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RESEARCH HANDBOOK ON
Energy, Law and Ethics

Edited by
Malik R. Dahlan • Rosa M. Lastra
Gustavo Rochette

Research Handbook on Energy, Law and Ethics

Edited by

Malik R. Dahlan

Emeritus Professor of International Law and Public Policy, Centre for Commercial Law Studies, Queen Mary University of London, UK

Rosa M. Lastra

Sir John Lubbock Chair in Banking Law, Centre for Commercial Law Studies, Queen Mary University of London, UK

Gustavo Rochette

Legal and Compliance Officer, Movhera, Portugal, and Teaching Associate, Centre for Commercial Law Studies, Queen Mary University of London, UK

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Estela B. Sacristán[1]

1. INTRODUCTION

The screen blinks and turns black; the lights go out. One, two, three, four, five seconds; the lights turn on again. I look for the switch to boot the computer again after the micro-shortage. Was I energy-poor during those five seconds? The answer would most certainly be affirmative if we consider the term '*energy poverty*' in the sense of lacking access to energy as a consequence of infrastructure issues, in either of the electric cycle stages (generation, transportation and distribution or commercialization). Nevertheless, it has also been suggested that the concept of '*energy poverty*' can include a scenario in which a person, for some reason, (1) cannot afford to lawfully access the electricity distribution grid due to low income or its absence; (2) uses polluting fuels; or (3) uses excessive energy to meet his or her energy needs.[2] The concept behind each of these situations could be identified with one of the components of the energy trilemma: availability, affordability, environmental adequacy and *energy* efficiency.[3]

The framework set in the previous paragraph can be viewed from the 'needs' platform, the non-fulfilment of which represents poverty; but this path would lead to a conflict-based approach; the '*lacking*' component of the concept of '*poverty*' appears to naturally lead us to do so. It also introduces the actors into a confrontation between the energy-rich and the energy-poor; and leads to incommensurable debates because needs, being subjective in nature, can be considered infinite. Therefore, it seems more adequate to approach that working framework, at this preliminary stage, from the point of view of 'freedoms' given that freedom is ontologically inherent to human beings. Each of the situations described in the previous paragraph implies the curtailment of a freedom: respectively, freedom of expression; freedom of life; freedom of living in a clean environment; and freedom of inefficiencies. The moment

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[1] The author would like to thank the editors of this book, Professors Malik R. Dahlan and Rosa María Lastra, for their generous invitation to participate in this volume. While this chapter was being written, Gustavo Rochette's support and guidance was crucial and Maria Eugenia Bagnulo made wise comments and gave specialized insight. The work benefited from María Eugenia Mattera's generous reviews. Last, but not least, a young colleague, Rocio Eugenia Sánchez, volunteered to provide timely research whenever necessary.

[2] Íñigo del Guayo 'Energy Poverty and Energy Access. A Legal Analysis' in Íñigo del Guayo, Lee Godden, Donald N. Zillman, Milton F. Montoya, and José Juan González (eds.) *Energy Justice and Energy Law* (OUP 2020) 31–47, 32.

[3] In this chapter, the term 'efficiency' is used meaning 'energy savings.' Therefore, 'environmental adequacy' excludes efficiency considerations. Likewise, the Energy Efficiency and Conservation Act 2000 of New Zealand, Section 3, which defines energy efficiency as: 'a change to energy use that results in an increase in net benefits per unit of energy'. See Adrian Bradbrook, 'The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector' in Aileen McHarg, Barry Barton, Adrian Bradbrook, and Lee Godden (eds.) *Property and the Law in Energy and Natural Resources* (OUP 2010) 391–412, 393.

any of these freedoms is affected, we become aware of the existence of the corresponding 'right' and that is when we become conscious of the possibility of claiming that the right be reinstalled or that the situation obtains redress.[4]

Even if rights, as juridical categories, can be traced to ancient times, from the point of view of history, a special set of rights has been subject to recognition after World War II: 'human rights.'

Human rights may be viewed not only as 'claim-rights',[5] but also as entitlements 'characterized by their universality – all human beings have these rights by the mere fact of being human – and by their absolute character, as well as by their resistance to all violation.'[6] In the light of this characterization, and in the specific field of energy, the natural question is whether there is a human right to energy in the sense of whether anybody, anywhere, across the world, just invoking his or her human condition, can, under no restrictions at all, claim for themselves and obtain available, affordable, 'clean' and/or efficient energy.

In fact, there have been several voices advocating a so-called '*human right to energy*' or a '*human right to energy services*' or even asserting a State's obligation to provide electricity.[7] Recognizing a human right to energy inevitably leads to further reflections regarding its content. For instance: how long should a shortage be in order for a claim relating to one's deprivation of the human right to energy to be legally admissible? What should be the advisable volume and electrical load when electricity is provided by the State (be it national, provincial or municipal) on a gratuitous basis, especially considering that, in winter, high use, for heating in poorer neighbourhoods will affect 'paying' customers of the same distribution grid? Is the purpose for which that energy is used relevant, considering that, in informal settlements, there could be high levels of energy consumption not for obtaining heat but for producing illicit drugs? How can we be sure that the State aid law, that convinced both the energy-rich and the energy-poor of the benefits of clean energy in a given jurisdiction, shall not be repealed after next year's elections following partisan goals? What is the level of education necessary to discern clean sources of energy (and avoid 'unclean' ones)? These are just a few among many other questions.

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[4] The word 'right' is herein used in the sense of 'claim right'; see W.N. Hohfeld, *Conceptos jurídicos fundamentales*, Genaro Carrió (trs., ontamara 1968),59.

[5] Allen Buchanan and David Golove 'Philosophy of International Law' in Jules Coleman and Scott Shapiro (eds.) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002), 868–934, 888.

[6] Juan Cianciardo (2020) *La cultura de los derechos humanos. Razón, voluntad diálogo* Universidad Nacional Autónoma de México, (2020) 30 <https://dadun.unav.edu/bitstream/10171/60039/1/2020-L-La%20cultura%20de%20los%20DDHH%20%283%29.pdf> accessed 27 March 2022.

[7] Christophe Krolik 'Por un derecho universal a los servicios energéticos modernos' (2016) 9 Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería 197. Professor Krolik's view can be contrasted with that of the Corte Interamericana de Derechos Humanos, *Resolución de la Corte Interamericana de Derechos Humanos de 25 de mayo de 2017, Caso Masacres de Río Negro v. Guatemala, Supervisión de cumplimiento de sentencia* (2017) <http://www.corteidh.or.cr/docs/supervisiones/rionegro_25_05_17.pdf> accessed 8 March 2020, especially at 11: 'within one year, the State must guarantee the provision of electric energy to the inhabitants of the Pacux colony, at affordable prices' ('en el plazo de un año (…), el Estado deberá garantizar la provisión de energía eléctrica a los habitantes de la colonia Pacux a precios asequibles'). Textually, then, there was no declaration of a human right to energy on behalf of the Tribunal; but a State obligation was established, instead.

