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# Towards a right to sustainable energy

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Energy represents the cornerstone of modern life. However, current patterns of energy production are unsustainable. This is true for both the developed and developing worlds. In this context, this paper considers how, from a conceptual perspective, the law can contribute to more sustainable patterns of energy production can be addressed. The approach that this paper adopts is to consider two of the most important concepts that are relevant to the governance of modern environmental and societal challenges: human dignity and sustainable development. It is within this context that this paper contends that the convergence of these concepts provides the platform for a novel approach to encourage the sustainable production of energy by way of a 'right to sustainable energy'. With this in mind, this paper considers the forum in which a right to sustainable energy may be developed and outlines the content of the proposed right.

## INTRODUCTION

Energy represents the cornerstone of modern life. It 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 ... [T]hese services are essential to social inclusion and gender equality.<sup>1</sup>

Therefore, where there is a limited supply of energy this 'correlates closely with many indicators of poverty, such as poor education, inadequate health care and hardships imposed

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<sup>1</sup> *The Future We Want*, UN Doc. A/CONF.216/L.1 (2012), para 125 (hereafter, **The Future We Want**). See also: Ban Ki-moon, 'Sustainable Energy for All: A Vision Statement by Ban Ki-moon, United Nations Secretary-General' (United Nations, 2011) <[http://www.sustainableenergyforall.org/images/content/SG\\_Sustainable\\_Energy\\_for\\_All\\_vision\\_final\\_clean.pdf](http://www.sustainableenergyforall.org/images/content/SG_Sustainable_Energy_for_All_vision_final_clean.pdf)> (hereafter, **Sustainable Energy for All**), p 1 and 'WEHAB Working Group: A Framework for Action on Energy' (United Nations Environment Programme, 2002), p 7.

on women and children'.<sup>2</sup> It is for these reasons that it is well established that energy and the services that it sustains are 'critical for achieving sustainable development'.<sup>3</sup>

While energy represents a crucial ingredient to sustainable development, current patterns of energy supply are unsustainable.<sup>4</sup> Almost

[o]ne out of every five people on Earth lives without access to electricity and the opportunities it provides for working, learning, or operating a business ... Where modern energy services are plentiful, the challenge is different. Emissions of carbon dioxide and other greenhouse gases from fossil fuels are contributing to changes in the Earth's climate, to the detriment of those who depend on the planet's natural systems for survival.<sup>5</sup>

In light of these challenges, this paper considers how, from a conceptual perspective, the unsustainable patterns of energy production can be addressed. Drawing inspiration from the statements in the *Johannesburg Declaration on Sustainable Development*<sup>6</sup> and its accompanying *Plan of Implementation*,<sup>7</sup> this paper explores how the formal recognition of human dignity has laid the groundwork for a sustainable approach to energy production.<sup>8</sup>

Within this context, this paper contends that the convergence of human dignity and sustainable development provides the platform for the creation of a 'right to sustainable energy'. Such a right can contribute to a more sustainable approach to the production of energy.

Following this introduction, this paper considers the meaning of 'sustainable development' and 'human dignity'. This exercise is intended to be brief. Its purpose is to provide the context for the sections that follow. This paper then considers the formal convergence between human dignity and sustainable development within the context of

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<sup>2</sup> See, eg, WEHAB Working Group, above n 1, p 7.

<sup>3</sup> *The Future We Want*, UN Doc. A/CONF.216/L.1 (2012), para 125. While the recognition that energy is fundamental to achieving sustainable development was noted in the outcome document of the United Nations Conference on Sustainable Development in 2012 (hereafter, **Rio +20**), the link between energy and sustainable development is not new. For earlier statements in this regard see, eg, Commission on Sustainable Development, *Report on the ninth session 5 May 2000 and 16-27 April 2001* E/CN.17/2001/19 (2001) and José Goldemberg and Thomas B. Johansson, 'World Energy Assessment: Overview 2004 Update' (United Nations Development Programme, United Nations Department of Economic and Social Affairs and the World Energy Council, 2004).

<sup>4</sup> WEHAB Working Group, above n 1, p 7.

<sup>5</sup> Sustainable Energy for All, above n 1, p 1.

<sup>6</sup> *Johannesburg Declaration on Sustainable Development*, UN Doc. A/CONF.199/20 (2002) (hereafter, the **Johannesburg Declaration**).

<sup>7</sup> *Plan of Implementation of the World Summit on Sustainable Development*, UN Doc. A/CONF.199/20 (2002) (hereafter, the **Plan of Implementation**).

<sup>8</sup> Most recently, this relationship was recognised in *The Future We Want*, UN Doc. A/CONF.216/L.1 (2012), paras 125-9.

international environmental law. This review is concerned principally with the convergence that has occurred between these concepts in relation to matters concerning the production of energy. The focus of this section is principally historical, as the most recent developments in international environmental law have generally operated to reaffirm – rather than realign – the fundamental direction of this discipline. This paper then considers how a right to sustainable energy, which represents the natural evolution of the convergence between human dignity and sustainable development, can encourage more sustainable patterns of energy production.

## OVERVIEW OF THE CONCEPTUAL FRAMEWORKS

### A. Sustainable development

The *Declaration of the United Nations Conference on the Human Environment*<sup>9</sup> adopted at the United Nations Conference on the Human Environment<sup>10</sup> in Stockholm in 1972 represented the emergence of international environmental law. Principle 21 of the Stockholm Declaration encapsulated the foundation of international environmental law. This principle affirmed that:

States have ... the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>11</sup>

The Stockholm Declaration also contained one of the first statements of the concept of sustainable development within the emerging forum of international law (although this term did not emerge formally until 1987). The Stockholm Declaration noted that:

[f]or the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment. To defend and improve the human environment for present and future generations has become an imperative goal for mankind—a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.<sup>12</sup>

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<sup>9</sup> *Declaration of the United Nations Conference on the Human Environment*, 11 ILM 1416 (1972) (hereafter the **Stockholm Declaration**).

<sup>10</sup> The United Nations Conference on the Human Environment is hereafter referred to as the **Stockholm Summit**.

<sup>11</sup> *Declaration of the United Nations Conference on the Human Environment*, 11 ILM 1416 (1972), Principle 21.

<sup>12</sup> *Ibid*, preamble (para 6).

In essence, the Stockholm Declaration recognised that humans must live in collaboration with the environment while pursuing economic and social development. The effect of this statement, and the Stockholm Declaration more generally, was to create an indelible link, initially within international environmental law but more recently in transnational and national laws, between the pursuit of environmental protection and the concepts of economic and social development.<sup>13</sup>

Following the Stockholm Summit, deliberations at a number of international fora contributed to the development of international environmental law and the concept of sustainable development.<sup>14</sup> However, it was not until the publication of the *Brundtland Report*<sup>15</sup> at the World Commission on Environment and Development in 1987 that the concept of sustainable development came to dominate ‘legal debates in the fields of social and economic development and environmental protection’.<sup>16</sup> The definition of sustainable development offered by the Brundtland Report regarded sustainable development as ‘development that meets the needs of the present without compromising the ability for future generations to meet their own needs’.<sup>17</sup> It is this definition that is adopted in this paper.

The Brundtland Report recognised two critical limitations to the definition of sustainable development. First, ‘overriding priority’<sup>18</sup> should be given to the ‘needs, in particular the essential needs, of the world’s poor’.<sup>19</sup> In other words, sustainable development must seek to end the plight of those living in poverty by focussing principally on the needs of the world’s most vulnerable. The reason for the focus on the essential needs of the world’s poor was because

[a] world in which poverty and inequity are endemic will always be prone to ecological and other crises. Sustainable development requires meeting the basic

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<sup>13</sup> Christina Voigt, *Sustainable Development as a Principle of International Law* (2009), p 13.

