realisation of socio-economic rights and access to renewable energy.⁷² Energy can play a crucial role underpinning efforts to achieve the Millennium Development Goals and to improve the quality of the lives of the poor people around the world.⁷³ Governments have historically made little effort to improve access to electricity particularly for the poor, because their energy policies and regulatory regimes focused have upon modern economic sectors such as industry, transport and urban infrastructure to the neglect of rural development.⁷⁴

What follows is an examination of the existing African legal framework pertaining to access to energy. Brief consideration will be given to various treaties relevant to increasing access to renewable energy in Africa. This chapter also highlights the pitfalls in these regional initiatives, and makes recommendations to the AU.

68 Article 22 of the Banjul Charter.

69 Paragraph 112 of NEPAD.

70 Paragraph 112 of NEPAD.

71 State of the Least Developed Countries 2013 <http://unohrrls.org/custom-content/uploads/2013/10/State-of-the-LDCs-2013.pdf> 13.

72 Marien 2009 <http://www.millennium-project.org/millennium/challeng.html>.

73 Report on Energy Services for the Millennium Development Goals, November 2005 www.energyandenvironment.undp.org.

74 Energy Access Working Group 2006 *Global Network on Energy for Sustainable Development, Theme Results: Summary of Policymakers* 6.

3.2 Regional initiatives aimed at increasing access to renewable energy in Africa

Regional initiatives aimed at increasing renewable energy have been taken at the international, AU and SADC levels. These initiatives had the concerted goal of increasing access to renewable energy in Africa.

3.2.1 Mandate for increased access to renewable energy in the AU

Long before the formation of the Organisation of African Unity (OAU), African leaders had recognised that cooperation and integration among African countries in the economic, social and cultural fields were indispensable to the hastened transformation and sustained development of the African continent.⁷⁵ It provided for the AEC to be set up through a gradual process, which would be achieved by the coordination, harmonisation and progressive integration of the activities of existing and future RECs in Africa. The aim of the AEC is to promote economic, social and cultural development as well as African economic integration in order to increase self-sufficiency and endogenous development and to create a framework for development and the mobilisation of human resources and material.⁷⁶ The AEC further aims to promote co-operation and development in all aspects of human activity with a view to raising the standard of living in Africa, maintaining economic stability and establishing a close and peaceful relationship between member states.⁷⁷ More specifically, the Abuja Treaty placed emphasis on how member states should conduct themselves in respect of Energy and Natural Resources:⁷⁸

1. Member States shall coordinate and harmonize their policies and programmes in the field of energy and natural resources.

2. To this end, they shall:

- (a) Ensure the effective development of the continent's energy and natural resources;

⁷⁵ African Economic Communities <http://www.dfa.gov.za/foreign/Multilateral/africa/aec.htm>.

⁷⁶ Article 4 (1) of the Abuja Treaty.

⁷⁷ Article 4(1) (c) of the Abuja Treaty.

⁷⁸ Article 54 of the Abuja Treaty.

- (b) Establish appropriate co-operation mechanisms with a view to ensuring a regular supply of hydrocarbons;
- (c) Promote the development of new and renewable energy in the framework of the policy of diversification of sources of energy;
- (d) Harmonize their national energy development plans;
- (e) Articulate a common energy policy, particularly in the field of research, exploitation, production and distribution;
- (f) Establish an adequate mechanism of concerted action and coordination for the collective solution of the energy development problems within the Community, particularly those relating to energy transmission, the shortage of skilled technicians and financial resources for the implementation of energy projects of Member States; and
- (g) Promote the continuous training of skilled manpower.

From the above provisions of Article 54 of the *Abuja Treaty* read with Article 51(1)(b), which provides that member states must coordinate and harmonise their policies and programmes in the field of energy and natural resources, it may be concluded that the established policy requires the harmonisation of African national energy development plans and the promotion of the development of new and renewable energy. The *Abuja Treaty* mandates the continent to increase the supply of renewable energy as one of the modern energy sources listed in its provisions.⁷⁹ The *Abuja Treaty* places an obligation on member states to cooperate in the fields of mineral and water resources, nuclear energy and renewable energy as well as non-renewable energy, and to undertake an assessment of their natural resources. Article 57 of the *Abuja Treaty* provides also for the member states to adopt a Protocol on Energy and Natural Resources.⁸⁰ Unfortunately, the Protocol has not been adopted up to date.

Although the *Abuja Treaty's* principal objective was to promote development through economic integration, the principles embodied therein should in the mind of the author form the basis for increased access to renewable energy in Africa.

⁷⁹ Article 55 of the *Abuja Treaty*.

⁸⁰ For the purposes of Articles 54, 55 and 56 of this Treaty, Member States shall cooperate in accordance with the provisions of the Protocol on Energy and Natural Resources.

Convinced of the need to accelerate the process of implementing the Abuja Treaty in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalisation, the African States adopted the *Constitutive Act*.⁸¹ In terms of the provisions of the Constitutive Act, the main objective of member states must be to promote sustainable development at the economic, social and cultural levels.⁸² This objective will be achieved only through the integration of the African economies; the promotion of cooperation among member states in all fields of human activity in order to raise the living standards of African peoples; the coordination and harmonisation of policies between existing and future RECs; and the advancement of the development of the continent through the promotion of research in all fields, particularly in science and technology.⁸³

3.2.2 Analysis of each initiative

The policy that spurs the initiative to increase access to renewable energy in Africa does not overtly address the issue. Instead, it addresses the issue of underdevelopment in Africa, but in doing so it recognises energy as one of the critical issues related to such underdevelopment. Each of the initiatives is analysed hereunder and its significance is brought to the fore.

3.2.2.1 NEPAD

NEPAD reiterates the firm and shared determination of African leaders to eradicate poverty, to place their countries, individually and collectively on the path of sustainable growth and development, and to participate actively in the world economy and body politic.⁸⁴ It thus requires African countries to take charge of their own destinies. As part of its mission, NEPAD is concerned with the provision of

81 Constitutive Act of the African Union 2000.

82 Article 3(j) of the Constitutive Act.

83 Article 3(k) of the Constitutive Act.

84 NEPAD para 1.

certain essential public goods, of which energy is one, through regional and sub-regional development programmes.

NEPAD is a mechanism that represents a collective desire and commitment of African countries to achieve sustainable economic and social development, including poverty eradication. It recognises that a healthy and productive environment is a prerequisite for development, that the range of issues necessary to nurture this environmental base is vast and complex, and that a systematic combination of initiatives is necessary to develop a coherent environmental programme.⁸⁵

The NEPAD priorities include establishing the conditions for sustainable development by ensuring peace and security and by adopting policy reforms and increased investment in key sectors such as industrial productivity, competitiveness, and diversity, access to modern energy services, transport systems and infrastructure, human resources development with a focus on the environment, health, education, science, and technology, improving infrastructure and mobilising resources.⁸⁶

With regard to energy, NEPAD indicates that African states should focus on increasing access to reliable and affordable commercial energy, reversing the environmental degradation associated with the heavy reliance on traditional fuels in rural areas, and stimulating a stronger focus on sustainable energy sources.⁸⁷ Furthermore it is stated that the enhancement of regional development and economic integration which will lead to achieving the objectives regarding the sectoral priorities hinges upon increased interaction and cooperation among sub-regional economic groupings.⁸⁸ Its adoption by the AU was followed by its international recognition as Africa's official development plan through the resolutions of the UN General Assembly.⁸⁹ The recognition of NEPAD at the regional and

85 Preamble to Chapter 8 of the New Partnership for Africa's Development documentation titled "The environmental initiative".

86 Para 95 of NEPAD.

87 Para 112 of NEPAD.

88 Para 94 of NEPAD.

89 UN General Assembly Declaration (A/RES/57/2) and the Resolution on NEPAD (A/RES/57/7).

international levels, however, does not transform NEPAD into a binding instrument. NEPAD is not a treaty, nor is it a convention containing legally binding provisions.