Against this background, the role of the State is significant, especially when it appeals to its function as facilitator of the general welfare, a minimally dignified life for the people or mere social peace. The introduction of the State, in that role, can, nevertheless, lead to controversial results we should be aware of: regulations destined to guarantee energy for all may allow simply anybody to take advantage of a commodity in a limitless and, therefore, unreasonable manner, and this is why the profile of the beneficiary should be carefully established and monitored; in a State-financing scenario, the Government can assure energy to all at the cost of public funds destined to other areas (such as education or health services) or, given a budget deficit, by resorting to freshly printed money and, therefore, causing inflation if there is no corresponding capital input.

Unavailable, unaffordable, unclean or inefficient energy may prompt multiple lines of discussion, many of which exceed the province of Law and enter into other fields of study, such as Politics or Sociology, the Public Sector, Economics or even Philosophy and Pedagogy. It would be clearly impossible to consider them all in these paragraphs.

Methodologically, energy, and particularly electricity, as subject matters, seem to exert a centrifugal force. Approaching the foursome question of energy availability, affordability, environmental adequacy or efficiency can also involve considerations of different *aspects of life* such as minimum living conditions and welfare; health and medical resources; minimum household income or pre-existence of some governmental aid scheme; safety equipment for households and factories; and availability of environmentally-friendly, and efficient electrical appliances. These aspects could become subjects of inquiry in the *fields of study* referred to above. In turn, from the platform of those different *fields of study*, the *details* involved could become objects of study themselves. Those *details* could include: (1) what the minimum living conditions are or should be to secure welfare; (2) the concept of health contents and the definition or enumeration of electricity-dependent medical services or appliances to be considered among the medical resources; (3) the determination of the minimum income or else the way in which the public sector will intervene to provide aid to the energy needy; (4) the level of safety that will be expected and adopted as to the electric appliances; and (5) the environmental effects of cooling or warming appliances and their economic benefit compared to other possibilities. Research on these various *details* would illustrate the centrifugal force mentioned above, and would clearly exceed the province of Law.

The complex scene described in the previous paragraph, however, cannot elude the fact that behind every situation involving energy and its unavailability, unaffordability, environmental inadequacy or inefficiency, there seems to lie a question that needs to be dealt with before all the others; a question that links moral, ethical and legal considerations. It is the inquiry regarding whether it is possible to conceive that there is a *right to energy*.

The chapter discusses the human right to energy (or access to energy services) from a theoretical perspective. Inquiring into the question of whether the right to energy is a human right *per se* – or at least a right – and exploring the guidelines or principles that would eventually govern such right, the chapter reviews the positive law at a supranational level. For this purpose, it looks into the United Nations (UN) legal framework and that established by certain Bilateral Investment Treaties (BITs). The following section (section 2) analyses the existence of a *right to energy* within the UN legal framework, firstly by focusing on existent instruments (subsection 2.1) and secondly by conducting a brief review of the language of rights within that framework (subsection 2.1). A short analysis of the framework of a similar *right to energy* within BITs is provided next (subsection 2.3). Section 3 analyses the principles of

International Law that may apply to energy ethics and to the *right to energy*. The conclusions arising from Sections 2 and 3 are included in Section 4.

2. IS THERE A RIGHT TO ENERGY SERVICES FROM AN INTERNATIONAL LAW VIEWPOINT?

Morality and Ethics can be considered as synonyms,[8] especially from the etymological point of view. 'Ethics' comes from the Greek *ethos*, meaning customs, habits people develop, and 'morality' is derived from the Latin *mores*, meaning the same. In Law, norms can be considered 'the resultant of complex patterns of behaviour of a large number of people over a protracted period of time',[9] *id est*, the product of socially accepted habits or customary law. The element of acceptance of the habit, or custom, is relevant and it can be illustrated by resorting to the well-known figure of the *energy theft*: it may be customary, in certain neighbourhoods, to connect to the distribution grid in a clandestine manner, but the reiteration of this behaviour does not convert it into a norm because it would lack social acceptance.

Given the particular semantic link between the three disciplines already mentioned - Morality, Ethics and Law – the law-based findings regarding the existence of a 'right' - or perhaps more precisely, a 'human right' – to energy shall also reflect a moral or an ethical conception.

Law can be conceived as a set of norms or rules emerging from *mores* or habits that do not depend on their written character but, rather, on habit, custom or even convention. They appear in the course of human interaction as 'regularities that take on normative significance'[10] perhaps without a specific design or explicit State mandate. When those rules or norms adopt the form of laws, as the product of human lawmaking, they may recognize 'rights'. This would be the case of a rule or norm establishing the right of the distribution grid company to collect the bills that are regularly sent to its clients.

Moreover, norms or rules coexist with another relevant category: principles. Principles are higher foundations for the norms or rules. It is generally considered that, in the natural law tradition, principles shall not be necessarily written, whereas for the normative or positive tradition, which considers law as a set of norms, principles will always be written and incorporated into the legal system by the authorized human lawgiver.[11]

The recognition and acceptance of the existence of higher principles – that can be said to lie beyond and above rights – underpins the idea of fundamental rights, common to all human beings, that no rule or norm can affect, alter or ignore. Human rights may be written, unwrit-

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[8] In this sense, John Finnis, 'Natural Law and the Ethics of Discourse' (1998) 43 *American Journal of Jurisprudence* 53, 61; Stephan Gammel, 'Ethics and Morality' <https://www.philosophie.tu-darmstadt.de/media/philosophie_nanobuero/pdf_2/ethicsportfolio/ethics_moralitybwnewfont.pdf> accessed 3 March 2021.

[9] Edna Ullmann-Margalit, *The Emergence of Norms* (OUP 1977) 8.

[10] Gerald J. Postema, 'Coordination and Convention at the Foundations of Law' (1982) XI *Journal of Legal Studies* 165, 167.

[11] But there are some exceptions. For instance, the Canadian constitutional tradition recognizes both the written Constitution, as well as the 'constitutional convention' and other unwritten rules. See Ejan Mackaay, 'Emergence of Legal Rules' in Peter Newman (ed.) *The New Palgrave Dictionary of Economics and the Law* (Vol. 2, Macmillan Reference Ltd 1998) 29–33, 30.

ten or implied and, insofar they are based on principles or on a 'higher-order' law, they can overcome the limitations of the human lawgiver, who may oversee or ignore certain situations in need of equitable solutions, or who may change his mind from time to time, repealing or amending existing rules and rights associated to them.