<sup>14</sup> For example, in 1980 the International Union for Conservation of Nature published its World Conservation Strategy (see: ‘World Conservation Strategy: Living Resource Conservation for Sustainable Development’ (International Union for Conservation of Nature and Natural Resources, 1980. In 1983, the United Nations published the World Charter for Nature (see: *World Charter for Nature*, GA Res 37/7, UN GAOR, 37<sup>th</sup> sess, 48<sup>th</sup> plenary mtg, UN Doc A/37/7 (1983)).

<sup>15</sup> Our Common Future, *Our common future* (World Commission on Environment and Development, 1987) (hereafter, the **Brundtland Report**).

<sup>16</sup> Ashfaq Khalfan and Marie-Claire Cordonier Segger, *Sustainable development law: principles, practices and prospects* (Oxford University Press, 2004), p 2.

<sup>17</sup> Brundtland Report, above n 16, ch 2: I paras 1-2.

<sup>18</sup> Ibid, ch 2: I paras 1-2.

<sup>19</sup> Ibid.

needs of all and extending to all the opportunity to satisfy their aspirations for a better life.<sup>20</sup>

The second limitation to development identified by the Brundtland Report recognised that there are environmental limits to the actions that can be taken to further development. Development must therefore be limited by the ‘state of technology and social organization on the environment's ability to meet present and future needs’.<sup>21</sup> Therefore, sustainable development seeks to address the inherent tension that exists between social and economic development and environmental protection. It has been noted that such an approach is necessary because without it there exists a greater risk that decisions will ‘destabilize economic and social conditions’.<sup>22</sup>

Considered in its most general sense, sustainable development is therefore ‘constructed to frame cooperative, integrated solutions to some of the most significant challenges of our era’.<sup>23</sup> In this regard, sustainable development is not concerned with a single issue. Rather, its application is determined by the context in which it is considered. Sustainable development therefore represents a dynamic conceptual tool that is concerned with the priorities of the day relating to social and economic development and environmental preservation.<sup>24</sup>

Following the publication of the Brundtland Report, the concept of sustainable development has been considered in various internationally relevant documents. Chief among these were the 1992 *Rio Declaration on Environment and Development*<sup>25</sup> and the 2002 Johannesburg Declaration. Most recently, the 2012 outcome document of Rio+20 – The Future We Want – reaffirmed many of the concepts that were considered in the earlier documents of the past few decades.

While the literature that has emerged since the Brundtland Report has contributed to the understanding and application of sustainable development, these documents have not altered its basic understanding. In essence, the concept of sustainable development remains concerned principally with the following three matters:

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<sup>20</sup> Ibid, ch 2: I paras 4.

<sup>21</sup> Ibid, ch 2: I paras 1-2.

<sup>22</sup> Nicholas A Robinson (ed), *Strategies Toward Sustainable Development: Implementing Agenda 21* (Ocean Publications, Inc., 2004), p 12.

<sup>23</sup> Khalfan and Segger, above n 17, p 3.

<sup>24</sup> Ibid.

<sup>25</sup> *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (1992) (hereafter, the **Rio Declaration**).

- economic – the perspective of resource development;
- ecological – the perspective of environmental protection;
- social – the perspective of conservation for present and future human needs.<sup>26</sup>

## B. Human dignity

Human dignity is understood as an ‘eclectic and ambiguous notion’<sup>27</sup> that represents an amalgam of several main historical developments.<sup>28</sup> During classical Roman times – when the concept is said to have emerged – the term *dignitas hominis* (or simply *dignitas*) referred to an individual’s status.<sup>29</sup> This entitled an individual to respect and honour.<sup>30</sup>

*Dignitas* was also used to refer to a second, broader (and, for current purposes, more relevant) concept that related to the inherent dignity of humans. In this sense, the term *dignitas* was used to reflect humankind’s elevation above animals because animals were concerned only with ‘bodily satisfactions ... Man’s mind, on the contrary, is developed by study and reflection’.<sup>31</sup> The term *dignitas* therefore distinguished humans from other living species. This approach also reflected the need for humans to consider ‘nature and [the] organization of the universe and one’s place in it’.<sup>32</sup> The introspective philosophical approach subsequently led scholars to offer religious, humanist, moral and anthropological views about the meaning of human dignity and the role of humans within the universe.<sup>33</sup>

The religious interpretation of human dignity was informed by the distinction between ‘Man from beast’. This approach held that ‘humans are made in the image of God and

<sup>26</sup> Douglas E Fisher, *The Law of Governance of Water Resources: The Challenge of Sustainability* (Edward Elgar Publishing Limited, 2009), p 23.

<sup>27</sup> Doron Shultziner, ‘Human Dignity: Functions and Meanings’ in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer Netherlands, 2007) 73, p 73. See also: Nathan Rotenstreich, *Man and His Dignity* (Magnes Press, 1983).

<sup>28</sup> Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) *European Journal of International Law* 655, p 656.

<sup>29</sup> Oliver Sensen, ‘Human dignity in historical perspective: The contemporary and traditional paradigms’ (2011) 10(1) *European Journal of Political Theory* 71, p 76; McCrudden, above n 29, p 656.

<sup>30</sup> Sensen, above n 30, p 76; McCrudden, above n 29, p 656.

<sup>31</sup> Marcus Tullius Cicero, *De Officiis* (Harvard University Press, Translated by Walter Miller in 1913), p 30. See also: McCrudden, above n 29, p 657.

<sup>32</sup> Martin Benjamin, *Splitting the Difference: Compromise and Integrity in Ethics and Politics* (University Press of Kansas, 1990), p 88.

<sup>33</sup> For religious views see, eg, Milton Lewis, ‘A Brief History of Human Dignity: Idea and Application’ in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer Netherlands, 2007) 93, p 94. For humanist views see, eg, Pico della Marandola, *On the Dignity of Man* (Hackett Publishing Company, p 1486 (translated by C Glenn Wallis in 1965)). For moral views see, eg, Immanuel Kant in Immanuel Kant, *Grounding for the Metaphysics of Morals* (James W Ellington trans, Hackett Publishing Company, Inc., (first published in 1785) 3<sup>rd</sup> ed, 1993). For anthropological views see ,eg, Tom Bryder, ‘Patters for Future Research on Self-Esteem and Human Dignity in Mass Society’ (1994) 15(3) *Political Psychology* 401, p 401-14 and Shultziner, above n 28, p 80.

[because] God became human, all humans have dignity'.<sup>34</sup> During the period of the Renaissance, rationality and reason were concepts that came to be considered as being synonymous with the concept of dignity.<sup>35</sup> The 'root of Man's dignity'<sup>36</sup> was considered to be 'his ability to choose to be what he wants to be based on reason, and that is a gift from God'.<sup>37</sup>

The concept of human dignity was explored further during the period of the Enlightenment. The approach adopted during this period held that, rather than God being the reason for human dignity, dignity is associated with the concept of free will. This approach reflected that human dignity relates to 'man's autonomy, his capacity to be lord of his fate and the shaper of his future'.<sup>38</sup> This approach is often cited as the philosophical basis for human dignity and for its incorporation into various documents concerning the law of international human rights.<sup>39</sup>

Despite the importance of the religious and philosophical approaches to human dignity, this concept did not receive popular attention until its incorporation within the discourse of political philosophy that occurred during the eighteenth and nineteenth centuries. During the French Revolution, for example, '*dignities*' – used in the sense of privileges that were afforded only to the aristocratic class – were provided to all citizens. This meant that all citizens were 'equally eligible to all public *dignities* ... without other distinction than that of their virtues and talents'.<sup>40</sup> This formulation of human dignity subsequently became synonymous with a variety of social and political movements that advocated specific types of social reform.<sup>41</sup> For example, human dignity informed the movements that were concerned with the promotion of the concept of equality, the abolition of slavery and the improvement of labour, social and living conditions.<sup>42</sup> Despite the different subject matters, the common

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<sup>34</sup> Lewis, above n 34, p 94.