3.2.2.2 SADC Protocol on Energy 1996

The Abuja Treaty, which came into force in 1994, provides for a gradual integration process, which would be achieved through coordination, harmonisation and progressive integration of the activities of existing and future RECs in Africa over a period of 34 years.⁹⁰ The RECs referred to in the Abuja Treaty are regarded as the building Blocs of the AEC. The RECs are: the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), the Economic Community of Central African States (ECCAS), the Common Market for Eastern and Southern African States (COMESA), and the Arab Maghreb Union (AMU). The relevance of the SADC Protocol on Energy is that it was passed by the SADC. SADC is one of the AECs established under the Abuja Treaty and therefore its viability is of great importance in regional economic integration. It is in keeping with this understanding of the right that the SADC would like to achieve development and economic growth, alleviate poverty, and enhance the standard and the quality of life of the people of Southern Africa.⁹¹ Amongst all AECs, the SADC is the least developed when comes to accessing modern sources of energy.⁹²

Recognising the fundamental role of energy in accomplishing its goals, the SADC passed the Protocol on Energy in 1996, which provides a framework for cooperation on energy policy among SADC Member States. The Protocol intends to promote the harmonious development of national energy policies and matters of common interest for the balanced and equitable development of energy throughout the SADC Region.

90 Mukamunana and Moeti 2005 *Journal of Public Administration* 95.

91 Article 5(a) of the *Treaty of the Southern African Development Community* 1992.

92 International Energy Agency Energy Poverty 2010 *How to make modern energy access universal?* 7.

The Protocol acts as the chief SADC regulatory framework for energy development in the region. With reference to energy policies specifically, article 3(1) and article 4 of the Protocol describe as one of its objectives the harmonisation of national and regional energy policies on matters of common interest in order to provide sustainable energy services.

Article 3 of the Protocol also notes the importance of renewable energy, advising member states to cooperate on the development and use of new and renewable energy sources in the region. Guided by the principles of using energy to support economic growth and development, alleviate poverty and promote self-reliance amongst member States, the Protocol clearly outlines the institutional mechanisms and financial provisions in place for implementing the Protocol. In greater detail, Annex 1 of the Protocol provides guidelines for promoting renewable energy production and use, as follows:

The SADC Energy Commission shall create financing mechanisms suitable for developing the renewable energy sector.

Member States shall consider implementing tax regimes that promote the development of renewable energy.

Member States shall strive to create an environment that enables the private sector to assist in renewable energy development.

The Energy Commission shall provide technical assistance to governments and non-governmental organisations involved with renewable energy.

Member States shall include cost-effective renewable energy applications in their public investment programmes.

While the Protocol on Energy and the Regional Indicative Strategic Development Plan address the SADC's broad energy objectives, they make little mention of renewable energy aside from hydropower. Within the SADC region, only Mauritius and South Africa have developed comprehensive strategies and action plans for renewable energy. At present there is no region-wide regulatory framework that specifically addresses renewable energy.

The region faces significant challenges in energy development and usage. The Regional Infrastructure Development Master Plan highlights the following issues:

only 5% of rural areas in the region have any access to electricity; and the SADC lags behind other Regional Economic Communities in Africa regarding access to electricity.⁹³

3.2.2.3 WSSD Johannesburg Plan of Implementation

In addition to the aforementioned initiatives, the Johannesburg Plan of Implementation adopted at the 2002 World Summit on Sustainable Development, which was held in Johannesburg, South Africa, recognised that NEPAD provides a framework for sustainable development in Africa.⁹⁴

Renewable energy was on the agenda of the Summit. In the United Nations-led implementation plan of action for the WSSD, named WEHAB, which stands for Water, Energy, Health, Agriculture and Biodiversity, top priority was given to the renewables and other alternative forms of energy services (WEHAB Working Group, 2002). One of the targets proposed at the WSSD was for every country to commit itself to meeting 10% of its national energy supply from renewables. Although the 10% target was not agreed to at the summit, there was general consensus that countries should commit themselves to the promotion of renewables.

The World Summit on Sustainable Development described access to energy as a basic requirement for human dignity⁹⁵ and recommended that countries reform their energy regimes to bring about sustainable development in the energy sector.⁹⁶ The growing trend towards sustainable development there has seen a concomitant global trend to shift towards a wider use of cleaner energy systems, to promote lower carbon economies and to convert to clean fuels and use of energy-efficient technology. Concurrently, social considerations need to be taken into account in

93 Southern African Regional Community: Towards a Common Future 2009
<http://www.sadc.int/themes/infrastructure/en/> .

94 International Institute for sustainable development 2009
<http://africasd.iisd.org/institutions/environment-initiative-and-action-plan-of-the-new-partnership-for-africas-development-nepad/>

95 Para 18 of the Johannesburg Plan on Sustainable Development.

96 Plan of Implementation for the United Nations World Summit on Sustainable Development.

order to provide more possibilities for income-generating activities and productivity for African countries.

In order to meet the ambitious target set in the WSSD, the nations agreed on eight recommendations, two of which the author will highlight to the extent that they are related to increasing access to energy in Africa.

Priority 1: “improve access to reliable, affordable, economically viable, socially acceptable and environmentally sound energy services and resources.” In Africa, where most communities are not party of any centralised national power grid, local systems for generating electricity will need to be established. Such efforts will require the extension of renewable energy sources. To accomplish such results, states must engage in “intensifying regional and international cooperation in support of national efforts, including through capacity building, financial and technological assistance”.⁹⁷

Priority 5: “Enhance international and regional cooperation” to meet the above ends, again “with special attention to rural and isolated areas”.⁹⁸ This will require improvements in international environmental governance systems, which were a priority for the WSSD in its preparation, but this was a topic on which consensus could not be reached in Johannesburg. Chapter X of the Johannesburg Plan of Implementation urged nations to make the existing systems of multilateral cooperation work more efficiently, but there is absence of institutional arrangements in the energy sector to undertake the cooperation called for.

3.3 Shortcomings of the regional initiatives

Though initiatives have been taken to acknowledge modern forms of energy as the vehicle to bring about sustainable development, the African region is yet faced with many challenges. One of the challenges is the lack of “soft” infrastructure in the

⁹⁷ Para 8(a) of the *Johannesburg Implementation Plan on Sustainable Development*.

⁹⁸ Para 8(f) of the *Johannesburg Implementation Plan on Sustainable Development*.

form of policies, strategies, and institutions available to ensure that the renewable energy projects identified in the initiatives are implemented. The major impediments include a lack of political commitment to regional integration, political instability, weak infrastructures, and problems with the distribution of the costs and benefits of integration.⁹⁹

These challenges notwithstanding, the coordination and harmonisation of policies in areas of common interest and relating to the development of the continent are intrinsically linked to AU objectives.¹⁰⁰ Energy is described as one of the areas of member states' common interests which should enjoy the focus of the Executive Council of the AU in establishing a coordinated policy.¹⁰¹ In practice, Africa's attempts at regional integration have failed to a large extent. Few of the commitments and objectives related to faster economic growth and development by means of regional integration have been achieved.¹⁰² The failure of regional integration schemes is mainly attributed to the adoption of the European model of the market integration approach, which was modelled on the economic conditions of developed economies.¹⁰³ In addition to claims that the African Union has pursued the wrong approach to regional integration, the suggestion is that other factors have also contributed to the disappointing results of African regional schemes

Though Africa is blessed with the natural resources needed to develop renewable energy, the situation may be described as "resource curse".¹⁰⁴ The phrase "resource curse" suggests that large, newfound resource endowments can both directly and indirectly result in poor forms of governance that incite, prolong and intensify political instability, graft and violent conflict.¹⁰⁵ Large revenues from oil or gas production, for example, can change government behaviour, damage economic growth and imperil development.¹⁰⁶ The consolidation and extraction of natural