To illustrate this: no one would deny that contracts must be honoured, and that all human beings are created equal and enjoy dignity. In this context, an agreement between the private distribution grid company and the Government can lawfully entitle the former to collect the bills corresponding to each served point within the utility's 'served area'.[12] However, this general contractual right[13] that assists the company under a contract protected by law, does not exclude the possibility that a different scheme be adopted for poorer and informal neighbourhoods or settlements for reasons of equality and dignity. In this latter case, it can be agreed, between the local government and the distribution company, that the bills – subject to certain caps, and corresponding to served points located in specific poorer neighbourhoods or even in informal settlements – be paid by the corresponding local government. This special scheme would aim at eliminating clandestine connections that can cause blackouts in the dwellings of the paying-customers connected to the same network. That payment to the company, by the local government, shall (i) honour the principle to protect the dignified life of those living in those previously specified locations as if they were paying customers; and also (ii) protect the company's contractual rights because there will be no obligation of the company to deliver electricity, to the beneficiaries who live in those informal neighbourhoods, on a gratuitous basis. This local government payment scheme would, in turn, appear to be fully justified because it would pursue objectives such as human health and integrity.[14] Another illustration could be the following:

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[12] The concept of 'served area' is used in those countries in which the electricity distribution concessionaire is still under an exclusivity regime. In this sense, Argentinean Law 24,065, Section 9, establishes that the electricity distribution concessionaire shall be defined as 'the one who, within its concession area, is responsible for supplying all the demand of the final users who are not qualified to contract their supply independently (…).' At the same time, the decree that enables the application of the said Law, Decree 1,398/1992, Section 1, establishes that 'The quality of *service public* assigned to the electric energy distribution activity is based on its natural monopoly condition. (…)' In this scene, the distribution concessionaire is under the duty to serve (Decree 1,398/1992, Section 21) in what is usually referred to as its 'served area.'

[13] The general contractual clause shall reflect, in turn, an equality principle set by the legislator in the formal law under which the agreement was entered into. The overbreadth of the general legal and contractual clauses oversees the fact that not all served points are the same. Therefore, distinctions are needed. In Aristotelian terms, the general solution established in the law and the general contractual clause requires further distinction based on 'equity.' See Aristoteles, *Ética Nicomaquea* (Antonio Gómez Robledo tr, 19th edn, Porrúa 2000).71 (in Spanish) or the corresponding text in English in Patricia Smith (1993), *The Nature and Process of Law – An Introduction to Legal Philosophy* (OUP 1993), 759. On this 'corrective' use, see also Juan Carlos Cassagne, *Los principios generales del Derecho en el Derecho Administrativo* (Abeledo Perrot 1988), 44.

[14] The alternative would be a cross-subsidy between paying customers, and non-paying customers of the grid, but cross-subsidies would be contrary to practical reasonableness: they would lack adequacy, indispensability and allocation efficiency. Laws regulating the electricity sector usually prohibit them on absolute terms. See Argentinean Law 24,065, Section 42.e): 'In no case shall the costs, allocated to the service rendered to a customer or class of customers, be paid by means of the tariffs charged to the other customers.'

No one would deny that human life is a precious value; we would all recognize and accept a principle stating that human life should always be protected, in all situations. Therefore, it seems only reasonable to rule or regulate access to electricity – one of the most widely used forms energy – on behalf of electricity-dependent patients for the sake of safeguarding the principle of protecting human life.

While a legal positivist may only see the rules or norms regulating each situation, the natural law lawyer shall see the principles that lie 'above' those rules.

Whether one seeks justification in rules, norms or in the field of principles, the question still to be answered is whether there is a '*human right to energy*' in international law. In order to do so, the UN legal framework becomes the starting point.

2.1 The United Nations Legal Framework

It can be affirmed that the Universal Declaration of Human Rights of 1948 (Declaration) does not establish a specific human right to energy. However, we cannot ignore that the Declaration includes indirect references that could be considered appropriate to support a 'right to energy' argument.[15] In this sense, Article 25 of the Declaration provides that '*everyone has a right to a standard of living adequate for the health and well-being of [themselves] and of [their] family* (...).' The background to this concern about a specific living standard can be found, in the UN International conventional framework, in different bilateral treaties signed between 1950 and 1990 by references to workers' normal living needs and electricity access;[16] adequate living conditions, particularly in relation to electricity supply;[17] exchange of information in the field of services to housing, including lighting;[18] exchange of technical and practical knowl-

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[15] The same as they would converge into a 'right to water' argumentation, or a 'right to ergonomic furniture' argumentation, or even a 'right to access a public library during the pandemic' argumentation, and so on. This infinite world of possibilities arises if we follow the needs-right link as described in the introduction of this chapter because needs themselves are infinite; a different line of thought can be followed adopting the liberties-rights approach, much more specific and textually circumscribed.

[16] United States of America – Mexico (1961) *Exchange of Notes Constituting an Agreement between the United States of America and Mexico Relating to Employment in the United States of Mexican Agricultural Workers. Mexico (11 August 1951)*, Standards 23, 30, 80, among others. <https://treaties.un.org/doc/Publication/UNTS/Volume%20461/volume-461-I-2133-English.pdf> accessed 3 March 2021.

[17] UNGA, *Convention on the Elimination of All Forms of Discrimination against Women* (18 December 1979, entered in force 3 September 1981) 1249 UNTS 13, Article 14(1): 'States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas. 2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (…) (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.' [CEDAW].

[18] United States of America – Union of Soviet Socialist Republics *Agreement between the United States of America and the Union of Socialist Republics on Cooperation in the field of Housing and other Construction* (1974), Article II(d): 'This cooperation will be directed to the investigation and solution of specific problems of mutual interest in the field of housing (…) in the following areas: (…) services to housing and other buildings, including water supply, waste disposal, heating, lighting, and ventilation, with special reference to combined utility functions (…).' <https://treaties.un.org/doc/Publication/UNTS/Volume%20961/volume-961-I-13802-English.pdf> accessed 7 March 2021.

edge as factors that contribute to develop human resources of the nations, including, among those factors, energy.[19] However, this interest in living conditions and energy before the 1990s coexists with the interest in various other forms of energy, especially solar,[20] and, in general, with the growing reliance on alternative sources of energy for low income human settlements, particularly in rural areas.[21] So, these international instruments appear to be somehow conscious of all the aspects of the 'energy trilemma' set out in our introduction.

In the UN legal framework, a most important Convention stands out for literally according to women in rural areas a right to electricity: The *Convention on the Elimination of all Forms of Discrimination against Women* ('the Convention'). Its Article 14.2(h)[22] establishes that: 'States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (...) (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.'[23]

Nevertheless, the field of application of this article is restricted to the particular group of women as embraced by its wording and by its antidiscrimination objective. As Azaria explains, '[th]is provision focuses on a particular group of beneficiaries ("women in rural areas"), owing to their vulnerability, and is limited in terms of purpose ("elimination of discrimination").'[24] The specific beneficiaries and the restricted purpose would make a general rule, establishing a right to a particular form of energy (electricity) for all human beings under Article 14.2(h) CEDAW, to be ungrounded.

The first tangible link between human beings and energy in the UN system can be traced back to the 1990s in a handful of resolutions related to 'sustainable development' and modern forms of energy (especially solar). It is worth bearing in mind that, a few years after the World Summit for Social Development in Copenhagen (1995) declared the eradication of poverty to be a priority and recommended the launch of a United Nations decade devoted to the achieve-

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[19] Netherlands – Venezuela, *Agreement on economic and technological cooperation* (20 February 1987), Article IV.1 <https://treaties.un.org/doc/Publication/UNTS/Volume%201547/volume-1547-I-26908-English.pdf> accessed 7 March 2021.