<sup>35</sup> McCrudden, above n 29, p 659.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Yehoshua Arieli, 'On the Necessary and Sufficient Conditions for the Emergence of Dignity of Man and his Rights' in David Kretzmer and Eckart Klein (eds), *The concept of human dignity in human rights discourse* (Kluwer Law International, 2002) 1, p 12.

<sup>39</sup> Carlos Ruiz Miguel, 'Human Dignity: History of an Idea' in *Jahrbuch des öffentlichen Rechts der Gegenwart* (J. C. B. Mohr (Paul Siebeck) Tübingen, 2002) vol 50, p 281.

<sup>40</sup> *Declaration of the Rights of Man and the Citizen* (1789), art 6.

<sup>41</sup> McCrudden, above n 29, p 660.

<sup>42</sup> See, eg, *ibid.*, Simon Bolivar, Message to Congress of Bolivia (Lima, 25 May 1826), quoted in Paolo Wright-Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights' (2003) 25 *Human Rights Quarterly* 281, p 301, Allan Flanders, *Management and unions: the theory and reform of industrial relations* (Faber, 1970), p 239 and Joern Eckert, 'Legal Roots of Human Dignity in German Law' in David Kretzmer and Eckart Klein (eds), *The concept of human dignity in human rights discourse* (Kluwer Law International, 2002) 41, p 47.

thread among these modern political approaches to human dignity was the recognition of the inherent value of human beings and their entitlement to certain and fundamental rights that operate as the basis for a dignified life.<sup>43</sup>

Based on the philosophical and political approaches, human dignity is considered to have strong moral implications that affect the operation of political life and human relations.<sup>44</sup> It is for this reason that scholars have noted that dignity represents an ‘objective and intrinsic value’<sup>45</sup> of humans. Therefore, when one speaks of human dignity, one refers to:

a value and intrinsic goodness greater than, and different from, a modest aesthetic value ... When we speak of human dignity, we speak of [a] morally relevant value, one which evidently imposes on us a moral call and an obligation to respect it.<sup>46</sup>

On this view, human dignity is non-relational.<sup>47</sup> It ‘endows each person with an intrinsic and objective preciousness’<sup>48</sup> that emerges from the context in which the concept is considered.

In the modern context, human dignity therefore provides individuals with the basis on which individuals can claim rights and have those rights recognised, protected and promoted. The recognition of this approach is evident in a number of international human rights documents, including the *Charter of the United Nations*,<sup>49</sup> the *Universal Declaration of Human Rights*,<sup>50</sup> and the two human rights covenants from 1966 – the *International Covenant on Civil and Political Rights*<sup>51</sup> and the *International Covenant on Economic, Social and Cultural Rights*.<sup>52</sup>

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<sup>43</sup> Sensen, above n 30, p 72.

<sup>44</sup> Jacques Maritain, *Man and the State* (Catholic University of America Press, 1998).

<sup>45</sup> Josef Seifert, *What is life?: the originality, irreducibility, and value of life* (Rodopi, 1997), p 97.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid, p 98.

<sup>48</sup> Ibid. See also: Sensen, above n 30, p 72.

<sup>49</sup> *Charter of the United Nations* (1945). The preamble to the *Charter of the United Nations* seeks ‘to reaffirm faith in fundamental human rights [and] in the dignity and worth of the human person’.

<sup>50</sup> *Universal Declaration of Human Rights*, GA Res 271A (III), UN GAOR, 3<sup>rd</sup> sess, UN Doc. A/810 (1948).

The preamble to the *Universal Declaration of Human Rights* recognises that the ‘inherent dignity of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’.

<sup>51</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 23 March 1976).

<sup>52</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) (hereafter, the **ICESCR**). The preambles to the covenants from 1966 note that the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [and] that these rights derive from the inherent dignity of the human person’.

While the incorporation of human dignity within the framework of international human rights law reflects its relevance to the recognition and protection of the intrinsic value of humankind, its historical evolution indicates that this concept is relatively opaque. For this reason, scholars have suggested that it is useful to consider human dignity as a set of complex ideas with a ‘basic minimum content’.<sup>53</sup> These are represented by the following three pillars:

- [The first is that] every human being possesses an intrinsic worth, merely by being human.
- The second is that this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth ...
- [The] third element [recognises that] ... the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa.<sup>54</sup>

While the assessment of the concept of human dignity stops short of exploring its intricacies and its applications in different fora (particularly in the modern context), this overview offers an understanding of its core content. Together with the assessment of sustainable development, the overview of human dignity provides us with sufficient context to consider the convergence of these concepts within the forum of international environmental law. This overview also provides the context for a right to sustainable energy, as such a right represents the natural evolution of the emerging relationship between sustainable development and human dignity.

## **THE RELATIONSHIP BETWEEN SUSTAINABLE DEVELOPMENT AND HUMAN DIGNITY**

The relationship between human dignity and sustainable development is well established in international environmental law. This relationship was initially identified in the Stockholm Declaration. Principle 1 of the Stockholm Declaration affirmed that ‘[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being’.<sup>55</sup> The reference to a ‘life of dignity’ recognises that ‘an environment of a particular quality is necessary for a man

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<sup>53</sup> McCrudden, above n 29, p 679.

<sup>54</sup> Ibid.

<sup>55</sup> *Declaration of the United Nations Conference on the Human Environment*, 11 ILM 1416 (1972), Principle 1.

to enjoy his fundamental rights to freedom, equality, and adequate conditions of life'.<sup>56</sup> In other words, the Stockholm Declaration recognised that the protection of the environment is essential for humans to have their intrinsic worth – their dignity – recognised and respected.

After the Stockholm Declaration, it took 20 years for the relationship between human dignity and sustainable development to be revisited formally within the framework of international environmental law. This observation does not suggest that the emerging content of international environmental law ignored the relationship between dignity and sustainable development in the intervening years. Rather, it suggests that for a number of years the relationship between human dignity and sustainable development was expressed in more subtle terms. For example, Principle 1 of the Rio Declaration proclaimed that humans 'are entitled to a healthy and productive life in harmony with nature'.<sup>57</sup> When considered in the context of the broader objects of sustainable development, one can suggest that to live a 'healthy and productive life' humans must first have their intrinsic worth recognised. However, unlike the approach of the Stockholm Declaration that recognised the relationship between dignity and sustainable development in express terms, the statement in the Rio Declaration merely inferred the existence of such a relationship. A similar approach was adopted in other documents, including in the Brundtland Report and in the programme of action that was published following the United Nations Conference on Environment and Development that was held in 1992 in Rio de Janeiro.<sup>58</sup>

The concept of human dignity was revisited in a formal sense within the context of sustainable development and international environmental law during the 2002 *World Summit on Sustainable Development*<sup>59</sup> and its accompanying Declaration: the Johannesburg Declaration. In one of its initial remarks, the Johannesburg Declaration noted that the governments that participated in the Johannesburg Summit were committed to 'building a humane, equitable and caring global society, cognizant of the need for human dignity for all'.<sup>60</sup> In addition to the general recognition of human dignity, the Johannesburg Declaration also identified the relevance of human dignity within the context of a number of specific issues concerning sustainable development. This was evident in Article 18 of the

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<sup>56</sup> Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law' (2003) 16 *Tulane Environmental Law Journal* 65, p 74.

