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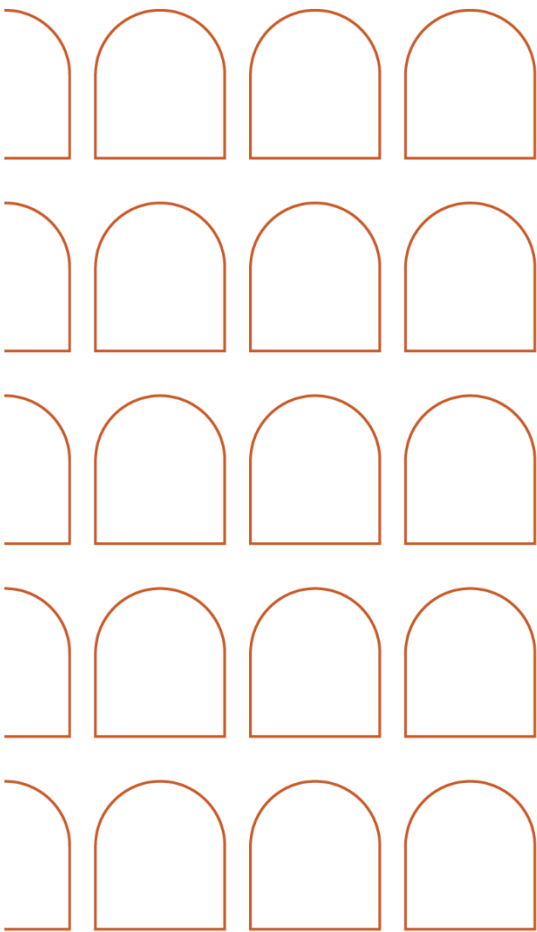
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WORKING PAPER

**A Just Transition? Investigating The Role of
Human Rights in The Transition Towards Net
Zero Societies**

Annalisa Savaresi and
Margaretha Wewerinke-Singh

European University Institute

Academy of European Law

European Society of International Law

Annual Conference, Aix-en-Provence, September 2023

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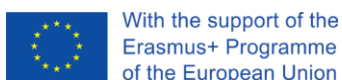
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Abstract

The transition towards net zero societies requires far-reaching changes that risk ignoring or exacerbating existing social inequalities and injustice. The term 'just transition' is commonly used to flag the justice implications of decarbonization and its societal impacts. The notion has moved beyond an initial focus on labourers, to encompass broader procedural, distributive, recognition and restorative justice questions. This article investigates the role of human rights in defining the parameters of a just transition. It explores how human rights can accelerate the transition and support greater fairness, but also how they might be perceived to work against climate action. It focuses on two key areas - the land sector and energy sector - to illustrate the complex justice tensions that arise. In doing so, it sheds new light on the role of human rights in addressing justice questions and ensuring that the transition towards net zero societies is inclusive, equitable, and just for all.

Keywords

climate change; human rights; transition

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Introduction

Climate change affects the enjoyment of virtually all human rights.¹ UN special mandate holders and experts have raised concerns over the impacts of climate change and/or of climate change response measures on victims of contemporary forms of slavery and/or trafficking,² internally displaced persons and migrants,³ people of African descent,⁴ minority communities,⁵

¹ See e.g. United Nations Human Rights Council (UNHRC) 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (2016) UN Doc A/HRC/31/52; UNGA (2019) UN Doc A/74/161; UNGA 'Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change' (2022) UN Doc A/77/226. See further e.g. Humphreys D, *Climate Change and Human Rights* (CUP 2008) Knox JH, 'Climate Change and Human Rights Law' (2009) 50 *Virginia Journal of International Law* 163; Knox JH, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477; Wewerinke-Singh M, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2019); Venn, A. 'Rendering International Human Rights Law Fit for Purpose on Climate Change' (2023) 23 *Human Rights Law Review* 1.

² UNHRC 'Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences' (2019) UN Doc A/HRC/42/44.

³ UN General Assembly (UNGA) 'Report of the Representative of the Secretary-General on the human rights of internally displaced persons' (2009) UN Doc A/64/214; (2011) UN Doc A/66/285, (2020) UN Doc A/75/207; UNGA 'Report of the Special Rapporteur on the human rights of migrants' (2012) UN Doc A/67/299.