[20] United States of America – Somalia, *Agreement for the sale of agricultural commodities under public law 480, Title I Program* (25 June 1980), Item VI(B)(7): 'Approximately 60 percent of Somalia's population is nomadic or semi- nomadic. They exist in a harsh environment and are largely dependent on their animals for physical and economic survival. Range managements and animal health projects will implement grazing systems and animal health programs while emphasizing conservation of the limited resources found in these dry lands. As the basic sources of energy for cooking and heating is wood or charcoal, projects will be developed emphasizing the more efficient use of these items and in the use of unsophisticated alternate sources of energy, such as solar cookers and simple bio/gas converters. (...).' <https://treaties.un.org/doc/Publication/UNTS/Volume%201252/volume-1252-I-20417-English.pdf> accessed 7 March 2021.

[21] *Agreement establishing the Latin American Housing and Human Settlements Development Organization (OLAVI). Concluded at Quito on 14 January 1982*, Article 5(b). <https://treaties.un.org/doc/Publication/UNTS/Volume%201397/v1397.pdf> accessed 7 March 2021.

[22] CEDAW (n 17).

[23] CEDAW (n 17) Article 14.2.h.

[24] See Danae Azaria (2018) 'Community Interest Obligations in International Energy Law' in Eyal Benvenisti and Georg Nolte (eds.) *Community Interests Across International Law* (OUP 2018), 297–315, 303 and case law and limited state practice cited therein.

ment of that objective, a Resolution adopted by the UN General Assembly (UNGA)[25] in 1998 invoked, as a priority, 'the elimination of poverty and the improvement of the quality of life of the millions living in misery', and, among other decisions, invited all States Members of the United Nations to contribute to the successful implementation of the World Solar Programme 1996–2005.

Accordingly, eliminating poverty and improving people's quality of life were objectives embedded in the language of Section 25 of the Universal Declaration of Human Rights. It can be stressed that the 1998 Resolution was recalled in the following years in Resolutions relating to new and renewable sources of energy, including the implementation of the World Solar Programme 1996–2005.[26] These findings bring aspects of the 'energy trilemma' into the spotlight, but it is still difficult to find in them the 'consecration' of a human right to energy.

A closer link between energy and human rights may be found in the Resolution adopted by the UNGA on 16 September 2005,[27] which reaffirmed respect for 'all human rights', invoked the aim of achieving progress in – among other areas – the area of 'development and human rights', and acknowledged the existence of four sets of problems: development; peace and collective security; human rights and the rule of law; and the strengthening of the UN system. This Resolution included a 'right to development' among the human rights.[28] This finding should allow us to consider the recognition of a human right to sustainable development, as characterized in the 1998 Resolution or, perhaps, to 'economic development' invoked in the 2005 Resolution itself.[29]

More relevant still, the 2005 Resolution, in its Development chapter, declares that the existing challenges include '*meeting energy needs*'[30] (apart from achieving sustainable development). It also individualizes 'energy needs and priorities' of developing countries,[31] and bears in mind that, in the field of development, 'access to energy facilitates the eradication of poverty'.[32] Moreover, in the Human Rights and Rule of Law chapter, the Resolution resolves to pursue the aim of 'effective enjoyment by all of all human rights (…) including the right to development.'[33]

In view of these considerations, it can be affirmed that a human right to energy can only be *indirectly* inferred from the 2005 Resolution, given the general rule of interrelatedness of all human rights,[34] and the semantic link between human rights and the rule of law, the right to development as a human right, and the inclusion of energy needs within the field of develop-

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25 UNGA (16 October 1998) UN Doc A/RES/53/7 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/775/21/PDF/N9877521.pdf?OpenElement> accessed 3 March 2020.

26 UNGA, (15 February 2001) UN Doc A/RES/55/205 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/571/45/PDF/N0057145.pdf?OpenElement>; UNGA (15 February 2002) A/RES/56/200 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/492/91/PDF/N0149291.pdf?OpenElement>; UNGA (13 February 2004) A/RES/58/210, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/507/12/PDF/N0350712.pdf?OpenElement> all accessed 3 March 2020.

27 UNGA, World Summit Outcome (24 October 2005) UN DocA/RES/60/1 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> accessed 3 March 2021.

28 ibid, para 24(b).

29 ibid, para 24(d) *in fine*.

30 ibid, para 50.

31 ibid, para 55(b).

32 ibid para 56(i).

33 ibid, para 123.

34 ibid, 13.

ment. However, no original, straightforward declaration regarding the existence of such a right for all can be read in the 2005 Resolution.

Similar considerations arise from the Outcome Document entitled *The Future We Want*, which was endorsed by the UN Conference on Sustainable Development on 22 June 2012, and was annexed to UNGA Resolution 66/288,[35] which recognized the critical role energy performs in the development process, insofar as access to sustainable modern energy services contributes to poverty eradication, saves lives, improves health and helps to satisfy basic human needs.

Regarding the organizations within the UN system, the United Nations Educational, Scientific and Cultural Organization (UNESCO) has made its contribution in the field of energy production and increased provision of energy to rural people, relying on low-cost renewable energy resources.[36] The same has been done by the United Nations Children's Fund (UNICEF) regarding children and their quality of life, as sustainable energy enables and improves the quality, accessibility and reliability of other services that children rely on for their survival and well-being.[37]

All these efforts, in the specific field of access to electricity, can be said to have paved the way for positive results. As the World Bank explains, '[s]ince 2010, more than a billion people have gained access to electricity. As a result, 90 percent of the planet's population was connected in 2018.'[38] This extract has crucial significance because, as UNGA says, 'energy facilitates the eradication of poverty.'[39]

Consequently, it can be affirmed that energy has found its way into the UN legal framework by means of two different paths that coexist under the wider umbrella of sustainable develop-

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[35] UNGA, (27 July 2012) UN Doc A/RES/66/288, para 125: 'We recognize the critical role that energy plays in the development process, as access to sustainable modern energy services contributes to poverty eradication, saves lives, improves health and helps to provide for basic human needs. We stress that these services are essential to social inclusion and gender equality, and that energy is also a key input to production. We commit to facilitate support for access to these services by 1.4 billion people worldwide who are currently without them. We recognize that access to these services is critical for achieving sustainable development.') and § 126 ('We emphasize the need to address the challenge of access to sustainable modern energy services for all, in particular for the poor, who are unable to afford those services even when they are available. We emphasize the need to take further action to improve this situation, including the mobilizing adequate financial resources, so as to provide these services in a reliable, affordable, economically viable and socially and environmentally acceptable manner in developing countries') <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_66_288.pdf> accessed 7 March 7 2021.

[36] United Nations Educational, Scientific and Cultural Organization, *UNESCO's Contribution to Poverty Eradication within its Fields of Competence* (28 March 1996) 9 <https://unesdoc.unesco.org/ark:/48223/pf0000103493> accessed 7 March 2021.