<sup>57</sup> *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (1992), Principle 1.

<sup>58</sup> See, eg, Brundtland Report, above n 16, chs 4 and 7 and *Agenda 21: Programme of Action for Sustainable Development*, UN Doc. A/CONF.151/26 (1992), chs 3, 4 and 6.

<sup>59</sup> The World Summit on Sustainable Development is hereafter referred to as the **Johannesburg Summit**.

<sup>60</sup> *Johannesburg Declaration on Sustainable Development*, UN Doc. A/CONF.199/20 (2002), para 2.

Johannesburg Declaration. This article noted that the governments that participated in the Johannesburg Summit ‘welcome[d] the focus ... on the indivisibility of human dignity’<sup>61</sup> as this would enable greater ‘access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity’.<sup>62</sup>

Paragraph 18 of the Johannesburg Declaration represented an important milestone in the convergence of the concept of human dignity and sustainable development. This article formally recognised that to have one’s dignity recognised and promoted it was necessary to provide such basic requirements as clean water, sanitation and energy. The provision of such basic requirements would then contribute to the achievement of sustainable development, as the access to such basic requirements would contribute directly to the eradication of poverty. Therefore, paragraph 18 of the Johannesburg Declaration recognised specifically that the protection and promotion of human dignity could contribute to the achievement of sustainable development. In this sense, the Johannesburg Declaration not only reaffirmed the relationship that was originally identified in the Stockholm Declaration and developed implicitly in the years following the Stockholm Summit, but it also recognised that human dignity and sustainable development are inherently interdependent and complementary concepts.

The recognition of the interdependence of human dignity and sustainable development was considered further in the *Plan of Implementation of the World Summit on Sustainable Development*.<sup>63</sup> This relationship was considered specifically in the context of the role that energy could play in eradicating poverty and contributing to more sustainable patterns of energy consumption and production.<sup>64</sup> In relation to the issue of poverty, the Plan of Implementation recognised that access to sustainable energy represented ‘an indispensable requirement for sustainable development’.<sup>65</sup> In this regard, the Plan of Implementation called for all levels of government to:

improve access to reliable and affordable energy services for sustainable development sufficient to facilitate the achievement of the Millennium development goals, including the goal of halving the proportion of people in poverty by 2015, and as a

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<sup>61</sup> Ibid, para 18.

<sup>62</sup> Ibid.

<sup>63</sup> *Plan of Implementation of the World Summit on Sustainable Development*, UN Doc. A/CONF.199/20 (2002).

<sup>64</sup> Ibid, chs II and III.

<sup>65</sup> Ibid, para 7.

means to generate other important services that mitigate poverty, bearing in mind that access to energy facilitates the eradication of poverty.<sup>66</sup>

To achieve this objective, the Plan of Implementation suggested that it would be necessary to provide ‘access to reliable, affordable, economically viable, socially acceptable and environmentally sound energy services and resources’.<sup>67</sup> A similar approach would also be required to address the unsustainable patterns of energy consumption and production. In this regard, the Plan of Implementation noted that it would be prudent to ‘develop and disseminate alternative energy technologies, with the aim of giving a greater share of the energy mix to renewable energies’.<sup>68</sup> Therefore, the Plan of Implementation recognised that to contribute to the achievement of sustainable development while promoting the intrinsic worth of humans, it would be necessary to move beyond the traditional fossil fuel-based sources of energy and accelerate the deployment of energy sources that do not undermine the Earth’s ecosystem.

The approach that was posited by the Johannesburg Declaration and the Plan of Implementation represented an extension of the approach that was elicited by the Stockholm Declaration. However, unlike the approach from 1972, the documents that were delivered during and after the Johannesburg Summit revealed that to address the challenges relating to the poverty-energy-environment nexus it would be necessary to recognise the intrinsic worth of humans. This is because, it is only by recognising and protecting the worth of humans – which is achieved by providing them with the requirements for a dignified life – that sustainable development is able to address the matters required to eradicate poverty and provide for more sustainable patterns of energy production.<sup>69</sup>

While the extension of the relationship between human dignity, poverty and energy represents an important point in the development of international environmental law, from a practical perspective the convergence of these issues has had little effect. This conclusion is

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<sup>66</sup> Ibid, para 9.

<sup>67</sup> Ibid, ch II, para 9(a). See also, Ibid, ch II, para 9(g). The Plan of Implementation reinforced many of the recommendations that were contained in the Report on the ninth session to the Commission on Sustainable Development (see: Commission on Sustainable Development, *Report on the ninth session 5 May 2000 and 16-27 April 2001* E/CN.17/2001/19 (2001), Decision 9/1). See also: *Agenda 21: Programme of Action for Sustainable Development*, UN Doc. A/CONF.151/26 (1992), ch 33.

<sup>68</sup> *Plan of Implementation of the World Summit on Sustainable Development*, UN Doc. A/CONF.199/20 (2002), ch II, para 9(a) and ch III, para 20, ch III, para 20(e).

<sup>69</sup> This conclusion was reaffirmed by a 2012 report that was published by the United Nations Secretary-General’s High-Level Panel on Global Sustainability: Resilient People, Resilient Planet, ‘Resilient People, Resilient Planet: A future worth choosing’ (United Nations Secretary-General’s High-level Panel on Global Sustainability, 2012).

premised on the reality that more than 1.4 billion humans continue to live in poverty<sup>70</sup> while more than 80 per cent of the world's energy continues to be sourced from fossil fuels.<sup>71</sup> The prevalence of these issues is the reason why the United Nations chose to declare 2012 as the 'International Year of Sustainable Energy for All'.<sup>72</sup> It is also the reason why one of the principal themes of Rio+20 was to address the concept of 'a green economy in the context of sustainable development and poverty'.<sup>73</sup>

It is within this context that the remainder of this paper considers how a right to sustainable energy can contribute to an international legal framework that is designed to address some of the challenges relating to the poverty-energy-environment nexus.

## **TOWARDS A RIGHT TO SUSTAINABLE ENERGY**

### **A. The relationship between human rights and international environmental law**

Using a rights-based approach to encourage more sustainable patterns of energy production reflects a departure from the traditional structure of international environmental law. It also reflects a departure from the traditional approach that is used to conceptualise and apply the law of human rights.

Traditionally, international environmental law has been designed to address matters that are of a communal nature, such as water scarcity, environmental degradation and, most recently, climate change. In this sense, international environmental law has traditionally been concerned with the management of the course of events in a social system.<sup>74</sup> On the other hand, the traditional approach to human rights law is concerned with the imposition of individual sanctions and the protection of individual rights.<sup>75</sup> On this basis, it would seem that a right to sustainable energy, which seeks to operate at the intersection of human rights and international environmental law, would not fit neatly within one of these disciplines.

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<sup>70</sup> Martin Ravallion, Shaohua Chen and Prem Sangraula, 'Dollar a Day Revisited' (2009) 23(2) (2009) *The World Bank Economic Review* 163, p 180.