⁴ UNHRC 'Environmental justice, the climate crisis and people of African descent: Report of the Working Group of Experts on People of African Descent' (2021) UN Doc A/HRC/48/78.

⁵ UNGA 'Report of the Special Rapporteur on minority issues' (2016) UN Doc A/71/254.

indigenous peoples,⁶ persons with disabilities,⁷ older persons,⁸ persons living in property,⁹ human rights defenders,¹⁰ and people living in small island developing states.¹¹

At the same time, measures adopted to deliver climate change mitigation and adaptation may themselves negatively affect the enjoyment of human rights.¹² This paradox is particularly evident in relation to measures constraining access to, and the use of, natural resources, which in turn hinder the enjoyment of rights, such as those to culture, food, water, and to respect for private and family life.¹³ Therefore, while there is no inherent contradiction between climate change response measures and the protection of human rights, their practical implementation often breeds conflicts.¹⁴

The notion of ‘just transition’ underlines a discrete kind of said conflicts. Historically, the term just transition has been deployed to draw attention to the specific needs of workers and communities depending on fossil fuel industries, who may be left behind by the switch to a low carbon economy.¹⁵ From these origins, the concept has evolved to encompass various dimensions of justice of the transition, across all levels of society.¹⁶

These tensions are recognised in the preamble of the Paris Agreement, which evokes a ‘just transition of the workforce’.¹⁷ The preamble also emphasises how parties ‘should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights’.¹⁸ A string of resolutions adopted by the United Nations (UN) Human Rights

⁶ UNHRC ‘Report of the Special Rapporteur on the rights of indigenous peoples’ (2017) UN Doc A/HRC/36/46; UNGA (2018) UN Doc A/73/176.

⁷ UNGA ‘Report of the Special Rapporteur of the Human Rights Council on the rights of persons with disabilities’ (2016) UN Doc A/71/314.

⁸ UNHRC ‘Report of the Independent Expert on the enjoyment of all human rights by older persons’ (2019) UN Doc A/HRC/42/43.

⁹ UNHRC ‘Report of the Special Rapporteur on extreme poverty and human rights’ (2019) UN Doc A/HRC/41/39.

¹⁰ UNGA Report of the Special Rapporteur on the situation of human rights defenders (2016) UN Doc A/71/281.

¹¹ UNGA ‘Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights’ (2016) UN Doc A/71/305.

¹² UNHRC ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2016) UN Doc A/HRC/31/52, 33.

¹³ Ibid 83. See further Naomi Roht-Arriaza, “‘First, Do No Harm’: Human Rights and Efforts to Combat Climate Change” (2010) 38 Ga. J. Int’l & Comp. L. 593; Shangrila Joshi, ‘From Forest Commons to Carbon Commodities – REDD+ and Community Forestry in Nepal’, *Climate Change Justice and Global Resource Commons* (Routledge 2021); Brenda L Gunn, ‘Protecting Indigenous Peoples’ Rights through Indigenous Peoples’ Participation in Decision-Making: A Climate Change Example’ (2020) 17 McGill International Journal of Sustainable Development Law and Policy 1.

¹⁴ Annalisa Savaresi ‘Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages’ in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge, Taylor & Francis Group 2018).

¹⁵ Xinxin Wang and Kevin Lo, ‘Just transition: a conceptual review’ (2021) 82 Energy Res. Soc. Sci., 1.

¹⁶ Ibid. See also Alexandra Harrington, *Just Transitions and the Future of Law and Regulation* (Palgrave Macmillan 2022).

¹⁷ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), Preamble.

¹⁸ Ibid.