[37] This is why UNICEF has conducted a Voluntary National Review for Governments as part of the Sustainable Development Goals 2020 targets, that include, as a top priority for children, by 2030, ensuring universal access to affordable, reliable and modern energy services. See: UNICEF, *Key Asks for 2020 SDG Voluntary national Reviews. Affordable and Clean Energy* <https://www.unicef.org/media/64346/file/sdg7_2pager_final.pdf> accessed 7 March 2021.

[38] The World Bank, 'Covid-19 Intensifies the Urgency to Expand Sustainable Energy Solutions Worldwide'. Press release, 28 May 2020 <https://www.worldbank.org/en/news/press-release/2020/05/28/covid-19-intensifies-the-urgency-to-expand-sustainable-energy-solutions-worldwide> accessed 7 March 2021.

[39] UNGA A/RES/60/1 (n 27) para 55(i) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> accessed 3 March 2021.

ment: poverty eradication, on the one hand; and the use of both low cost and clean forms of energy, on the other. As UNESCO itself explains, '[t]he international community recognizes a number of basic rights: the right to water, the right to food, the right to health, the right to adequate housing, the right to make a living through work and the right to take part in cultural life, but it is yet to recognise a right to clean, safe, sufficient and reliable energy supply.'[40] In light of this reasoning, there is no 'right to energy access' recognized as such in the UN legal framework.

2.2 An Appraisal: The Language of Rights

There seem to exist no binding international commitments in Public International Law in relation to a universal right to energy. In addition, access to modern energy services is not expressly recognized as a specific universal human right in any international human rights instrument.[41] However, from what was concluded above, it is possible to discern attitudes towards the consecration of a right to energy.

There is an evident right to enjoy adequate living conditions, particularly pertaining to electricity, accorded by the clear wording of CEDAW but it is a *sectorial right*, restricted to 'women in rural areas'[42] and aimed at avoiding discrimination. CEDAW is the only instrument that stands out for linguistically recognizing a 'right' to electricity directly or immediately in favour of the abovementioned group and for antidiscrimination reasons. Besides, the provision can be logically linked to the principle of life protection and freedom. In other words, electricity access for a woman in a rural area may signify the difference between her being exposed to or being safeguarded against gender-based violence,[43] or the difference between the mere possibility of her going out for a walk or for a bike ride after sunset instead of being restricted to stay indoors.

Rules according rights are expected to use a prescriptive language; we expect them to literally include the term 'right' followed by, at least, the details regarding that right. Regarding a possible right to energy, the language used in various UNGA Resolutions differs from the prescriptive language present in written rules or norms; however, this non-prescriptive language succeeds in putting into words, albeit at different degrees, a *concern* regarding energy that convinces us of its relevance. Therefore, even if the prescriptive or normative result

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[40] UNESCO Office Bangkok and Regional Bureau for Education in Asia and the Pacific, *Energy Equity and Environmental Security* (2012) Ethics and Climate Change in Asia and the Pacific (ECCAP) Project, Working Group 7 Report, 30 <https://unesdoc.unesco.org/ark:/48223/pf0000218271.locale=es> accessed 7 March 2021.

[41] Alexandra Wawryk 'International Energy Law. An Emerging Academic Discipline' in Paul Babie and Leadbeter Paul (eds.), *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press 2014), 223–256, 248 <http://www.jstor.org/stable/10.20851/j.ctt1sq5xw.14> accessed 7 March 2021. Likewise, Danae Azaria 'Community Interest Obligations in International Energy Law' in Eyal Benvenisti and Georg Nolte (eds.) *Community Interests Across International Law* (OUP 2018) 297–315, 303; Íñigo del Guayo, 'Energy Poverty and Energy Access. A Legal Analysis' in Íñigo del Guayo, Lee Godden, Donald N. Zillman, Milton F. Montoya, and José Juan González (eds.) *Energy Justice and Energy Law* (OUP 2020), 31–47, 42.

[42] CEDAW (n 17).

[43] See Joy S. Clancy, Soma Dutta, Nthabiseng Mohlakoana, Ana Victoria Rojas, and Margaret Njirambo Matinga, (2016) 'The Predicament of Women' in Lakshman Guruswamy (ed.) *International Energy and Poverty. The Emerging Contours* (Routledge 2016) 24–38, 27.

cannot be said to be achieved by those Resolutions, they succeed, at the social level, in communicating and convincing us of the relevance of the good or commodity involved.

In the Annex of the 2015 Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda),[44] Section 12 'encourages' countries to consider setting nationally appropriate spending targets for quality investments in essential public services for all, including, among others, energy, in a manner consistent with national sustainable development strategies. Also, Section 14 'establishes a new forum' to bridge the infrastructure gap, stating that investment in energy (among other services) is a pre-requisite to achieve the 'sustainable development goals', while Section 49 establishes the aim of 'ensuring' universal access to affordable, reliable, modern and sustainable energy services for all for 2030, 'recognizing' the special vulnerabilities and needs of certain developing States.[45]

The language used in those Sections appears to be the one typically used in written norms or prescriptions; there, those Sections can be said to hold normative or prescriptive value. But what is prescribed in those Sections relates not to human beings directly, but to indirect encouragement (via each country), exchanges (via forums), prospective assurance (aiming at 2030) and recognition (of the needs in developing States). This is also the case of the Resolution adopted by the UNGA on 19 December 2019,[46] which, notwithstanding its ambitious grounds or justifications,[47] only succeeds, at the normative or prescriptive level, in 'calling' impersonally (for ensuring access to affordable, reliable, sustainable and modern energy for all, among other goals) and in 'encouraging' Governments, among others, where 'feasible and appropriate' (to leverage the cost-competitiveness of renewable energy 'in order to' achieve universal energy access).[48]

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[44] Addis Ababa action agenda of the Third International Conference on Financing for Development: the final text of the outcome document adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13-16 July 2015) and endorsed by UNGA Res 69/313 (27 July 2015) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/232/22/PDF/N1523222.pdf?OpenElement> accessed 1 March 2020.

[45] ibid.

[46] UNGA (21 January 2020) UN Doc A/RES/74/225 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/436/54/PDF/N1943654.pdf?OpenElement> accessed 1 March 2020).

[47] ibid. In the written expression of its grounds or justifications, this Resolution 'reaffirms' the sovereign rights of countries to define appropriate policies for the production and use of energy; it expresses a 'deep concern' as to the amount of people with no access to electricity or the ones relying on traditional biomass; it 'notes' the appropriateness of transitioning from inefficient fuels to sustainable energy for all. The Resolution puts forth all these concepts in its grounds or justifications, which lack normative value (*id est*, they are not written rules or norms but a guide for the interpreter to get to know and understand the reasons for the measures adopted in the Resolution).

[48] ibid. In the normative or prescriptive part of the Resolution, Section 5, 'calls for ensuring' access to affordable, reliable, sustainable and modern energy for all; Section 6 'calls for the promotion' of an 'enabling environment' at the national and international levels for the increased use of sustainable, cleaner and more efficient cooking and heating methods, especially in developing countries; Section 7 'encourages Governments,' among others, where 'feasible and appropriate,' to leverage the cost-competitiveness of renewable energy 'in order to' achieve universal energy access; and Section 10 'calls upon Governments' to expand the use of renewable energy beyond the power sector.