<sup>71</sup> 'Renewables 2011: Global Status Report' (Renewable Energy Policy Network for the 21st Century, 2011), p 17.

<sup>72</sup> Sustainable Energy for All, above n 1.

<sup>73</sup> José Antonio Ocampo, Aaron Cosbey and Martin Khor, 'The Transition to a Green Economy: Benefits, Challenges and Risks from a Sustainable Development Perspective' (Report by a Panel of Experts to Second Preparatory Committee Meeting for United Nations Conference on Sustainable Development, 2011), p 3.

<sup>74</sup> See, eg, Oran R Young, 'Governance for sustainable development in a world of rising interdependencies' in Magali A Delmas and Oran R Young (ed), *Governance for the Environment: New Perspectives* (Cambridge University Press, 2009), p 20; Carol Harlow, 'Deconstructing Government?' in Tom Ginsburg and Robert A. Kagan (eds), *Institutions & public law: comparative approaches* (Peter Lang Publishing, 2005), pp 143-4.

<sup>75</sup> See, eg, Young, above n 75, p 20 and Harlow, above n 75, pp 143-4.

However, such a view ignores the evolution of the relationship between international environmental law and the law of human rights. As a result, the traditional view of these legal disciplines now oversimplifies the reality of their interaction.<sup>76</sup> For this reason, rather than being considered to operate at two ends of the legal spectrum, the Office of the High Commissioner on Human Rights<sup>77</sup> has suggested that '[h]uman rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking in the area of environmental protection'.<sup>78</sup>

On the basis of this integrated view, the OHCHR has identified three approaches to the relationship between human rights and international environmental law. These approaches 'are capable of coexisting and do not necessarily exclude one another'.<sup>79</sup> The first approach 'postulates that the environment is a precondition to the enjoyment of human rights [and] ... underscores the fact that life and human dignity are only possible where people have access to an environment with certain basic qualities'.<sup>80</sup> The former Vice-President of the International Court of Justice, Justice Weeramantry, underscored this point when he noted that:

the protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.<sup>81</sup>

The second approach views human rights as 'tools to address environmental issues, both procedurally and substantively'.<sup>82</sup> The third approach recognises the 'integration of human rights and the environment under the concept of sustainable development'.<sup>83</sup> This approach requires the integration of economic, environmental and social justice issues<sup>84</sup> within the context of sustainable development.

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<sup>76</sup> Alan Boyle, 'Human Rights and the Environment: Where Next?' *The European Journal of International Law* 23(3) 613, p 616.

<sup>77</sup> The Office of the High Commissioner on Human Rights is hereafter referred to as **OHCHR**.

<sup>78</sup> OHCHR, *Analytical Study on the Relationship Between Human Rights and the Environment*, UN Doc. A/HRC/19/34, para. 2.

<sup>79</sup> *Ibid*, para 7.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgement, Merits) [1997] ICJ Rep 162 (Vice-President Weeramantry), para 21.

<sup>82</sup> *Ibid*, para 8.

<sup>83</sup> *Ibid*, para 9.

<sup>84</sup> *Ibid*.

Notwithstanding the evolution of the relationship between human rights and sustainable development, the basis of this relationship is being challenged by the emergence of the concept of the ‘green economy’. This concept has only emerged within the past decade. However, its emergence has been so profound that one of the principal objects of Rio+20 was to consider the role of ‘a green economy in the context of sustainable development and poverty eradication’.<sup>85</sup>

The United Nations Environmental Program has described the concept of the green economy as an economy that is

low-carbon, resource efficient, and socially inclusive. In a green economy, growth in income and employment are driven by public and private investments that reduce carbon emissions and pollution, enhance energy and resource efficiency, and prevent the loss of biodiversity and ecosystem services ... The key aim for a transition to a green economy is to enable economic growth and investment while increasing environmental quality and social inclusiveness.<sup>86</sup>

In this respect, the concept of the green economy ‘is compatible with the older concept of sustainable development that has been mainstreamed into the United Nations’ work for decades’.<sup>87</sup>

However, the tension that arises between the concept of the green economy and the relationship between sustainable development and the law of human rights is that the former

entails risks and challenges, particularly for developing countries, for whom economic development becomes more demanding and the fear arises that the new concept [of the green economy] could be used to reinforce protectionist trends, enhance the conditionality associated with international financial cooperation, and unleash new forces that would reinforce international inequalities.<sup>88</sup>

Put differently, the concept of the green economy risks undermining the recognition and protection of fundamental human rights if it fails to recognise the different application of sustainable development in developed and developing nations.

This tension is particularly pronounced in relation to the issue of energy. The reason for this is that without energy, development and the corresponding recognition of basic

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<sup>85</sup> *The Future We Want*, UN Doc. A/CONF.216/L.1 (2012), para 12.

<sup>86</sup> 'Towards a green economy: Pathways to Sustainable Development and Poverty Eradication' (United Nations Environment Programme, 2011), p 16.

<sup>87</sup> Ocampo, Cosbey and Khor, above n 74, p 4.

<sup>88</sup> *Ibid*, p 3.

human rights is not possible. However, if the energy that is required to support development is sourced from unsustainable sources, then this will contribute to outcomes where other basic rights (such as a right to a healthy environment) are not adequately recognised or protected. For this reason, the application of the concept of the green economy requires careful thought based on the context in which it is applied.

Therefore, in order for the concept of the green economy to support the pursuit of sustainable development, the recognition of human rights and, more particularly, a right to sustainable energy, it must address the ‘tradeoffs that may be involved at different stages of development and with different environment endowments and challenges’.<sup>89</sup> To manage these tradeoffs, a three-pronged approach has been suggested.<sup>90</sup> This approach requires that

developed countries ... take the lead in changing their production and consumption patterns; developing countries maintain their development goals but do so while adopting sustainable practices; and developed countries commit to enable and support the developing countries’ sustainable development through finance, technology transfer and appropriate reforms to the global economic and financial structures.<sup>91</sup>

By adopting such a nuanced approach, the pursuit of a green economy within the context of sustainable development can operate to enhance further the existing relationship between human rights and international environmental law and, more particularly for this paper, can also contribute to the sustainable production of energy.

## **B. The benefit of a right to sustainable energy**

Considered within the modern context, a right to sustainable energy that is designed to operate in conjunction with existing international environmental laws offers two principal benefits. The first relates to the ability of an individual to invoke the right and demand it of a state.<sup>92</sup> The second benefit extends beyond formal obligations on the state and concerns the recognition of the right in the context of interpreting and designing legal rules.

A right to sustainable energy could entitle its beneficiary to seek the recognition, protection and promotion of this right. To do so, a corresponding obligation (or duty) would need to be created. Such a duty would compel those that are bound by it to limit their actions so as not to breach the corresponding right. It would also compel these actors to undertake

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<sup>89</sup> Ibid, p 4.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid. These approaches are considered in more detail in Ocampo, Cosbey and Khor, above n 74, pp 76-93.