Council similarly emphasises the need for a mutually supportive interpretation of states' obligations, highlighting the need to develop and adopt rights-based approaches to climate action.¹⁹ International, regional and national human rights bodies increasingly hear complaints concerning climate change and its impacts²⁰ and have played an increasingly prominent role in addressing the enforcement gaps in climate change law.²¹

These activities may be viewed as part of a process, whereby international bodies seek to engender systemic integration in the interpretation of state obligations on climate change and human rights.²² Climate change concerns are increasingly mainstreamed into the work of human rights bodies and mechanisms, which are developing a more integrated understanding of human rights and climate change law.²³ In 2021, this process culminated in the appointment of the first UN Special Rapporteur on the promotion and protection of human rights in the context of climate change.²⁴ The rapporteur is, among other things, tasked to consider the impacts of climate change on the enjoyment of human rights, as well as those of climate change response measures.²⁵

The interplay between the protection of human rights and the pursuit of climate change goals is increasingly evident also in the practice of litigation.²⁶ On the one hand, there has been a global surge in 'rights-based litigation' demanding state and corporate actors to take greater climate action on the basis of human rights.²⁷ On the other, there has also been a rise in 'just

¹⁹ UNHRC Resolution Human Rights and Climate Change (2008) UN Doc A/HRC/RES/7/23; (2009) UN Doc A/HRC/RES/10/4; (2011) UN Doc A/HRC/RES/18/22; (2014) UN Doc A/HRC/RES/26/27; (2015) UN Doc A/HRC/29/15; (2016) UN Doc A/HRC/RES/32/33; (2017) UN Doc A/HRC/35/20; (2018) UN Doc A/HRC/38/4; (2019) UN Doc A/HRC/RES/41/21; (2020) UN Doc A/HRC/RES/44/7; (2021) UN Doc A/HRC/RES/47/24.

²⁰ UN Human Rights Committee (CCPR) 'Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019' (2020) UN Doc CCPR/C/127/D/2728/2016; UN Committee on the Rights of the Child 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 104/2019' (2021) UN Doc CRC/C/88/D/104/2019; UN CCPR 'Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019' (2022) UN Doc CCPR/C/135/D/3624/2019.

²¹ For a review, see Riccardo Luporini and Annalisa Savaresi 'International Human Rights Bodies and Climate Litigation: Don't Look Up?' (2023) 32(2) *Review of European, Comparative & International Environmental Law* 267

²² As argued also in Annalisa Savaresi, 'UN Human Rights Bodies and the UN Special Rapporteur on Human Rights and Climate Change' (2023) 4 *Yearbook of International Disaster Law* 396.

²³ Ademola Oluborode Jegede, 'Arguing the Right to a Safe Climate under the UN Human Rights System' (2020) 9 *International Human Rights Law Review* 184; Margaretha Wewerinke-Singh and Melina Antoniadis, 'Vessel for Drowning Persons?: The Standard-Setting Potential of International Human Rights Litigation in Addressing Climate Displacement' (2022) 3 *Yearbook of International Disaster Law Online* 238.

²⁴ UNHRC Res 48/14 (2021) UN Doc A/HRC/RES/48/14.

²⁵ *Ibid* 50.b, c and d.

²⁶ Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37; Margaretha Wewerinke-Singh, 'The Rising Tide of Rights: Addressing Climate Loss and Damage through Rights-Based Litigation' (2023) 12 *Transnational Environmental Law* 537; Annalisa Savaresi, 'Human rights-based litigation in the transition towards net zero emissions: A double edge sword?' [2024] (forthcoming).

²⁷ See the analysis in Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Env'tl L* 37; Annalisa Savaresi and Juan Auz 'Climate Change Litigation and

transition' litigation lamenting human rights abuses – such as killings, threats, intimidation, land grabs, dangerous working conditions and poverty wages –linked to various kinds of climate action.²⁸

This paper takes stock of these trends, exploring how human rights law can both support and challenge measures aimed at facilitating the transition towards net zero emissions. It poses the following critical question: how do human rights shape states' obligations concerning the transition? Our preliminary research in this field has led us to focus on two main areas of inquiry: the land sector, and the energy sector. These two areas of inquiry were picked, due to their prominence in the debate concerning the transition. The paper concludes by reflecting on how human rights play a crucial role to ensure that the transition towards net zero societies is inclusive, equitable, and just for all.

The transition and the land sector

Access to, use of and control over land directly affect the enjoyment of a wide range of human rights.²⁹ At the same time, the governance of land uses is a subject matter on which states have jealously guarded their sovereignty.³⁰ Climate change has exacerbated this already complex situation.