99 Mukamunana and Moeti 2005 *Journal of Public Administration* 97–99.

100 Article 3(k) of the *Constitutive Act*.

101 Article 13(1)(b) of the *Constitutive Act*.

102 Mukamunana and Moeti 2005 *Journal of Public Administration* 95.

103 McCarthy "Regional Integration in Sub-Saharan Africa" 7.

104 Bazilian *et al* 2013 *Journal of Energy & Natural Resources Law* 36.

105 Ross *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* 10.

106 Stevens "Resource Curse and Investment in Energy Industries" 451–459.

resources can lead to disproportionate wealth which may then contribute to rising income gaps between the rich and the poor, and thence lead to the institutionalization of corruption, and may even enable oppressive regimes to maintain their political power.¹⁰⁷ Resources can be used to finance conflicts or can be a motive for other countries to go to war.¹⁰⁸ In war-torn countries such as Sierra Leone and Liberia, electricity transmission and distribution infrastructure has often been destroyed.¹⁰⁹

There has been gross lack of political will on the part of African states to translate goals into reality. Udombana presents this view as follows:¹¹⁰

African leaders lack the sense of certitude to face challenges of integration. Integration requires that each constituent party have clearly defined national plans and strategies to achieve economic development. Like a child in a toyshop, most leaders in Africa do not know which way to look. They have been unable to make changes that will sustain growth and development. Others are not prepared to subordinate immediate national plans for long-term regional goals or to cede essential elements of sovereignty to regional institutions.

This embarrassing state of affairs is exacerbated by weak institutional machinery. The time of hushed criticisms of the weaknesses of African institutions, mechanisms and structures is long gone.¹¹¹ It is no secret that the African regional human rights system has severely underperformed its mandate and has not met the expectations of the people of the continent. African regional institutions are not independent enough to implement integration initiatives. These regional institutions are expected to operate based on the whims of member states often run by dictators with personal interests at heart, rather than being eager to fulfil the ambitious objectives of the organisation, which in this case is the AU.¹¹² This was demonstrated in the demise of the SADC Tribunal. In one of its first cases, *Mike Campbell (Pvt) Ltd and*

107 Silberfein 2004 *Geopolitics* 213–241.

108 Billon 2004 *Geopolitics* 1–28.

109 Billon 2004 *Geopolitics* 1–28.

110 Udombana 2002 *California Western International Law Journal* 87–128.

111 Du Plessis and Stone 2007 *African Human Rights Journal* 529.

112 Fabricius 2013 http://www.iol.co.za/news/africa/selfish-jz-allowed-mugabe-to-kill-sadc-tribunal-1.1479714#.U-k3O_mdZlo.

*Others v Republic of Zimbabwe*¹¹³ the SADC Tribunal decided in 2007 and 2008 that the government of Zimbabwe may not evict farmer Mike Campbell from his land, and that farm evictions per Amendment 17 of Zimbabwe's constitution amount to *de facto* discrimination against Whites. Following this decision, Zimbabwe pulled out of the SADC Tribunal, challenging its legitimacy. The 2010 SADC summit then ordered a review of its terms and functions. The relevancy of this discussion of the SADC Tribunal is that the SADC is one of the AECs established under the Abuja Treaty.

The AU's political organs continue to rhetorically support the human rights organs in their resolutions, but not much is done to exercise peer pressure on states that fail to live up to what they have committed to.¹¹⁴ Africans need and deserve well-functioning institutions. The principal means of ensuring compliance with the Banjul Charter was meant to be the African Commission, which is a quasi-judicial enforcement mechanism established under article 30 of the Banjul Charter, with the specific mandate to "promote and protect human and peoples' rights in Africa".¹¹⁵

To some, with respect to the performance of the African Commission in general, the Commission is a disappointment.¹¹⁶ One of the most pronounced criticisms is that it lacks an effective tool to ensure compliance with the norms enshrined in the Banjul Charter.¹¹⁷ The African Commission is tasked with implementing and enforcing the Banjul Charter through its three primary mandates, namely the protective mandate, the promotional mandate and the interpretive function.¹¹⁸ Under the protective mandate the Banjul Charter permits the African Commission to consider complaints (communications) brought against state parties by individuals, non-governmental organisations (hereafter NGOs) or other states alleging violations of human rights. The African Commission is mandated to seek an amicable resolution and, should that fail, to make non-binding recommendations which the Assembly of Heads of State

113 SADC (T) 11/2008.

114 Du Plessis and Stone 2007 *African Human Rights Journal* 529.

115 Du Plessis and Stone 2007 *African Human Rights Journal* 529.

116 Du Plessis and Stone 2007 *African Human Rights Journal* 529.

117 Du Plessis and Stone 2007 *African Human Rights Journal* 529.

118 Articles 45(1), (2) & (3) of the African Charter prescribe the mandates of the African Commission.

and Government should adopt. It becomes apparent that those states which have perpetrated human rights violations have the power to lobby like-minded states to potentially veto the adoption of these recommendations; hence the author's particular criticism that human rights in Africa are at the behest of states. The effect of the omnipotence of states within the regional system is one of the common concerns which undermine the African regional human rights system, political goodwill and diplomacy between states which have often placed a dampener on the protection of human rights.¹¹⁹

It has to be noted that implementation of the *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*¹²⁰ decision has been lacking. Morka, Executive Director of the NGO that brought that case to the African Commission, wrote that "the Nigerian government has failed to develop or implement a comprehensive remedial plan for Ogoniland or the Niger Delta region as a whole."¹²¹ Furthermore, he pointed out that the "entire justice system remains skewed against the local oil-bearing communities in favour of powerful multinational oil companies."¹²² Similarly a SERAC representative pointed out during his intervention at the UN Human Rights Commission that "the Nigerian government, now under civilian rule, has failed to address the plight of the Indigenous Ogoni people and to protect their human rights."¹²³ Along the same lines and remarking a more general weakness of the African Commission, a report of the Minority Rights Group International found that "one of the greatest constraints to the effectiveness of the African Commission's protective mandate is related to the lack of implementation and enforcement of its recommendations to state parties."¹²⁴

Another threat to increasing access to renewable energy in Africa is monopoly. Currently governments subsidize conventional forms of energy development at the

119 Du Plessis and Stone 2007 *African Human Rights Journal* 529.

120 155/96 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*.

121 Morka date unknown www.crin.org/docs/FileManager/felix.doc.

122 Morka date unknown www.crin.org/docs/FileManager/felix.doc.

123 United Nations Commission on Human Rights Report 2005 <http://www.unpo.org/article/2311>.

124 Wachira 2008 <http://www.refworld.org/pdfid/48e4763c2.pdf>.

expense of renewables.¹²⁵ This situation is witnessed by the current collapse of Eskom in South Africa as a result of monopoly and the reluctance in tightening laws and policies promoting diversification of modern sources of energy. This resulted in recurrence of load shedding in South Africa in 2015. In 2008 also, South Africa experienced the debilitating phenomenon of 'load shedding', where the availability of electricity supply did not meet the demand.¹²⁶ In order to avoid unpredicted blackouts, creation of a level playing field through removal of these subsidies can make renewables attractive to investors. A level playing field is missing due to lack of legal framework for Independent Power Producers to promote competitive electricity production and distribution in Africa. South Africa is an example, where the publication of *Energy Policy White Paper in 1998* in which one of its objective was to develop an enabling legislative and regulatory framework to integrate IPPs into the existing electricity system. IPPs were expected to play a significant role in electricity generation mix, but to date, it is not yet enacted. In these circumstances, in the absence of a legal framework, IPPs may not be able to invest in renewable energy facilities because of the lack of known, consistent, regulatory uncertainty and transparent rules.