The Resolution adopted by the UNGA on 23 December 2016[49] establishes, in Section 54, the 'commitment' that acts as the foundation for the Resolutions cited above.[50] The object of the 'commitment' comprises, apart from the generation and use of renewables, 'affordable energy'. Besides, the Resolution 'notes' the effects of renewable energy cost reductions on the lowering of energy supply costs for cities and human settlements. It also emphasizes 'giving particular attention' to the energy needs of the people, particularly those living on low-income and in informal settlements; in other words, the 'poorest and those in vulnerable situations', who deserve full and productive employment.[51] The prescriptive value of 'committing' and 'noting' moves away from the obligations arising from contracts or agreements. Nevertheless, the wording used serves the purpose of communicating attentiveness towards a specific concern internationally: the needy.

Finally, in the Resolution adopted by the UNGA on 20 December 2018, the language addressing the issue of 'energy for all' is located in the written expression of the grounds or justifications of the measure contained in the Resolution, and we know grounds or justifications lack normative or prescriptive value and only serve the purpose of providing the grounds or reasons for the decision or measure. Those grounds or justifications 'emphasize' or transmit 'deep concerns' regarding energy for all. At the prescriptive level, that Resolution, in Sections 3, 5, 6, 7 and 10, aims at 'encouraging' or 'calling upon' Governments to ensure access to affordable, reliable, sustainable and modern energy for all.[52] It thus addresses the issue of energy for all via Sections with normative value, but in an indirect or mediate manner by way of encouragement or formal petition to the Governments.

From the Convention on the Elimination of all Forms of Discrimination against Women, it can be inferred that, whenever an international instrument purports to accord or sanction a right, it does so in a clear manner. The language adopted in the abovementioned Resolutions – which shows a considerable use of adjectives, condition-setting and the consideration of particular situations, and subjects implementation to intermediate steps – does not sanction a right to energy. Despite its circumlocutory tenor, it succeeds in expressing at the global level a deep concern towards energy in relation to all human beings. However, at the normative or prescriptive level, no human right to energy seems to be established in the abovementioned Resolutions.

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[49] UNGA (25 January 2017) UN Doc A/RES/71/256 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/466/55/PDF/N1646655.pdf?OpenElement> accessed 1 March 2020.

[50] It reads as follows: '54. We commit ourselves to the generation and use of renewable and affordable energy and sustainable and efficient transport infrastructure and services, where possible, achieving the benefits of connectivity and reducing the financial, environmental and public health costs of inefficient mobility, congestion, air pollution, urban heat island effects and noise. We also commit ourselves to giving particular attention to the energy and transport needs of all people, particularly the poor and those living in informal settlements. We also note that reductions in renewable energy costs give cities and human settlements an effective tool to lower energy supply costs.'

[51] UNGA Res 71/256 (n 49) Section 57.

[52] UNGA (15 January 2019) A/RES/73/236 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/460/88/PDF/N1846088.pdf?OpenElement> accessed 1 March 2020.

2.3 Principles in Bilateral Investment Treaties – A Short Reference

Discerning a human right to energy in the context of Bilateral Investment Treaties (BITs)[53] when the human rights regime itself does not acknowledge it, might be misplaced. Indeed, no BIT establishes such a right. Nonetheless, it may prove useful to analyse BITs with the objective to extract from them potentially valuable principles regarding energy in the human sphere, as well as other considerations that relate to human beings and human life.

It is generally acceptable that living standards may improve by means of a stable framework for investment.[54] Individuals[55] or nationals[56] engaged in economic activities have been recognized in some BITs as included in the economic life of the contracting countries, but only in the sphere of cooperation. The consumer, as object of protection, has also been included in the written grounds or justification of some BITs alongside internationally recognized labour rights.[57]

Alternatively, some BITs have 'laid their eyes' on the necessity to protect human life or health, alongside the life of plants and animals.[58] In this case, for the purpose of the

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[53] BITs are treaties 'concluded between two states that establish obligations owed by each contracting state to investors within their territory. At the most basic level, BITs are intended to protect foreign investors from interference by host states and to ensure that host governments honour promises made to attract foreign investment. BITs are supposed to mitigate some of the risks investors assume when investing abroad, particularly in developing countries.' In Annie Leeks, 'The Relationship between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach' (2007) 65(2) University of Toronto Faculty of Law Review 1, 5.

[54] United States of America – Uruguay BIT (2005) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2380/download>; North Macedonia, Republic of – Kazakhstan, Republic of BIT (2012) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1782/download> accessed 1 March 2020.

[55] Netherlands–Sudan BIT (1970) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5197/download> accessed 1 March 2020.

[56] Kenya – Netherlands BIT (1970) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1793/download> accessed 1 March 2020.

[57] United States of America–Uruguay BIT (2005) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2380/download>; Kenya–Korea, Republic of BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5261/download>; Cameroon - Korea, Republic of BIT (2013) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5256/download>; Korea, Republic of–Rwanda BIT (2009) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4843/download>.

[58] Saint Vincent and the Grenadines–Taiwan Province of China BIT (2009) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2243/download>; Colombia–Japan BIT (2011) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/797/download>; Japan–Uruguay BIT (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3284/download>; Chile–Hong Kong, China SAR BIT (2016) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5413/download>; Canada–Guinea BIT (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5095/download>; Burkina Fas–Canada BIT (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3460/download>; Canada–Côte d'Ivoire BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3242/download>; Canada–Mali BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3239/download>; Canada–Senegal BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3240/download>; Cameroon–Canada BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/

Agreement, a Party may adopt or enforce measures necessary to protect them, sometimes under certain conditions such as the absence of unjustifiable discrimination. Certain BITs have also recognized the power of the Contracting Party to adopt or enforce measures necessary to protect public morals or to maintain public order.[59]

A Party to a BIT may reserve the right to deny investors' rights or preferences provided to certain minorities, namely socially or economically disadvantaged minorities.[60] Sometimes this reservation is set with no limitations;[61] other times it is limited to certain areas.[62] Sometimes BITs resort to the concept of 'minority';[63] other times, they mention 'communities'[64] or even 'groups including minorities instead'.[65] Evidently, the semantic meaning of

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3163/download>; Japan–Mozambique BIT (2013) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3114/download>; Canada–United Republic of Tanzania BIT (2013) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/636/download>; China - United Republic of Tanzania BIT (2013) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5488/download>; Benin–Canada BIT (2013) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/438/download>; Rwanda – United States of America BIT (2008) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2241/download>; Gambia–Taiwan Province of China BIT (2010) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3346/download>; Canada–Egypt BIT (1996) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/611/download>; BLEU (Belgium-Luxembourg Economic Union)–Guatemala BIT (2005) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/364/download>; among others, accessed 1 March 2020.

[59] Japan–Peru BIT (2008) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1733/download>; Japan–Mozambique BIT (2013) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3114/download>; Chile–Hong Kong, China SAR BIT (2016) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5413/download>; Japan–Uruguay BIT (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3284/download>; Colombia–Japan BIT (2011) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/797/download>; Japan–Peru BIT (2008) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1733/download>; among others – all accessed 1 March 2020.