On one hand, maintaining and enhancing sinks and removals linked to land uses is crucial to achieve net-zero emissions, in line with the objectives outlined in the Paris Agreement.³¹ Rural

Human Rights: Pushing the Boundaries' (2019) 9 (3) *Climate Law* 244; César Rodríguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (CUP 2022).

²⁸ Annalisa Savaresi and Joanna Setzer, 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2022) 13 *J Human Rights & Env't* 7; Maria Antonia Tigre and others, 'Just transition litigation in Latin America: an initial categorization of climate litigation cases amid the energy transition' (2023) Sabin Center for Climate Change Law <https://scholarship.law.columbia.edu/sabin_climate_change/197/> accessed 26 October 2023; and Savaresi A and others, 'Just Transition Litigation: A New Knowledge Frontier' (5 April 2023) <<https://papers.ssrn.com/abstract=4561679>> accessed 4 March 2024.

²⁹ See for example UN Office of the High Commissioner for Human Rights (OHCHR), 'Land and Human Rights: Standards and Application' (2015) <https://www.ohchr.org/sites/default/files/Documents/Publications/Land_HR-StandardsApplications.pdf> accessed 30 October 2023; *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* [2009] Inter-American Commission of Human Rights (IACHR) OEA/Ser.L/V/II. Doc. 56/09.

³⁰ Humphreys D, *Logjam: Deforestation and the Crisis of Global Governance* (Earthscan 2006); Ronnie Lipschutz, 'Why Is There No International Forestry Law? An Examination of International Forestry Regulation, Both Public and Private' (2000) 19 (1) *UCLA J. Environmental L. & Policy* 153; Catherine MacKenzie, 'Lessons from Forestry for International Environmental Law' (2012) 21 (2) *Review of European Community & International Environmental Law* 114.

³¹ Intergovernmental Panel on Climate Change (IPCC), "Summary for Policymakers," *Climate Change and Land: IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems* (Cambridge University Press 2022) <<https://doi.org/10.1017/9781009157988.001>> accessed 26 October 2023, A.3.

communities and smallholder farmers are expected to bear the brunt of climate extremes.³² Climate change is predicted to reduce agricultural production and the availability of food, leading to increases in commodity prices and limiting access to food.³³ Furthermore, climate change is expected to compromise the nutritional quality of food and facilitate the spread of pathogens, thus posing a threat to food safety.³⁴

On the other hand, certain climate change response measures, such as biofuel subsidies and the growing utilization of forest biomass, have exerted pressure on land, leading to increases in food prices, social unrest, and food insecurity, thereby impacting the realization of human rights.³⁵ Mechanisms established under the UNFCCC, including the so-called REDD+ program, have reportedly exacerbated existing injustices and marginalization,³⁶ and even led to the perpetration of human rights abuses.³⁷ In 2023, the Global Climate Fund took the unprecedented action of suspending disbursements to a REDD+ project in Nicaragua, Central America, in response to urgent human rights concerns. To the best of the authors' knowledge, this marks the first instance of such a decision since the fund's establishment in 2010.³⁸

The UN Special Rapporteur on the right to food has raised specific concerns over 'green-grabbing or land-grabbing' with the alleged purpose of mitigating climate change.³⁹ The UN Special Rapporteur on extreme poverty and human rights has further cautioned against 'climate apartheid' whereby the wealthy pay to escape overheating, hunger and conflict, while the rest of the world is left to suffer.⁴⁰ The international climate regime has delivered limited tools to address these concerns,⁴¹ and trade-offs between the pursuit of climate objectives and

³² Ibid p. 455.

³³ Ibid p. 451.

³⁴ Ibid.

³⁵ UNHRC 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (2016) UN Doc A/HRC/31/52, 69.

³⁶ Susan Chomba and others 'Roots of Inequity: How the Implementation of REDD+ Reinforces Past Injustices' (2016) 50 Land Use Policy 202.