3.4 Conclusion

What should be the way forward to increase renewable energy access in Africa? Problems with energy supply and use are related not only to global warming, but also to such environmental concerns as air pollution, acid precipitation, ozone depletion, the destruction of forests and the emission of radioactive substances.¹²⁷

In order to address the above challenges related to increasing access to modern energy, the collective efforts of AU member states and/or RECs must be focused on the formulation of coordinated regional and/or sub-regional policies regulating the supply of energy. These regional efforts should be geared towards promoting sustainable development - that is, promoting energy security and at the same time

125 Beck and Martinot 2004 *Encyclopaedia of Energy* 366.

126 Kidd *Environmental Law* 316.

127 Dincer 1999 *Energy Policy* 846.

taking care of the environment. The purpose should be to extend access to energy to those in rural communities, which are often neglected.

The legal and regulatory environment is critical for the development of the African continent. In any country business can thrive and drive economic growth only when there is a sound legal and regulatory environment characterised by a level playing field, which means that there have to be transparent and supportive rules and regulations, as well as strong enforcement institutions and mechanisms. Reducing the risks to commercial activity requires clear and transparent regulations that foster and safeguard innovation and property rights, together with the ability to punish illegal business practices. Unwavering commitment from and cooperation amongst policy makers, the private sector and civil society are essential for the necessary reforms to succeed.¹²⁸

The ambiguous regulatory frameworks in Africa contribute to the challenges to transparency and accountability, which qualities remain crucial for harnessing the wealth of natural resources to enable economic growth. Against the backdrop of the inadequacy of the existing checks and balances, the possibility of amassing great wealth through the exploitation of Africa's abundant resources has induced rent seeking and corruption on a massive scale. This undermines the quality of the institutions and the governance of resources in Africa. Transparency should therefore be promoted under all circumstances in order to promote modern energy services and hence to promote sustainable development in Africa. Regional integration should therefore be much more than macro-economic cooperation between states and corporations; it should promote the protection of shared resources and should promote human development.

Pointing out the role of regional law and policy in the governance of the provision of energy in Africa has involved discussing some of the relevant initiatives but not all, and not exhaustively. These regional laws and policies play a significant role in mandating increased access to renewable energy. They are often met with problems

128 African Development Bank Report 2011 <http://www.afdb.org>.

such as the weak infrastructure common in the member states of the AU. Given the existence of such problems, the author will in the next chapter consider how human rights can serve as the legal basis for increased access to renewable energy in Africa.

4 Human rights as the legal basis for increased access to renewable energy in Africa

4.1 Introduction

In the foregoing chapter the link between increased access to renewable energy and the realisation of human rights in Africa was established. The perception of this link supports the assumption that increased access to renewable energy should embody the AU normative response to the challenges related to energy poverty in rural African communities. Furthermore, this normative response, in the mind of the author, should be embodied in regional law and policy as mandated by the *Constitutive Act*.¹²⁹ While the topic of an AU legal framework aimed at increasing access to renewable energy will be touched upon, establishing the content of such a legal framework is not the main aim of this dissertation. Rather, focus will fall on the legal basis for establishing such a legal framework. In this regard the author will focus on existing international and AU human rights documents and more specifically existing social, cultural and economic rights. The interpretation of these rights by international organisations as well as the African Commission on Peoples' Rights will prove extremely relevant in establishing human rights as the legal basis for increasing access to renewable energy in Africa.

There will also be a brief analysis of what the right to development entails in the context of Articles 22 and 24 of the Banjul Charter, then under the international realm. A discussion of how the African Commission interpreted the socio-economic rights will follow. Two African Commission decisions, that is, the SERAC and the Endorois cases, will be scrutinised.

The chapter below will focus on the interpretation of social, economic and cultural rights by the African Commission and other international institutions. This discussion is conducted in a bid to see how human rights can serve as legal basis for increased access to renewable energy in Africa.

¹²⁹ See Chapter 3 above.

4.2 Mandate for development under the AU.

The concept of the Right to Development is controversial, with some researchers disputing whether it is a right at all. Higgins¹³⁰ has perceived a potential conflict between a right to development and a right to the environment. She observes that "there is frequently an environmental price to pay for development,"¹³¹ including potential clashes between citizens' invocation of a right to a safe environment and state arguments for a right to economic development. Already clashes sometimes occur when some nation states, typically under the guise of national development, sanction unsustainable logging, mining and infrastructural development, and fail to provide support for the political and civil rights of local communities marginalised by these activities.

The meaning of the right to development has been elaborated in a number of sources. The Banjul Charter provides the right to development as a definitive individual and collective right. Article 22(1) provides that: "All 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." Article 22 of the Banjul Charter therefore suggests that development in the context of the Banjul Charter must be seen to include social, cultural and economic development coupled with the enjoyment of the common heritage of mankind. The said Article also proceeds further to indicate that states bear the duty to ensure the exercise of the right to development either individually or collectively. Concomitant to Article 22 of the Banjul Charter is Article 24, which is a pioneering environmental provision¹³² which states that: "All people shall have the right to a general satisfactory environment favourable to their development." The right to a satisfactory environment is not confined solely to the natural environment. The utility of the right in this regard is due to its composite nature, as it aims not only at enhancing the protection of the environment but also at the promotion of socio-

130 Lynch 1994 <http://www.ciel.org/Publications/olp3iii.html>.

131 Lynch 1994 <http://www.ciel.org/Publications/olp3iii.html>.

132 Alberts *Improving Community Involvement in Biodiversity Conservation in Southern and South Africa: A Legal Analysis* 25.

economic development. The Banjul Charter in this regard acknowledges the indivisibility and universality of economic, social, cultural, political and civil rights. Furthermore, the Banjul Charter contains the principle of the universality of human rights, where it states that “the satisfaction of economic, social and cultural rights is a guarantee of the enjoyment of civil and political rights”. The importance of this right to the achievement of sustainable development should be based on the need for African states to respect, protect, promote and fulfil the obligations they assumed under the Banjul Charter. It should be noted, however, that Article 24 does not give the criteria for judging that an environment is generally satisfactory.¹³³ Bearing in mind that access to modern energy has positive impacts on sustainable development; the author postulates that such access may be considered as one of these criteria. The author proposes that the legal basis for the realisation of this criterion should be founded on an inference drawn from the interpretation of social, economic and cultural rights by the African Commission and other international institutions. This proposition should find its basis in the rights already enumerated in the Banjul Charter, Articles 22 and 24.

The Banjul Charter also mandated taking into account the provisions of international law when interpreting the rights enshrined in the Charter.¹³⁴ Below is a discussion of international instruments that provide for the protection of the right to development and the form the right should take.

The right to development under the international law regime is also provided for in the United Nations Declaration on the Right to Development.¹³⁵ This declaration affirms that the right to development is an inalienable human right by virtue of which every person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, thus providing a context in which all human rights and fundamental freedoms can be fully realised.¹³⁶ The individual is the central subject of development and should be an active participant

133 Barnard and Scholtz 2015 *South African Yearbook of International Law* 7.

134 Article 7 of the Banjul Charter.

135 United Nations Declaration on Development 1986.

136 Article 1(1) of the United Nations Declaration on the Right to Development of 1986.

and beneficiary of the right to development.¹³⁷ The right to development is not binding under the international law regime, however Sengupta¹³⁸ observes that:

The main aim of people's right to development in the Declaration was to stress the need to move from an economic a human development approach. Development as a process was to centre on raising the living standards of the majority of the population in developing countries who were poor and deprived leading to the improvement of the well-being of the entire population.¹³⁹

In 1993 the Vienna Declaration recognised the indivisibility and equal priority of all rights - economic, social, cultural, civil and political. It further stressed that democracy, development and human rights are interdependent and mutually reinforcing.¹⁴⁰ Both categories of rights are of importance in the design of effective strategies to achieve sustainable development.¹⁴¹ The Vienna Declaration and Programme of Action states in Article 10 that:

The World Conference on Human Rights reaffirms the 'right to development', as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. As stated in the Declaration on the Right to Development, the human person is the central subject of development. While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognised human rights. States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realisation of the right to development and the elimination of obstacles to development. Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.¹⁴²

137 Article 2(1) of the United Nations Declaration on the Right to Development.

138 Sengupta 2002 *Human Rights Quarterly* 837.

139 Sengupta 2002 *Human Rights Quarterly* 848.

140 Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, A/Con.157/24 (PartI) at 20 (1993)

141 The Universal Declaration of Human Rights 1948 includes rights and freedoms in each of these categories. Subsequently two international treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have made these rights part of international law. These instruments have now been ratified by 149 and 145 States respectively.