[60] Canada–Guinea, Republic of BIT (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5095/download> accessed 1 March 2020.

[61] Japan–Peru BIT (2008) (The Republic of Peru reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities and ethnic groups) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1733/download>.

[62] Chile–Hong Kong, China SAR BIT (2016) ((…)('(…) Chile reserves the right to adopt or maintain any measure that does not conform to the obligations set out below with respect to the following sectors, subsectors or matters: (…) according rights or preferences to socially or economically disadvantaged minorities; where the measure does not conform with the obligations imposed by Article 4 (Non-discriminatory Treatment as Compared with a Party's Own Investors), Article 5 (Non-discriminatory Treatment as Compared with a Non-Party's Investors), Article 8 (Senior Management and Boards of Directors), or Article 9 (Performance Requirements);') <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5413/download> accessed 1 March 2020.

[63] See n 59.

[64] Rwanda–United States of America BIT (2008) (Rwanda reserves the right to adopt or maintain any measure that accords rights or preferences to socially or economically disadvantaged communities among the people of Rwanda). <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2241/download> accessed 1 March 2020.

[65] Israel–Japan BIT (2017) (Israel reserves its right 'to adopt or maintain measures to promote policy objectives for the benefit of socially or economically disadvantaged groups, including minorities, dis-

each expression differs, as does their source; for minority seems to be a legal concept while community or group are sociological concepts. Also, 'minorities' may be mentioned alongside 'ethnic groups'[66] by means of the conjunction 'and', according the benefits of the clause to certain groups that may or may not conform to a minority within the host-State.

Finally, human rights have found their way into certain BITs but in a mediate or indirect manner: some BITs have established the duty of each Party to encourage enterprises to voluntarily incorporate recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle (endorsed or supported by the Parties). These principles address human rights, among other issues (such as labour rights, the environment, community relations and anti-corruption).[67]

The consideration of human beings or human rights, from a textual viewpoint, differs from clauses that comprise elements such as domestic health, safety or the environment.[68] The scope of such clauses is limited to the recognition of those elements and in no way do they establish or set forth rights – or human rights – in the sense of 'claim-rights'.[69]

3. PRINCIPLES APPLICABLE TO ENERGY ETHICS

Energy has perhaps become the most precious object of procurance, at least for human beings. As Kimmins stated, '[w]e are living in a world that can no longer do without energy – so much

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bled persons, military veterans and first-degree family members of Israeli fallen soldiers and the development of its peripheral areas.' <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5849/download> accessed 1 March 2020.

[66] Japan–Peru BIT (2008) ('The Republic of Peru reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities and ethnic groups') <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1733/download> accessed 1 March 2020.

[67] Canada–Guinea BIT (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5095/download>; Burkina Faso–Canada BIT (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3460/download>; Canada–Côte d'Ivoire BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3242/download>; Canada–Mali BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3239/download>; Canada–Senegal BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3240/download>; Cameroon–Canada BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3163/download>; Benin–Canada BIT (2013) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/438/download>; among others, accessed 1 March 2020.

[68] This is the case of 2007 Kingdom of Norway Model BIT, art. 11 ('Not Lowering Standards') which reads as follows: '1. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures or core labour standards. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor. 2. If a Party considers that the other Party has offered such an encouragement, it may request consultations under Article [Joint Committee].' <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2873/download> accessed 4 May 2021). Cited in Ahmad Ali Ghouri 'Positing for Balancing: Investment Treaty Rights and the Rights of Citizens' (2011) 4(1) Contemporary Asia Arbitration Journal 95, 109 <http://sro.sussex.ac.uk/id/eprint/49153/1/Annex_Article_3.pdf> accessed 4 May 2021.

[69] See n 4.

so that some people are calling for a declaration of the universal 'right to energy'.[70] In light of this, as Frigo reminds us, a change of mentality was overdue.[71]

The change of mentality can be said to have transferred the issues surrounding energy itself to a *human-being context*, leaving behind the paradigm of determinism, which even governed moral choices. Having human beings at the centre, the Ethics of energy, today, will necessarily privilege the *principle of human life protection*. The *principle of human life protection*, in turn, shall entail protecting *human dignity*. In this sense, the needs that converge into an undignified life when not fulfilled, have to be identified and tackled from a moral standpoint: at the legislative or regulatory level, a) *reasonableness*,[72] which means choosing the most suitable means, establishing the least burdensome measure, and securing proportionality *strictu sensu*,[73] and, on behalf of the courts of law, b) *equity* or equitable solutions as enabling exceptions to general measures.

Would the Ethics of energy need to be individualistic? The answer Kimmins suggests appears to be negative; he approaches the challenges energy poses not from a selfish or individualistic or person-based standpoint, but from the point of view of *networks* and *interconnectedness*, whether physical, political or social: 'The complexity of energy issues, and their interconnectedness to every other issue (…) shows that all potential solutions to individual energy questions involve a social cost, an ethical dilemma and an impact on the way other problems are resolved. Thus, they can only be looked at within a broader consideration of the functioning of the world system of which energy is but one interwoven component'.[74] In this way, his contribution virtually serves the purpose of building a *system-based energy ethics principle* or an *interconnectedness energy ethics principle* that involves much more than physical wires or switches; it includes a consideration of the whole surroundings that have accompanied, accompany and shall accompany an energy issue. An interconnectedness principle, in these terms, allows us to face the 'energy trilemma' with a sense of obligations towards both current and future generations. This is how the *principle of intra-generational justice* and the *principle of inter-generational justice* are introduced in the arena of issues surrounding energy.[75] However, we must bear in mind that those two principles operate in a Rawlsian cooperation scheme that differs from the Natural law concept of common good. Cooperation aims at social justice, while the common good is justice itself or the just (or fair) order. When all the users of the distribution grid pay the same tariff, regardless of how long they have belonged to the network, there is an apparent cross-subsidy that resembles social justice;[76] likewise, when

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[70] James Peter Kimmins (Marcia Lord colab.) *The Ethics of Energy: A Framework for Action* (UNESCO, World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) 2001) 6 <https://unesdoc.unesco.org/ark:/48223/pf0000123511> accessed 5 May 2021.

[71] Giovanni Frigo 'Energy Ethics. A Literature Review' (2018) 6(2) Relations, 177, 205.

[72] See, in general, John Finnis 'The Nature of Law' in John Tasioulas (ed.) *Cambridge Companion to Philosophy of Law* (CUP 2017) 4 <https://www.kcl.ac.uk/law/c-ppl/philo-workshops/The-Nature-of-LawSingleSp27Jan17.pdf> accessed 5 May 2021.

[73] Juan Cianciardo, *El principio de razonabilidad. Del debido proceso sustantivo al moderno juicio de proporcionalidad* (2nd edn, Ábaco 2009) 64-67; id., *Principio de proporcionalidad y concepto de Derecho. Una aproximación desde las tesis del positivismo jurídico* (Ad Hoc 2009) 59–61.