³⁷ See for example UN Committee on the Elimination of Racial Discrimination (CERD), 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Indonesia' (2007) UN Doc CERD/C/IDN/CO/3; UNGA 'Report of the Committee on the Elimination of Racial Discrimination' UN GAOR 70th and 71st Session Supp No 18 UN Doc (A/62/18). See also Annalisa Savaresi, 'The Human Rights Dimension of REDD' (2012) 21 Review of European Comparative & International Environmental Law 102; Sébastien Jodoin, *Forest Preservation in a Changing Climate: REDD+ and Indigenous and Community Rights in Indonesia and Tanzania* (Cambridge University Press 2017).

³⁸ Matteo Civillini, 'UN climate fund suspends project in Nicaragua over human rights concerns' (*Climate Change News*, 26 July 2023) <<https://www.climatechangenews.com/2023/07/26/un-fund-gcf-human-rights-nicaragua-indigenous-people/>> accessed 27 October 2023.

³⁹ UNHRC 'Critical perspective on food systems, food crises and the future of the right to food Report of the Special Rapporteur on the right to food' (2020) UN Doc A/HRC/43/44, 21.

⁴⁰ UNHRC 'Climate change and poverty Report of the Special Rapporteur on extreme poverty and human rights' (2019) UN Doc A/HRC/41/39, 51. See also Margaux J Hall and David C Weiss, 'Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law' (2012) 37 *The Yale Journal of International Law* 309.

⁴¹ Annalisa Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards' in Christina Voigt (ed), *Research Handbook on REDD+ and International Law* (Edward Elgar Publishing 2016); Annalisa Savaresi and Lucia Perugini, 'Article 5: Sinks, Reservoirs of GHGs and Forests' in Geert van Calster

the reform of land uses are becoming increasingly manifest. Most recently, opposition to measures aimed at adopting more climate-friendly agricultural practices has led to widespread farmers' protests.⁴²

These tensions are increasingly apparent also in the swelling body of climate litigation.⁴³ For example, in *EU Biomass Plaintiffs v. European Union* (2019),⁴⁴ a group of citizens, including some foresters, challenged the EU's classification of forest biomass as a renewable fuel, arguing that it could potentially contribute to widespread deforestation, thereby violating a set of human rights. Similarly, *Korean Biomass Plaintiffs v. South Korea* (2020)⁴⁵ also raised concerns about the treatment of forest biomass as a source of renewable energy. The case was initiated by solar power plant owners who contested South Korea's policy to subsidize biomass, alleging violations of their constitutional rights. In *ClientEarth v. Commission*, the applicants referenced the EU's regulation introducing a classification system for economic activities aligning with the EU's net-zero trajectory and environmental objectives. They contested the treatment of wood biomass under the EU's Taxonomy regulation, also invoking the right to access justice under the Aarhus Convention.⁴⁶

Rights-based approaches for understanding climate change and shaping the development and implementation of climate decisions and actions have been increasingly advocated for to resolve tensions such as these.⁴⁷ Such approaches focus on the implications of climate change for the pursuit of social and environmental justice and on meaningful public participation in decision making.⁴⁸

The Paris Agreement includes some language on measures to enhance public participation and public access to information.⁴⁹ Best practices here include human rights impact and other due diligence assessments, safeguards to address tensions between the protection of fundamental rights and climate action, and rights-based approaches for developing, implementing, monitoring, and evaluating climate policies and programmes.⁵⁰ The latter

and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar Publishing, 2021).

⁴² 'Making Farming More Climate Friendly Is Hard. Just Ask Europe's Politicians. - The New York Times' <<https://www.nytimes.com/2024/02/06/climate/europe-farming-protests-policy.html>> accessed 13 March 2024.

⁴³ See Alice Bisiaux, Annalisa Savaresi and Joana Setzer, 'Bridging the accountability gap in global forest governance: The role of forest climate change litigation' (forthcoming).

⁴⁴ *EU Biomass Plaintiffs v. European Union* (2019), also known as: *Sabo and Others v. Parliament and Council*. T-141/19 (European General Court, judgment May 6, 2020) and C-297/20 P (European Court of Justice, judgement January 14, 2021).