142 Article 10 of the Vienna Declaration.

The *Rio Declaration on Environment and Development, 1992*¹⁴³ also provides for the harmonisation of the environment and development. The first of its principles reads as follows: "Human beings are at the centre of concerns for sustainable development.¹⁴⁴ They are entitled to a healthy and productive life in harmony with nature". Principle 23 states that "The environment and natural resources of people under oppression, domination and occupation shall be protected". What is noteworthy about this declaration is the fact that it recognises the interdependence and indivisibility of peace, development and environmental protection,¹⁴⁵ and what it says is that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations"¹⁴⁶ and that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".¹⁴⁷

All legal instruments that have used the term "right to development," under the international regime, however, are arguably "soft-law", and thus would not be considered binding texts in a traditional legal context. However, under the African regime, the right to development is protected under a binding instrument.¹⁴⁸ Assuming the existence of the right to development, the above instruments and perspectives suggest that in addition to constituting a distinct human right, the right to development is also complementary to the right to satisfactory environment. Against this background, the provisions in Articles 22 and 24 of the Banjul Charter related to environmental and developmental rights should act as a powerful instrument for protecting the environment against all forms of degradation. Development policies should be designed and implemented in a manner that is consistent with the principle of equality and non-discrimination, paying special attention to social groups that are particularly vulnerable. This criterion is relevant,

143 Annex I Rio Declaration on Environment and Development. The United Nations Conference on Environment and Development, Rio de Janeiro June 1992.

144 Principle 1 of the Rio Declaration.

145 Principle 25 of the Rio Declaration.

146 Principle 3 of the Rio Declaration.

147 Article 4 of the Rio Declaration.

148 Article 22 of the Banjul Charter.

taking into consideration the plight of people living in rural areas who are deprived of access to modern energy. The exception is, South Africa which has achieved a considerable success in electrifying its rural areas, although it is still relying heavily on coal generated electricity which is a cause of concern in this dissertation.

Shelton¹⁴⁹ has, in the mind of the author, precisely pointed out that "...virtually every text concerning a right to environment qualifies the word environment with adjectives describing a particular kind or quality of protected environment..." The term "right to environment," therefore, is imprecise. This flexibility in terminology renders it difficult to say whether there is one "right to environment", or in fact several related rights to the environment, namely a "right to a healthful and safe environment", a "right to an environment ... adequate for ... health, well-being and dignity", a "right to a healthy environment" or a "right to a secure, healthy and ecologically sound environment".¹⁵⁰ Notwithstanding the stylistic variations, each of the articulations contains an identifiable essential: that the human right regarding the environment concerns affording each person a right to an environment that supports his or her physical and spiritual well-being and development. The type of environment suggested in the AU instruments is one which is ecologically sound. The term is imprecise but it would probably proscribe the degradation of forests, the depletion of biodiversity, and the pollution of air and water to a level which compromises human health.¹⁵¹ The author therefore believes that these catastrophes are likely to be curbed by the provision of increasing access to renewable energy.

Ultimately, the achievement of the right to development is dependent upon the realisation of all human rights, and development is dependent upon the maintenance and enhancement of environmental and social quality. In the context of sustainable development, the right to development and the right to environment are complementary. It is too uncertain at the moment to state that a right to sustainable development has been recognised in general by the international community. In this

149 Kiss and Shelton *International Environmental Law* 174-178; Shelton 1991 *Stanford Journal of International Law* 103.

150 Kiss and Shelton *International Environmental Law* 174-178; Shelton 1991 *Stanford Journal of International Law* 103.

151 See Chapter 2 above.

case, increasing the provision of access to renewable energy should be seen as a way to give effect to the protection of the right to development and the right to an environment favourable to development.

4.3 Energy and human rights

The human rights framework protects civil, political, economic, social and cultural rights. There are basic principles that are always part of human rights standards and implementation.¹⁵² These principles are universality, indivisibility, participation, accountability, transparency and non-discrimination.¹⁵³ These principles are applicable to access to renewable energy. Take for example, the indivisibility principle. It indicates that human rights are indivisible and interdependent, which means that in order to guarantee civil and political rights, a government must also ensure economic, social and cultural rights (and vice versa).¹⁵⁴ The indivisibility principle recognises that if a government violates rights such as the right to health, this violation necessarily affects people's ability to exercise other rights such as the right to life.

The principle of the indivisibility of human rights is relevant to ensuring access to renewable energy across Africa. It is applied taking into account the role of energy in meeting people's basic needs, as well as in safeguarding a broad range of human rights. The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), for instance, reveals how essential access to energy is to a wide range of socio-economic goals upheld by the ICESCR. Article 11 of the ICESCR provides a list of a number of rights that are essential to achieving a decent standard of living, including access to adequate food, clothing and housing, and to continuous improvement in living standards. Article 12 confers the right to the highest attainable standard of physical and mental health. Articles 6 and 7 of the ICESCR establish the

152 United Nations Economic, Social and Cultural Rights: *Handbook for National Human Rights Institutions* 3.

153 United Nations Economic, Social and Cultural Rights: *Handbook for National Human Rights Institutions* 3.

154 United Nations High Commissioner for Human Rights date unknown <http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>.

right to work, while article 13 establishes the right to education. In a way in attempting to safeguard socio-economic and cultural rights, civil and political rights are also promoted. Though these rights are embodied in different covenants, they stem from the same source, however, which is the Universal Declaration of Human Rights.¹⁵⁵ The ICESCR protects socio-economic and cultural rights whereas the International Covenant on Civil and Political Rights (hereinafter the ICCPR)¹⁵⁶ provides for the protection of civil and political rights.

Still on the topic of the indivisibility of human rights, the right to development appears in the Declaration on the Right to Development as a unifier of the two covenants, the ICCPR and the ICESCR. The formulation of the right to development unifies civil and political rights with economic, social and cultural rights into an indivisible and interdependent set of human rights and fundamental freedoms, to be enjoyed by all human beings.¹⁵⁷

4.4 Interpretation of socio-economic rights by the African Commission

Writers reluctant to recognise second generation rights as human rights have often based their arguments on the assumption that courts are unable to enforce affirmative duties on states and that therefore such rights are mere aspirational statements.

Consideration has to be given to what has already been achieved by the African Commission in practice. The recent decision of the African Commission gives a guideline on what could be a way forward relating to governance issues in African countries. Of specific relevance to this issue is the manner in which the African Commission dealt with the question as to the justiciability of the right to development contained in article 22 of the Banjul Charter. The African Commission views the right to development as a two-pronged test, that it is both constitutive and instrumental.¹⁵⁸ Stated differently, the right to development is useful as either a

155 Universal Declaration of Human Rights 1948.

156 International Covenant on Civil and Political Rights 1966.

157 Preamble to the Declaration on the Right to Development.

158 *Endorois* para 277.

means or an end in itself. It views a violation of either the procedural or substantive element as a violation of the right to development – in other words, the satisfaction of the right to development is dependent upon the fulfilment of both prongs. The African Commission notes the complainants' arguments that recognising the right to development requires fulfilling five main criteria: the recognition must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.¹⁵⁹

The African Commission had to give a more fleshed out decision in the SERAC case.¹⁶⁰ The SERAC case was based in a communication submitted to the African commission on March 14, 1996 by the Social and Economic Rights Action Committee (SERAC) of Nigeria and the Centre for Economic and Social Rights (CESR). In their communication on behalf of the Ogoni people, the NGOs alleged that the Nigerian government was in violation of a series of articles of the African Charter on Human and Peoples Rights. The articles they claimed were violated were: Articles 16 and 24, relating to the right to health and the right to a healthy environment; the right to housing, which was deduced from combining the right to property (Article 14), the right to health (Article 16) and the right to family (Article 18); the right to food, which was deduced from the right to life (Article 4) and the right to health (Article 16); the right to non-discrimination (Article 2) and the right of peoples to freely dispose of their resources (Article 21).