<sup>92</sup> Jennifer A Downs, 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1993) 3 *Duke Journal of Comparative and International Law* 351, p 364.

specific actions to ensure that the corresponding right can be fulfilled. If a duty were breached, the beneficiary of the right would be entitled to bring legal proceedings. Given that under the law of international human rights a right is conferred on an individual, it would be the individual that is the beneficiary of a right to sustainable energy while the corresponding duty would rest with the state.<sup>93</sup> Therefore, failure by a state to comply with its duty would generally entitle a victim to invoke the right and demand it of the state.<sup>94</sup>

The second benefit of a right to sustainable energy extends beyond the issue of legal enforceability, as rights are not solely concerned with ‘conferring rights enforceable by legal proceedings’.<sup>95</sup> Rights may also be used to ‘ascribe value or status to the interests and claims of particular entities’.<sup>96</sup> In this regard, rights can encourage

law-makers and institutions to take account of those interests, to accord them priority which they might not otherwise enjoy and to make them part of the context for interpreting legal rules.<sup>97</sup>

Considered in the context of international law, whether a right is justiciable will not be determinative of whether that right has any impact.<sup>98</sup> This is because the mere recognition of a right can provide a ‘focus for efforts at both the national and international level to bring pressure to bear on states to fulfil their responsibilities to citizens’.<sup>99</sup> Therefore, the recognition of a right to sustainable energy may, even if it is not immediately capable of judicial enforcement, raise the awareness of the issues with which the right is concerned.

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<sup>93</sup> Adrian J Bradbrook and Judith G Gardam, 'Placing Access to Energy Services within a Human Rights Framework' (2006) 28 *Human Rights Quarterly* 389, p 412.

<sup>94</sup> See, eg, John Scanlon, Angela Cassar and Noemi Nemes, 'Water as a Human Right' (IUCN Environmental Policy and Law Paper No 51, IUCN Environmental Law Programme, 2004), pp 21-2. It has been noted that in relation to economic, social and cultural rights as well as those rights that appear to represent communal objectives (termed ‘solidarity rights’), ‘there is a long standing debate as to whether [these] ... right can really be regarded as rights at all given the fact that they are alleged to be non-justiciable in the sense of being unable to be subjected to judicial scrutiny (see: Bradbrook and Gardam, above n 94, pp 412-3). See also, eg, Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156, Atapattu, above n 57, pp 110-1 and Downs, above n 93, pp 363-7.

<sup>95</sup> Patricia W Birnie and Alan E Boyle, *International law and the environment* (Oxford University Press, 2<sup>nd</sup> ed, 2002), p 250.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> For a discussion on the challenges relating to whether a right will be justiciable see, eg, James R. May and Erin Daly, 'New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide' (2011) (1) *IUCN Academy of Environmental Law eJournal* 13. This article suggests that rights may not be justiciable in certain circumstances, including if it is not clearly defined, the right is not clear as to who might have standing to bring a claim or the right does not define what is an actionable violation of the right.

<sup>99</sup> Bradbrook and Gardam, above n 94, p 413.

Consequently, the proclamation of a right to sustainable energy could, if designed appropriately, potentially provide for a justiciable right. This could provide victims with an immediate opportunity to have that right recognised, protected and promoted. However, even to the extent that such a right were not immediately justiciable, the recognition of a right to sustainable energy would still operate to raise awareness of the issues with which the right is concerned and to encourage states to make it part of the context for interpreting and designing legal rules. In this regard, a right to sustainable energy provides new opportunities to enhance the production practices of energy that currently undermine the achievement of sustainable development.

Given that a right to sustainable energy offers some benefits to contribute to the achievement of sustainable development, the questions that arise are: (i) how might a right to sustainable energy be formulated within the framework of international law? and (ii) what would such a right entail? Let us address these questions in turn.

#### **A. The forum for a right to sustainable energy**

There are arguably only a few mechanisms through which a right to sustainable energy can be recognised within the framework of international law.<sup>100</sup> First, such a right might emerge under customary international law, as ‘evidence of a general practice accepted as law’.<sup>101</sup> Second, a right to sustainable energy might be able to be derived from the existing law of international human rights. Third, such a right could be formally recognised in a covenant.<sup>102</sup> Finally, a right to sustainable energy could also be recognised by being included in a soft law instrument.

Soft law instruments refer to instruments that are not legally binding *per se* but that nonetheless influence the direction of international law.<sup>103</sup> Such instruments include resolutions of the United Nations General Assembly, guidelines of international organisations and statements of principles. In this regard, Sands has noted that soft law instruments ‘point to the likely future direction of formally binding obligations, by informally establishing acceptable norms of behaviour’.<sup>104</sup>

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<sup>100</sup> Downs, above n 93, p 374.

<sup>101</sup> *Statute of the International Court of Justice*, art 38(1)(b).

<sup>102</sup> Downs, above n 93, p 374.

<sup>103</sup> Philippe Sands et al, *Principles of International Environmental Law* (3rd ed, 2012), p 108-9.

<sup>104</sup> Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003), p 124.

**a. Customary international law**

Customary international law is derived from legal custom that is evidenced by state practice.<sup>105</sup> Legal customs crystallise into international law ‘only if accompanied by a subjective belief on the part of the state concerned that it is under a legal obligation to conform to the custom’.<sup>106</sup> This belief usually only occurs after an extended period of time during which time the practice ‘is so widely and consistently followed that the necessary sense of obligation (the *opinio juris*) is apparent and established’.<sup>107</sup> Such practices may be recorded in the resolutions of the United Nations General Assembly, state statutes, international fora, statements from intergovernmental bodies, public statements of policy and judicial decisions.<sup>108</sup> However, in a ‘world of diverse cultures, policies, interests and legal systems’<sup>109</sup> it has been noted that is particularly difficult to identify universal practices sufficient to recognise customary international law.<sup>110</sup>

While customary international law offers an opportunity to recognise the right to sustainable energy, relying on such an approach may not be particularly useful. While there is growing documentary evidence of the need to develop energy production practices that are more sustainable, the recognition of the importance of energy and, more particularly, sustainable energy, is relatively novel. In fact, as Bradbrook and Gardam have suggested, ‘[i]n world fora relating to sustainable development, energy [has] lagged behind many other ... issues’.<sup>111</sup> Energy has only ‘reached center stage’<sup>112</sup> in the context of sustainable development and international environmental law since the ‘deliberations at and leading up to the ninth session of the Commission on Sustainable Development’<sup>113</sup> and the Johannesburg Summit in 2002.

Further, because of the ‘urgent, widely varied, and dynamic’<sup>114</sup> issues concerning the production of sustainable energy, it is suggested that these issues ‘would not be adequately addressed by a broad international legal norm which would require years to establish’.<sup>115</sup>

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<sup>105</sup> Sands et al, above n 104, p 111-2.

<sup>106</sup> Patricia W Birnie, 'International Environmental Law: Its Adequacy for Present and Future Needs' in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment* (Clarendon Press, 1992), p 57.

<sup>107</sup> Ibid.

<sup>108</sup> See, eg, Downs, above n 93, p 375, Birnie, above n 107, p 57 and Sands et al, above n 104, pp 111-7.

<sup>109</sup> Birnie, above n 107, p 57.

<sup>110</sup> Sands et al, above n 104, p 112.

<sup>111</sup> Bradbrook and Gardam, above n 94, p 389.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Downs, above n 93, p 376.

<sup>115</sup> Ibid.

Therefore, the right to sustainable energy does not appear to be particularly well suited to recognition within the forum of customary international law.

**b. *An inferred right to sustainable energy***

The second approach that may lead to the recognition of a right to sustainable energy involves inferring such a right from the existing legal framework governing international human rights. The application of this approach would not create a new right *per se*; it would merely recognise that such a right exists by virtue of its relevance to other, existing rights. Such an approach might work for a right to sustainable energy as this right is well grounded in the current law of international human rights. The right to sustainable energy is related to a number of rights that are contained in the ICESCR.<sup>116</sup> For example, the right to an adequate standard of living,<sup>117</sup> the right to the highest attainable standard of physical and mental health<sup>118</sup> and the right to work,<sup>119</sup> each rely on the availability of affordable and sufficient energy. The relevance of sustainable energy can also be observed in other international human right law documents, including the *Convention on the Rights of the Child*<sup>120</sup> and the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>121</sup> Therefore, the right to sustainable energy can be inferred from the context of existing human rights law.