[74] James Peter Kimmins (Marcia Lord colab.) (n 70), 35.

[75] On the concept of inter-generational justice, see John Rawls, *Teoría de la Justicia* (de María D. González tr. de la 1a ed. en inglés de 1971) (Fondo de Cultura Económica 1979) 323 et seq.

[76] According to Johannes M. Bauer, 'Network Expansion and Pricing in Transmission and Distribution' in VVAA, *Competition and Regulation in the Gas Industry*, Buenos Aires, 16–17 May 1996.

current users do not pay the costs associated to potential users (and potential users may have to pay additional costs to receive electricity),[77] a just (or fair) order is achieved.

It has been argued that there are several ethical principles[78] applicable to questions of energy access and production, environmental implications, and obligations towards future generations. Those principle include, among others: (i) accessibility or availability, which means that energy should be available to individuals on an equitable basis and at an adequate level – equitable basis meaning that all persons, regardless of their geographical origins and social status, must have access to energy;[79] (ii) sustainability in terms of intergenerational equity, which means that energy sources should be objectively sustainable or fit to satisfy the needs of present or current generations without impairing the ability of future generations to meet their own foreseeable needs; still, nowadays it has also been proposed that they should also contemplate intra-generational needs; (iii) precaution, a principle that can lead to virtual paralysis if not associated to reality and foreseeable human abilities; under this principle, creating irreversible situations should be avoided given that there is factual evidence that today no energy source is totally free of drawbacks; (iv) environmental responsibility, aiming at the reduction of the environmental impact of energy production, transportation, distribution and use; (v) innovation, adaptation and research; (vi) education and transparency; (vii) international cooperation given the fact that the implications of energy production, transportation, distribution and use may transcend the boundaries of a given country.[80]

This enumeration can be viewed as *desiderata*, but it must be read carefully. Regarding the first principle; it comprises two different issues that have been distinguished: affordability (and unaffordability), as opposed to availability (and unavailability). Someone may be able to afford the energy bill but may suffer unavailability due to a blackout. Similarly, someone may know that the distribution grid is available across the street but may not be able to afford connecting to it. The second principle refers to intergenerational equity, but contemplating intra-generational needs, which may be arguable from the point of view of coherence of the system. The principle of precaution can freeze a project for years, regardless of the fact that it may be aimed at helping the energy-poor. The same outcome may arise from the environmental responsibility principle. Innovation, adaptation and research, especially when there are aimed

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[77] Likewise, National Association of Regulatory Utility Commissioners (2017) *Report of the NARUC Task Force on Natural Gas Access and Expansion*, November 2017, p. 9. Available at: <https://pubs.naruc.org/pub.cfm?id=8F38EF6F-D44F-80A0-578C-CF1610C47520> accessed 5 September 2020.

[78] Kimmins, James Peter (Lord, Marcia, colab.) (2001) *The Ethics of Energy: A Framework for Action*, UNESCO, World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) pp 38–41. Available at <https://unesdoc.unesco.org/ark:/48223/pf0000123511> accessed 15 May 2021 Likewise, World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) (2002) *Recommendations on the Ethics of Energy*, Audouze, Jean (Rapporteur) 32 C/18, Paris, Annex pp. 9–12, esp. p. 10. Available at <https://unesdoc.unesco.org/ark:/48223/pf0000131243_spa> accessed 15 May 2021.

[79] Kimmins, James Peter (Lord, Marcia, colab.) (2001) *The Ethics of Energy: A Framework for Action*, UNESCO, World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), p. 33. Available at <https://unesdoc.unesco.org/ark:/48223/pf0000123511> accessed 15 May 2021.

[80] World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) (2002) *Recommendations on the Ethics of Energy*, Audouze, Jean (Rapporteur) 32 C/18, Paris, Annex pp. 9–12, esp. p. 10. Available at <https://unesdoc.unesco.org/ark:/48223/pf0000131243_spa> accessed 15 May 2021.

at renewables, pose the challenge of how appealing those areas may prove to be for the private investor, or the challenge of keeping them in a politically neutral arena when publicly funded. The principle of education presupposes the fulfilment of prior needs, such as the alleviation of hunger. Transparency extends itself beyond the energy sector, involving the institutions of the corresponding country and the active role of its civil society. International cooperation is a relevant strategy to attain the regional integration of energy systems, but it may suffer the consequences of domestic emergency legislation invariably held constitutionally valid.

A concluding remark, regarding these principles, would focus on the relationship between human needs, principles and rules – *id est*, between facts, values, and norms. 'Law's nature must be described / explained as a system of institutions and rules for meeting human needs.'[81] Of course, 'human needs' does not mean 'all human needs' because the implementation of policies, by means of legislation, cannot be considered divorced from tangible, genuine financial resources available. Those human needs shall be backed by human values. It is the task of the institutions to familiarize themselves with those values in order to foster them by means of rules aimed at channelizing specific human needs. Those rules may adopt the form of laws or regulations (depending on which the competent government branch or agency is) and may accord rights, but rights – and, specifically, a right to energy – should be accorded in a clear and intelligible manner (under the *rule of law* principle). Those laws or regulations, in turn, shall embody a decision-making process that bears a political nucleus and that dwells within a margin of legislative discretion. The emerging rights shall be fit to be exercised by anyone under the *principle of equality*. But the sources of rights are not restricted to rules: there may be rights arising from agreements, covenants, or contracts, and the consecration of said rights, when financed by the State, should presuppose the necessary budgetary genuine resources.

4. CONCLUDING REMARKS

At the international level, there are tangible links between human beings and energy in a handful of UN Resolutions that later converged into the proclamation of a right to development and the recognition of the challenge to meet energy needs. Therefore, if a right to energy is to be recognized, albeit indirectly, it can be justified under the wide 'umbrella' provided by the concepts of development and sustainability, as associated to poverty eradication and the use of clean energies.

From the point of view of language, the international treaty-making experience shows a unique case in which a human right to electricity might be said to have been accorded: the access to electricity in favour of women living in rural areas for the purpose of preventing discrimination. The remaining international instruments reviewed are mostly far from using the prescriptive language expected in rules that establish rights. Even when they are close enough, energy is adjuvant to the fulfilment of some other right. More often than not, international instruments avoid the language of rights and merely establish objectives such as 'ensuring' access to energy services for the future.

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[81] Finnis, John (2017) 'The Nature of Law', in Tasioulas (ed.) *Cambridge Companion to Philosophy of Law*, esp. p. 4. Available at <https://www.kcl.ac.uk/law/c-ppl/philo-workshops/The-Nature-of-LawSingleSp27Jan17.pdf> accessed 15 May 2021.

Notwithstanding the apparently 'soft' language at the international level, there has been a change of attitude towards energy issues as a result of the applicability of principles of Ethics to the governance of energy matters. This change has allowed for the identification of various principles that are apt to govern energy issues when carefully read and construed: (i) the principle of primacy of the human being and human life protection, which bring to the forefront, the principle of human dignity; (ii) the principles of reasonableness and equity; (iii) the principle of interconnectedness; (iv) the principles of intra- and inter-generational justice.