In its decision in the SERAC case the African Commission emphasised state responsibility for the actions of a non-state actor which violated the Ogoni peoples' rights. The African Commission was of the view that the right to development had been violated, although it did not pronounce such violation in its decision. It referred to the violation of the right to development while emphasising the violation of "the right to food" implicit in several violated provisions. The African Commission indicated that:

¹⁵⁹ *Endorois* case, para 128.

¹⁶⁰ *155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*.

The right to food is implicit in the African Charter, in such provisions as the right to life (Article 4 of the Banjul Charter), the right to health, and the right to economic, social and cultural development (article 22 of the Banjul Charter). By its violation of these rights, the Nigerian government trampled upon not only the explicitly protected rights, but also upon the right to food implicitly guaranteed.¹⁶¹

Although the African Commission had the latitude to pronounce on the right to development, it failed to use the opportunity to provide a dynamic reading of law to clarify the scope and protect the right to development.¹⁶² The African Commission also found a violation of the right to shelter, which is not explicitly provided in the Banjul Charter, through the combination of the protection of the right to health, property and family.¹⁶³ A similar approach could have been used to link other human rights together to pronounce a violation of the right to development, even if the latter was not expressly provided for by the Banjul Charter.¹⁶⁴

Although the African Commission stopped short of commenting in the SERAC case on the current status of the right to healthy environment, its reflections are significant.

The Endorois case¹⁶⁵ was brought before the African Commission by the Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council alleging that the Kenyan government had violated the human rights of the Endorois Community, an indigenous people, by forcibly removing them from their ancestral land without adequate compensation for the loss of their property. This state of affairs was also disruptive to the community's pastoral enterprise and constituted a violation of their right to culture, as well as the overall process of development of the Endorois people.

161 *SERAC* case para 63-64.

162 Kamga 2011 *De Jure* 389.

163 *SERAC* case para 60.

164 Kamga 2011 *De Jure* 390.

165 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003.

In the Endorois case the African Commission departed from “the doctrine of implied rights” which had assisted it in finding the violation of the right to housing and food in the SERAC case. It went for a broader interpretation of the law which enabled it to consider the interdependency of rights in protecting the right to development. As a result, the African Commission highlighted the holistic character of the right to development, which encompasses elements of non-discrimination, participation, accountability and transparency.¹⁶⁶ It described the right to development as being both “constitutive and instrumental”;¹⁶⁷ hence, the violation of either the procedural or substantive element constituted an encroachment on the right.

The African Commission noted that while the terms “peoples” and “indigenous community” aroused emotive debates, some marginalised and vulnerable groups in Africa were suffering from particular problems. It was aware that many of these groups had not been accommodated by the dominant developmental paradigms and in many cases were being victimised by mainstream development policies and thinking. Their basic human rights were being violated. The African Commission was also aware that indigenous peoples had, due to past and ongoing processes, become marginalised in their own countries, and that they needed recognition and protection of their basic human rights and fundamental freedoms.¹⁶⁸

Furthermore, the African Commission in the Endorois case fleshed out what should be the standard for participation to realise the right to development. The African Commission indicated that “prior informed consent” is the minimum standard to be achieved by states before undertaking any endeavours in indigenous peoples’ communities.¹⁶⁹ In this respect, the African Commission indicated that:

The State has a duty to actively consult the said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties.¹⁷⁰

¹⁶⁶ *Endorois case* para 128.

¹⁶⁷ *Endorois case* para 277.

¹⁶⁸ *Endorois case* para 148.

¹⁶⁹ *Endorois case* para 148, Kamga 2011 *De Jure* 390.

¹⁷⁰ *Endorois case* para 289.

The SERAC decision indicates that courts are placed in a better position to articulate the substantive content of the right to a satisfactory environment.¹⁷¹ The African Commission herein indicated that the right to a general satisfactory environment:

Requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and secure an ecologically sustainable development and use of natural resources...Government compliance with the spirit of Article 24...must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous material and activities, and providing meaningful opportunities for individuals to participate in the development decisions affecting their communities.¹⁷²

These obligations as spelled out by the African Commission have both substantive and procedural aspects. Procedural aspects are invariably essential to democratic processes and participation.¹⁷³ These procedural rights aim for transparency, accountability and participation in decision-making.¹⁷⁴ In so far as they allow for public engagement in developmental and environmental decision-making, they appear to strengthen concerns for ecological sustainability.¹⁷⁵ The procedural aspects are therefore important in safeguarding the energy sector, which has been hampered by the lack of such rules in Africa.¹⁷⁶ Procedural rights are important because they serve as prerequisites for better decision making. In addition, a positive obligation is placed on states to take appropriate steps to safeguard the lives of those within their jurisdiction. This obligation entails above all a primary duty on the state to put in place a legislative and administrative framework designed to provide effective development and to safeguard environmental issues.

171 Amechi 2009 *Law, Environment and Development Journal* 65.

172 SERAC paras 52-53.

173 Bosselmann *The principle of sustainability: Transforming law and governance* 116.

174 Bosselmann *The principle of sustainability: Transforming law and governance* 116.

175 Bosselmann *The principle of sustainability: Transforming law and governance* 116.

176 See chapter 3 above.

The decisions of the African Commission clearly show its legal recognition of the idea that environmental degradation can result in the deprivation of existing human rights. Mere recognition of such deprivations is not enough to promote and secure a healthy environment. To achieve this, two approaches have been followed in the past: one is to strengthen procedural rights and the other is to recognise the substantive part of the right.

The African Commission also referred to international law and to the European Court of Human Rights, where the court had to deliver judgements in difficult cases on the basis of general assumptions, theories and principles.¹⁷⁷ This is relevant in any case where no hard and fixed specific rules seem to exist and the case must still be decided.¹⁷⁸ What has also become apparent from the African Commission's decisions is that in the absence of general open-ended clauses containing the fundamental principles underlying the Banjul Charter, the courts will try to deduce them from the text.¹⁷⁹

In dealing with issues of increasing access to renewable energy, it is important to note that the right to development and the right to favourable environment should be interpreted extensively and also that the Banjul Charter is a dynamic treaty which needs to be adapted to changing circumstances.¹⁸⁰ An example of this practice is the *Tyrer* case,¹⁸¹ ruled by the European Courts on Human Rights, wherein the court noted:

The Convention is a living instrument which must be interpreted in the light of the present day conditions. In the case now before it, the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member states of the Council of Europe.¹⁸²

In accordance with the above reasoning, the Banjul Charter should also be treated as a dynamic treaty which needs to be adapted to changing circumstances. The

177 *SERAC Case* para 57.

178 Herringa "Human rights and general principles and their importance as a legislative technique. Do they matter in legislation? An analysis with specific reference to environmental protection"10.

179 *SERAC Case* paras 63-64.

180 *SERAC case* para 68.

181 *Tyrer v. the United Kingdom* 5856/72, 25 April 1978.

182 *Tyrer Case* para 31.

historical purpose behind the drafting of the Banjul Charter was to address the impacts of colonialism impacts on African States:¹⁸³

The Banjul Charter is not an accident of history. Its creation by the (Organisation of the African Union (OAU)) came at a time of increased scrutiny of States for their human rights practices, and the ascendancy of human rights as a legitimate subject of international discourse. For African states, the rhetoric of human rights had a special resonance for several reasons, including the fact that post-colonial African states were born out of the anti-colonial human rights struggle, a fight for political and economic self-determination and the need to reclaim international legitimacy and salvage its image.