While the importance of energy can be identified from within the framework of existing international law, recognising a right to sustainable energy in this manner has its limitations. Arguably, its greatest limitation is that inferring such a right merely creates an interpreted right. Therefore, such a right would carry ‘neither the clout nor the binding legal status

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<sup>116</sup> Boyle, above n 77, p 628.

<sup>117</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976), art 11.

<sup>118</sup> *Ibid*, art 12.

<sup>119</sup> *Ibid*, arts 6 and 7. For a thorough and detailed consideration of the interaction between matters related to access to energy and the current framework on international human rights see, eg, Bradbrook and Gardam, above n 94, Adrian J Bradbrook, Judith G Gardam and Monique Cormier, 'A Human Dimension to the Energy Debate: Access to Modern Energy Services' (2008) 26 *Journal of Energy and Natural Resources Law* 526 and Adrian J Bradbrook and Judith G Gardam, 'Energy and Poverty: A Proposal to harness international law to advance universal access to modern energy services' (2010) *Netherlands International Law Review* 1.

<sup>120</sup> *Convention on the Rights of the Child*, GA Res 44/25, UN GAOR, 61<sup>st</sup> plenary mtg, UN Doc. A/Res/44/25 (1989). Article 24 of this Convention provides for a right to enjoy the highest attainable standard of health. This requires access to energy and the services that it sustains.

<sup>121</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 107<sup>th</sup> plenary mtg, UN Doc. A/Res/61/295 (2007). Article 21 of this Declaration provides that a right for indigenous peoples to the improvement of their economic and social conditions, including, among other things, housing, sanitation, health and social security. Recognition and protection of each of these rights requires access to energy.

necessary<sup>122</sup> for its effective enforcement in the international setting. Consequently, the creation of an inferred right to sustainable energy is not suitable for a matter that is desperately urgent to address matters relating to human poverty and the future of the Earth's ecosystem.

*c. A treaty guaranteeing the right to sustainable energy*

The third approach that could be used to create a right to sustainable energy involves the creation of a treaty that is designed specifically to guarantee this right. Such an approach seems eminently more sensible than the two aforementioned approaches as its creation could (at least if consensus could be reached about its design) occur quickly and without the need to infer it from the existence of other rights. Importantly, a treaty that is designed specifically to guarantee a right to sustainable energy would give this right an independent legal status and, as a result, would provide legal recourse for the beneficiaries of the right.<sup>123</sup>

While a treaty that is concerned specifically with guaranteeing a right to sustainable energy might seem appropriate, it is useful to consider why such a treaty has not yet emerged if it represents the most robust approach. One of the most obvious reasons for this is that there is little consensus about what course of action is required to recognise, protect and promote a right to sustainable energy. This is because states in the developed world consider issues relating to energy principally through the lens of greenhouse gas emissions reductions while those from the developing world view energy as a fundamental tool to eradicate poverty.<sup>124</sup> These different interpretations consequently lead to different strategic responses. Further, even if agreement could be reached in relation to these issues, matters relating to energy, environmental protection and climate change have proven to be vexed issues where little consensus exists within international fora.<sup>125</sup> Therefore, a treaty that relies on a rigid framework and that requires broad international consensus does not appear to offer a practical approach to address the dynamic, complex and urgent matters required to guarantee a right to sustainable energy, at least not in a timely fashion.<sup>126</sup>

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<sup>122</sup> Downs, above n 93, p 378.

<sup>123</sup> Ibid.

<sup>124</sup> See, eg, Sustainable Energy for All, above n 1.

<sup>125</sup> The most obvious example of this discord relates to the negotiations on a new international climate change framework.

<sup>126</sup> Bradbrook and Gardam, above n 120, pp 11-2.

*d. The use of a soft law instrument to promote a right to sustainable energy*

The final approach that may be adopted to create a right to sustainable energy relies on a soft law instrument that promotes this right. Unlike the other approaches, there are no guidelines that describe how soft law is to be created or the form that such law should take. Soft law instruments can range from resolutions of the United Nations General Assembly, guidelines of international organisations, statements of principles, resolutions of international conferences of states, codes of conduct or declarations of international organisations. Therefore, the forum of international soft law provides great flexibility to create the foundations for a right to sustainable energy.

Soft law instruments ‘are particularly useful when the subject in question is one about which there may be considerable difficulty in reaching consensus amongst states’.<sup>127</sup> Addressing the unsustainable approach to energy production and poverty reflects such issues. For this reason, it is suggested that the most appropriate approach to formulate a right to sustainable energy is to develop a soft law instrument that recognises and promotes this right. Such an approach could provide ‘a flexible framework allowing states to feel comfortable working within its terms [and] is [therefore] far more likely to achieve some real outcomes’<sup>128</sup> rather than a rigid treaty that is unlikely to yield broad consensus. Therefore, an appropriately drafted soft law document could represent the basis for a right to sustainable energy.

A soft law instrument that is concerned with creating a right to sustainable energy could take the form of an informal document, such as a code of conduct or an action plan. Alternatively, a soft law instrument could be drafted so that it is presented in a more formal setting, such as in a declaration. This paper suggests that because a right to sustainable energy has not been considered at any length, it would be most appropriate to adopt an informal approach. Such an approach could be combined with the initiatives that are suggested in response to the United Nations’ Sustainable Energy for All initiative.<sup>129</sup> More importantly, such an approach could provide the basis for future work to formalise the right to sustainable energy so that it may eventually form part of the formal international legal framework.

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<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> See, eg, *Sustainable Energy for All* (2012) United Nations <<http://www.sustainableenergyforall.org/about-us>> and ‘Sustainable Energy for All: A Framework for Action’ (United Nations and The Secretary-General’s High-level Group on Sustainable Energy for All, 2012) <[http://www.sustainableenergyforall.org/images/content/SE\\_for\\_All\\_-\\_Framework\\_for\\_Action\\_FINAL.pdf](http://www.sustainableenergyforall.org/images/content/SE_for_All_-_Framework_for_Action_FINAL.pdf)>.

## B. Content of a right to sustainable energy

A legal right to sustainable energy must ensure that there is access on the basis of equality and without any discrimination to ‘reliable, affordable, economically viable, socially acceptable and environmentally sound’<sup>130</sup> energy that is sufficient to sustain those services and amenities (including the environment) that are required to live a dignified life.<sup>131</sup> Therefore, to be effective a right to sustainable energy must address a number of issues that are context specific.

For example, issues relating to ‘sufficiency’, ‘economic viability’ and ‘affordability’ are matters that cannot be readily defined, as they will mean different things when considered in different contexts. The amount of energy that is required to be made available will depend on the needs of individuals within a particular economy. For this reason, rather than offering a very specific definition in each context, it is more important that a soft law instrument be concerned with the fundamental matters with which each issue is concerned. Therefore, in the case of ‘sufficiency’, an instrument must provide that supply must be able to meet the ‘primary needs of the community it ... serve[s]’.<sup>132</sup> For affordability, which represents one of the major obstacles to implementing such a right, it is critical that the right requires that states identify and then work to negate the financial barriers that limit the affordability of energy.<sup>133</sup> In this regard, it is critical that any document that purports to support a right to sustainable energy must be practical and be cognisant of the different contexts in which such a right may apply.