However, colonialism is now a thing of the past. The theme for the AU should therefore shift, be directed towards prevailing circumstances, and address the currently pressing needs such as poverty, energy poverty, under-development, and environmental degradation, and the need to stabilise the greenhouse gas emissions which cause climate change through the promotion of sustainable energy, for instance, renewable energy sources.¹⁸⁴ These are the most pressing issues, given that most African states fall into the category of Least Developed countries.¹⁸⁵ Africa too is vulnerable to climate change. This was reiterated in the NEPAD:

a pledge by African leaders ... that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively on a path of sustainable growth and development and, at the same time, to participate actively in the world economy and body politic.¹⁸⁶

In addition, the decisions of the African Commission are a clear indication that the rights guaranteed under the Banjul Charter must be effective and not illusory rights.¹⁸⁷ This means that the State parties to the AU must do everything possible to effectively ensure that the rights can be enjoyed in practice. This rule therefore implies that positive obligations can be imposed upon states to actively promote the

183 The African Commission reiterated this in the *Endorois case*, footnote 49.

184 Todorova 2014 <http://www.thenational.ae/uae/environment/climate-change-is-the-defining-issue-of-our-time-uae-forum-hears>.

185 See chapter 2 above.

186 NEPAD para 1.

187 *SERAC case* para 68.

realisation of the rights. In this regard the African Commission observed the following:¹⁸⁸

The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to the African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make it clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian government did not live up to the minimum expectations of the African Charter.

When interpreting the Banjul Charter the African Commission took into account the consensus among the contracting states. This approach therefore means that gradually the scope of the treaty will be widened. AU members seem to have accepted environmental protection and ecologically sustainable development as being part of the human rights approach and as being capable of legal enforceability. Several African states have adopted constitutions and laws pertaining to the right to an environment favourable to development. Furthermore, most African States are parties to the UNFCCC.

Overall, the decisions of the African Commission in the above cases are welcome and positive contributions to a stronger protection of economic, social, cultural and collective rights in the African context. The condemnations of the Nigerian government in the SERAC case and the Kenyan government in the Endorois case are clear and unequivocal.¹⁸⁹

The fact that the text of the provisions on economic, social and cultural rights in the Banjul Charter does not use the wording of progressive realisation probably has made it easier for the African Commission to find that the conduct of the government through its action and policy directly violated the rights of the Ogoni

188 *SERAC Case* para 68.

189 Coomans 2003 *International Comparative Law Quarterly* 9.

population. State parties owe obligations to respect, protect and fulfill all the rights enunciated in the African Charter, including the socio-economic rights. The obligation to respect, like that arising under CESC, means that states must "refrain from actions or conduct that contravene or are capable of impeding the enjoyment of economic, social and cultural rights".¹⁹⁰ The obligation to protect involves a duty to encourage third parties, including non-state actors, to respect these rights or refrain from violating them. The obligation to fulfill creates a duty that "requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights."

In addition, it should be noted that the collective rights in the present case as provided in Articles 22 and 24 are facilitative not only for the enjoyment of individual rights, but are also capable of being claimed by a group (the Ogoni or the Endorois people).¹⁹¹ Of course, more research into the underlying general principles is required, but it is self-evident that the court, through taking this approach, will be able to resolve many issues which might not be covered by the wording of the Banjul Charter. The use of this structure by the African Commission then shows how to make economic, cultural and social rights justiciable.

The African Commission rejected the traditional approach to the protection of human rights. The traditional approach provides for the division of human rights into three watertight compartments. The first compartment is occupied by civil and political rights as first-generation rights and they are meant to be capable of immediate realisation; the second generation rights are social, cultural and economic rights which can be progressively realised and impose a moral duty only; and lastly, the third generation rights, which are referred to as group rights, are thought by some authors to be end results to be attained and therefore not as rights which are capable of being realised.

¹⁹⁰ *Ibe African Journal of Human rights* 227.

¹⁹¹ Coomans *International Comparative Law Quarterly* 9.

4.5 The limitations of applying a human rights framework

While the importance of modern forms of energy can be identified from within the framework of existing AU law, the promotion of access to renewable energy in this manner has its limitations. The need for energy security and increased access to modern energy may lead to the temptation to consider the use of fossil fuels as energy sources, as they are sufficiently abundant to satisfy the energy needs of the poor. Renewable technologies are believed to be cost ineffective. This then could lead to further development of the fossil fuel industry, where carbon emissions are predicted to escalate in response to social demands for economic prosperity and for satisfaction of people's basic needs.¹⁹²

The individualistic core of human rights is not conducive to the promotion of social, economic and cultural rights as second generation rights and also the protection of third generation rights such as the right to environment and development since they are regarded as group rights. This was reinforced by Bosselmann,¹⁹³ who pointed out that:

even where environmental and other public interest groups claim human rights violations of entire populations, the legal yardstick used in response is the individual's right to life or property.¹⁹⁴

This practice therefore, involves the use of a reductionist, almost absurd logic: the more people are threatened, the less likely are violations of human rights to be signalled.¹⁹⁵ There seems, then, to be a dramatic gap between morality and legality of development and the preservation of a healthy environment, and the issue therefore is how to close such gap. One possible course of action is to insist on the superiority of morality.¹⁹⁶ This argument propose that human rights fundamentally reflect human dignity and life as the highest values of modern civilisation. It would, therefore, not be acceptable to decide not to protect human rights on the basis of

192 Tully *North-western Journal of International Human Rights* 545.

193 Bosselmann *The Principle of Sustainability: Transforming Law and Governance* 115.

194 Bosselmann *The Principle of Sustainability: Transforming Law and Governance* 115.

195 Bosselmann *The Principle of Sustainability: Transforming Law and Governance* 115.

196 Bosselmann *The Principle of Sustainability: Transforming Law and Governance* 116.

their individual nature. Massive threats to human dignity and life would have to be considered as violations of individual human rights. The argument against this perspective is that it underestimates the clout of legal rights. They are not a direct reflection, but an ideologically filtered reflection of morality.¹⁹⁷ Generally and systematically, human rights have emerged from political liberalism preferring the protection of individual freedom to the protection of groups or entire populations. This “reduced concept of freedom” means that human rights only protect individualised legal positions in relative isolation from social and ecological conditions.¹⁹⁸ This isolation has never been complete. Developmental and environmental rights cases show that collective goods can be protected through human rights, but there are limits. This limitation is depicted scenario where, individual freedom is alleged as being threatened by collective interests, no matter how urgent they may be, individual freedom will prevail. An example *in casu* is individual property rights dominating over social and ecological responsibilities. To close the gap between the morality and the legality of rights, human rights themselves need to be redefined.

Another limitation of the human rights orientation is that it is ultimately directed at enhancing social and economic welfare and not at increasing energy access *per se*. The human rights paradigm does not entitle individuals to an immediate or free electricity supply. Nor is a rights-based approach simply intended to augment property rights or enable market participation.¹⁹⁹ Claims in the economic, social and cultural field are typically framed as broadly-formulated governmental programmes. The principle of progressive realisation under the ICESCR requires governments to take steps only to the maximum of their available resources to progressively achieve the rights recognised thereunder.²⁰⁰

However, unlike the ICESCR, the principle of progressive realisation is not specifically enumerated in the Banjul Charter, thereby leading several authors and

197 Bosselmann *The Principle of Sustainability: Transforming Law and Governance* 116.

198 Bosselmann *The Principle of Sustainability: Transforming Law and Governance* 116.

199 Bradbrook and Gardam 2006 *Human Rights Quarterly* 399.

200 Article 3 of the ICESCR.

the present author to conclude that rights under the AU are of equal importance and therefore capable of immediate realisation. The Banjul Charter contains some very basic notions to assist and allow the Courts or the African Commission to build a coherent interpretive model and to resolve hard cases which at first sight seem difficult to tackle but can be dealt with on the basis of a careful analysis, taking into account the basic values and principles of the AU. These principles include, *inter alia*, dignity and democracy. As these are the principles underlying the Banjul Charter, they are therefore the principles that should lead the AU members in their interpretation and the legislature in the enactment of laws and in the execution of policies.

There is increasing legal recognition of the idea that environmental degradation can result in the deprivation of existing human rights, and that the mere recognition of such deprivation is not enough to promote and secure a healthy environment. Strengthening procedural rights is also crucial. These are essentially democratic and participatory, and aim for transparency, accountability and participation in decision making.²⁰¹ However, they are only a prerequisite for better environmental decision-making and do not in themselves safeguard ecological sustainability.

The SERAC and Endorois cases suggest a general acceptance that environmental harm can cause human rights violations of entire populations. Environmental preservation is foundational for their culture. The rights protected by Article 22 of the Banjul Charter include the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. It is possible that a certain culture is closely linked to a particular way of life and that the industrial exploration of natural resources may affect the group's way of life.

The provisions of the Banjul Charter could be interpreted as being forward-looking; that is, they could be relied upon to address unforeseen problems, to close gaps and maintain coherence. Clearly, the decisions of the African Commission embraced the

201 Bosselmann *The Principle of Sustainability: Transforming Law and Governance* 116.

idea that traditional human rights concepts are insufficient to accommodate the continent's concerns relating to development, environmental protection and sustainability.

4.6 Conclusion

Following the lead shown by the decisions of the African Commission, AU law and policy could still go a long way towards the realisation of the need to increase access to renewable energy without the formal inclusion of an independent right in the Banjul Charter, but through a broad reading of the right to development and the right to satisfactory environment favourable to development.²⁰² Such an approach would not create a new right *per se* but it would merely recognise that the need to increase access to renewable energy can be addressed through its relevance to existing rights such as those enshrined in Article 22 and 24 of the Banjul Charter. Above all, AU laws and policies should reflect the overall purpose and objects of the AU²⁰³ as enshrined in the Constitutive Act, the Banjul Charter and the Abuja Treaty, for instance. It is also necessary to take into account the fact that the laws as enshrined in the Charters are dynamic.

The next chapter presents conclusions drawn from this research as a whole. The points made below are pressing in that they suggest a way forward for AU.

202 Cullet 1995 *Netherlands Quarterly of Human Rights* 13.

203 See chapter 3 above.

5 Conclusion and recommendations

5.1 Conclusion

It is to be understood that energy plays a critical role in the development process, as access to sustainable modern energy services contributes to poverty eradication, saves lives, improves health and helps provide for basic human needs. Where there is a limited supply of energy, this correlates closely with many indicators of poverty, such as poor education, inadequate health care and general hardship.²⁰⁴ The use of energy derived from fossil fuels contributes in large part to the emission of the greenhouse gasses associated with the warming of the earth's surface.²⁰⁵ The use of renewable energy should therefore be promoted in order to curb global warming and to contribute to the protection of human health against air pollution. There is an increasing appreciation of the role that renewable energy can play in helping to move the world towards a low carbon economy.²⁰⁶ In addition, energy efficiency can also play a role in increasing supply and moderating demand, thus reducing GHG emissions.

Lack of political will for implementation of laws among African countries undermines the renewable energy regime.²⁰⁷ Weak consultation and public participation mechanisms generally lead to poor management. In this thesis the author has argued that, along with an effective legal framework for increasing access to renewable energy, strong institutions of governance and the rule of law are important to increasing access to a supply of modern energy.²⁰⁸

It should be borne in mind that increasing access to renewable energy would address two issues facing the AU at this stage. On the one hand, the production of renewable energy would ensure energy security through the diversification of energy supplies, so that the dependence on fossil fuels and biomass would be considerably

204 See chapter 2 above.

205 See chapter 2 above.

206 See para 3.2 above.

207 See Chapter 3 above.

208 See para 3.4 above.

reduced. On the other hand, the development of renewable energy might contribute to enhanced climate resilience, since it would contribute to the mitigation of the effects of climate change. All in all, a change to renewable energy would help in ameliorating the consequences of climate change, including potential conflicts and security risks caused by the competition for natural resources.²⁰⁹

Recognition of the complementary relationships between civil and political rights on the one hand and economic, social and cultural rights to the other would strengthen as well as broaden the scope of energy poverty reduction strategies. The indivisibility principle is of the utmost importance in proving the interrelatedness of energy and other recognised social, cultural and economic rights.²¹⁰ The author has argued for a right-based approach to energy poverty reduction and has shown how human rights are being underpinned by a comprehensive AU legal framework and if realised in a sustainable manner can be employed as strategic tools in energy poverty reduction strategies. The human rights embedded in the Banjul Charter and the range of broadly-ratified human rights conventions and treaties are based on fundamental values. These values include equality and non-discrimination, peace and security, respect for fundamental principles and rights, social and cultural dignity, solidarity, tolerance, shared responsibility, accountable and democratic governance, and sustainable development. The same values would need to underpin the new transformative development agenda in Africa. They encompass social, economic and cultural rights, while also including civil and political rights related to peace and security and other challenges, as well as the right to development. The current energy poverty regime in Africa undermines development and environmental quality. These issues need to be addressed simultaneously in order to conform to the regional law and policy as mandated by the Article 3(k) and 3(l) of the Constitutive Act.²¹¹ Increasing renewable energy access therefore should be considered as solution to simultaneously address the twin issues facing Africa, that is, under-development and environmental degradation.

209 See para 3.3 above.

210 See para 4.3 above.

211 See para 3.2.1 above.

5.2 Recommendations

Given that the use of modern sources of energy underpins development, the movement to halt or reverse climate change and the concomitant environmental degradation, the current methods of energy production are unsustainable. Articles 22 and 24 of the Banjul Charter can therefore be taken as a beacon of hope by which to orient oneself about where to go and what to do. These articles may also serve as point of departure for the AU's policies and laws aimed at promoting increased access to renewable energy in Africa. These articles provide for how to proceed and what to do next. African states need to increase the provision of access to modern energy in order to meet Africa's developmental challenges,²¹² but the way in which modern energy is sourced should be environmentally friendly. These two articles should be used as a yardstick for enlightening the AU about its ambitions and goals and about the general elements that keep the body of law together, ensure coherence and continued improvements. The African Commission framed these enlightened articles and has interpreted them within the spirit and purpose of the specific provisions and the general idea and object of the Banjul Charter as a whole.

There are significant limits to the ability of human rights norms to provide a solution to a complex entrenched problem - the achievement of sustainable development through the implementation of a human rights agenda. It is not suggested that a legal strategy based on human rights alone can provide clear and simple answers to the issue of ensuring access to energy for the African region. What can be achieved, however, is the provision of a mechanism for utilising existing AU legal mechanisms that have the potential to play a valuable part in any efforts to resolve the problem. Considerable work needs to be undertaken in elaborating the content of such a relationship to existing human rights – civil, cultural, economic, political and social rights and to sustainable development. Moreover, efforts should be undertaken to

212 See chapter 2 above.

investigate the various ways in which this obligation on States could be met in relation to increasing access to modern energy.

There will be a necessity for precise drafting as well as to meet the need for open clauses which articulate the underlying general principles and give direction to the overall interpretation of specific clauses and allow the gaps to be filled and hard cases be resolved. These should be interpreted with the view that there is more at stake than a simple direct relationship with this right. The object and purpose of the Banjul Charter should be taken into account. Thus the power of the states under the Banjul Charter cannot be treated as power simpliciter, but as a power coupled with a duty to make sure that rights are realised effectively. The inference could be drawn from the decisions of the African Commission that the provision of increased access to renewable energy should find its legal basis in the right to development as enshrined in Article 22 and the right to an environment favourable to development provided in Article 24 of the Banjul Charter. This is relevant where development in the African continent is crippled due to the energy poverty prevalent in its communities.²¹³ Adopting this approach would pave the way for establishing a theoretical foundation for an environmentally benign African renewable energy regime. In the absence of a Charter recognising the right of access to energy in Africa, this could be a master stroke.

213 See chapter 2 in this regard.

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