A right to sustainable energy must also define what is meant by the concept of ‘environmentally sound’ energy. The Plan of Implementation suggested that the term ‘environmentally sound’ means that there must be an emphasis on reducing our reliance on fossil fuels to generate energy and, in its place, give ‘a greater share of the energy mix to renewable energies’.<sup>134</sup> The vision statement of the Secretary-General of the United Nations, which contains the objects of the ‘Sustainable Energy for All’ initiative, expanded on this statement by noting that to ‘underpin the goal of achieving sustainable energy for all, by

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<sup>130</sup> *Plan of Implementation of the World Summit on Sustainable Development*, UN Doc. A/CONF.199/20 (2002), ch II, para 9(a).

<sup>131</sup> Bradbrook and Gardam noted that the concepts of ‘non-discrimination’ and ‘equality’ are ‘features common to all human rights, irrespective of their provenance’ (see: Bradbrook and Gardam, above n 93, p 411).

<sup>132</sup> *Ibid*, p 409.

<sup>133</sup> ‘Energy for all: Financing access for the poor’ (International Energy Agency, 2011).

<sup>134</sup> *Plan of Implementation of the World Summit on Sustainable Development*, UN Doc. A/CONF.199/20 (2002), ch III, para 20(a).

2030'<sup>135</sup> there must be double 'the share of renewable energy in the global energy mix'<sup>136</sup> based on current total energy production. This requires that by 2030, approximately 30 per cent of the world's energy will need to be sourced from renewable sources.<sup>137</sup> Therefore, while it might appear trite, it is nonetheless critical that a right to sustainable energy recognises the importance of increasing the use of renewable sources to produce energy.<sup>138</sup> If possible, it would also be beneficial for such a document to put forward a medium and long-term goal that relates to increasing the use of renewable sources to produce energy.

However, merely noting that renewable sources of energy are environmentally sound is not sufficient. This is because not all renewable energy sources are environmentally benign. Therefore, not all renewable sources contribute to the achievement of sustainable development. For example, hydropower facilities (which rely on water to produce energy) rely on a renewable resource. However, hydropower facilities can have 'potentially large environmental impacts'.<sup>139</sup> These facilities can 'affect the hydrology of freshwater systems, obstruct upstream and downstream migration, and change the water flow and sediments'.<sup>140</sup> In this regard, a definition of environmentally sound energy sources must also consider the ecological impacts of various renewable sources to ensure that their impact does not undermine the achievement of sustainable development.

This discussion does not represent a definitive assessment of what is required to prepare a soft law instrument that is concerned with developing a right to sustainable energy. Clearly much more work is required to fashion a right to sustainable energy, even within the relatively informal nature of an international soft law document. To do so would require

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<sup>135</sup> Sustainable Energy for All, above n 1, p 3.

<sup>136</sup> Ibid. This is also contained in the zero draft of the outcome document for the United Nations Conference on Sustainable Development, *The Future We Want*, UN Doc. A/CONF.216/L.1 (2012), para 127).

<sup>137</sup> According to a 2011 study conducted by the International Energy Agency, in 2009, just over 13 per cent of the world's primary energy supply was sourced from renewable sources (see: 'Renewables Information 2011' (International Energy Agency, 2011), p 53).

<sup>138</sup> Arguably, the most popular definition for renewable energy has been adopted by the International Energy Agency, which notes that '[r]enewable [e]nergy is derived from natural processes that are replenished constantly. In its various forms, it derives directly or indirectly from the sun, or from heat generated deep within the earth. Included in the definition is energy generated from solar, wind, biofuels, geothermal, hydropower and ocean resources, and biofuels and hydrogen derived from renewable resources' (see: *Policies and Measures Databases* (2012) International Energy Agency <<http://www.iea.org/textbase/pm/glossary.asp>>).

<sup>139</sup> 'Towards efficient use of water resources in Europe' (EEA Report No 1/2012, European Environment Agency, 2012), p 19. See also, 'Dams and Development: A New Framework For Decision-Making - The Report of the World Commission on Dams' (World Commission on Dams, 2000), p 74.

<sup>140</sup> 'Towards efficient use of water resources in Europe', above n 140, p 19. In this regard, Volpi has offered a definition of 'new renewables', which excludes large hydropower systems as they pose threats to the environment and the communities involved (see: Giulio Volpi, 'Renewable Energy for Developing Countries: Challenges and Opportunities' in Volkmar Lauber (ed), *Switching to Renewable Power: A Framework for the 21st Century* (Earthscan, 2005) 83, pp 84-5).

input from various actors, including from the beneficiaries of such a right and from states that would be obliged to recognise, protect and promote this right.<sup>141</sup> This paper has merely sought to contribute to the discourse on this matter by identifying some of the most critical issues in this regard.

## CONCLUSION

Energy represents the cornerstone of modern life. It allows society to function, produce, invent and develop. It is also the fundamental ingredient for a dignified life, as it is the source of such basic human requirements as cooked food, a comfortable living temperature and essential health care. Somewhat ironically, however, humankind's overreliance on fossil fuels for energy means that the production of energy is undermining the livelihood of the Earth's ecosystem. This delicately nuanced approach has been recognised by international environmental law.

While the convergence of human dignity and sustainable development represented an important milestone in the maturation of international environmental law, this approach has proven insufficient to address the challenges posed by the poverty-energy-environment nexus. 1.4 billion continue to live in poverty, economic turmoil is undermining the ongoing development of the global economy and the warming of the Earth's climate is threatening the future prosperity of its ecosystem. It is for these reasons that this paper has suggested that it is timely to develop a right to sustainable energy in order to encourage more sustainable patterns of energy production. While the creation of such a right might represent a departure from the traditional approach existing under international environmental law, such a right furthers the convergence of sustainable development and human dignity.

To be clear, a right to sustainable energy would not replace the existing approaches concerning energy, poverty and the environment that exist within the framework of international environmental law; it would be designed to complement the existing approach. Therefore, the promotion of a right to sustainable energy does not advocate an anthropocentric approach to environmental protection or to sustainable development, more generally. While suggesting that a right to sustainable energy can contribute to the more sustainable patterns of energy production, this paper recognises that matters concerning the

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<sup>141</sup> Bradbrook and Gardam, above n 94, p 412.

environment ‘encompass a much wider range of actors, affecting a much larger category of species than human rights violations’.<sup>142</sup>

While this paper offers an approach to further encourage the sustainable production of energy, it does not purport to provide the answers to some of the most dynamic and complex issues threatening the sustainable existence of the Earth and its many and varied inhabitants. Rather, this paper has merely sought to recognise the inability of the current international legal framework to address the challenges posed by the poverty-energy-environment nexus.

This paper has suggested that a right to sustainable energy may be able to contribute to a solution to these challenges in a practical and meaningful way. Such an approach would also represent a natural evolution of the sentiments first enunciated in the Stockholm Declaration and carried forward to the Johannesburg Declaration and, more recently, at Rio+20 relating to the fundamental relationship between human dignity and sustainable development. More importantly, such an approach would also contribute to the eradication of poverty and the protection of the Earth’s ecosystem by better managing the Earth’s resources for the benefit of its human and non-human inhabitants. In this sense, the formal convergence of human dignity and sustainable development offers a tremendous opportunity to address many of the world’s most fundamental and persistent problems.

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<sup>142</sup> Atapattu, above n 57, p 67.