⁴⁵ *Korean Biomass Plaintiffs v. South Korea* (2020). (South Korean Constitutional Court, filed September 28, 2020).

⁴⁶ *ClientEarth and others v. Commission* (2023). T-215/23 OJ C 235/62 2023.

⁴⁷ Sébastien Jodoin, Annalisa Savaresi and Margaretha Wewerinke-Singh 'Rights-Based Approaches to Climate Decision-Making' (2021) 52 *Current Opinion in Environmental Sustainability* 45.

⁴⁸ *Ibid.*

⁴⁹ Paris Agreement, Art 12.

⁵⁰ UNHRC 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox Mapping report' (2013) UN Doc A/HRC/25/53, 79

specifically emphasize citizens and communities' participation in climate decision-making, and access to judicial or administrative proceedings and effective remedies for harm caused both by climate change and by climate change response measures.⁵¹

The Paris Agreement is also the first climate treaty to explicitly reference traditional knowledge, recognising the need to protect local communities and indigenous people, and the importance of their knowledge to adaptation.⁵² The Local Communities and Indigenous Peoples Platform was created to strengthen indigenous peoples' and local communities' ability to cope with climate change, to engage in the fight against climate change, and to share their ideas and best practices.⁵³ The platform seeks to facilitate the integration of diverse knowledge systems, practices and innovations in designing and implementing international and national climate action, in a manner that respects and promotes the rights and interests of local communities and indigenous peoples. So far, the platform has developed recommendations concerning the engagement and input of indigenous peoples and local communities across the UNFCCC process,⁵⁴ has organised a series of training webinars and created a dedicated portal.⁵⁵

These steps seem however rather modest, given the swelling body of human rights practice on this subject matter. The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) recognises the right of peasants and other people working in rural areas to contribute to the design and implementation of national and local climate change adaptation and mitigation policies, including through traditional knowledge.⁵⁶ Furthermore, UNDROP recognises the right of peasants and other people working in rural areas to adequate training, including the ability to cope with climate change and weather-related events.⁵⁷ The UN Human Rights Council, during its 54th session, passed a resolution aimed at advancing the realization of UNDROP. This resolution brings into existence a novel Working Group comprising independent experts devoted to addressing the issue.⁵⁸

More generally, a growing body of international bodies have pointed specifically to states' obligation to enable traditional knowledge holders' participation in decision making and science creation.⁵⁹ States' obligations associated with the right to culture and the right to access to justice are especially relevant here. Amongst others, these obligations entail making effective remedies, including judicial ones, available to individuals and groups who feel that their

⁵¹ Ibid 80.

⁵² Paris Agreement, Art 7.5.

⁵³ UNFCCC 'Decision 2/CP.23 Local communities and indigenous peoples platform' (2018) UN Doc FCCC/CP/2017/11/Add.1 6.

⁵⁴ LCIPP Activity 6 Recommendations:
https://unfccc.int/sites/default/files/resource/sbsta2021_1_AV.pdf

⁵⁵ UNFCCC 'Local Communities and Indigenous Peoples Platform' < <https://lcipp.unfccc.int/>> accessed 26 October 2023.

⁵⁶ UNCCPR Res 39/12 (2018) UN Doc A/HRC/RES/39/12 Art 18. For a commentary, see A. Savaresi and M. Alabrese 'The UNDROP and Climate Change: Squaring the Circle?' in (Eds.) Alabrese, M. Bessa, A. and Brunori, M. *The UN Declaration on Peasants' Rights* (Edward Elgar, 2022)

⁵⁷ Ibid Art 25.

⁵⁸ UNCCPR 'Working Group on the rights of peasants and other people working in rural areas' (2023) UN Doc A/HRC/54/L.11.

⁵⁹ Nicole Schabus, 'Chapter III.19: Traditional knowledge' in Michael Faure (ed) *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing 2023).

traditional knowledge has not been adequately protected and has been unduly appropriated.⁶⁰ In this connection, a human rights-based approach provides a much-needed safety net against the misuse and misappropriation of traditional knowledge and the reporting of unauthorised access.⁶¹ Admittedly, squaring the circle between enabling access to decision-making, while protecting the rights of knowledge-holders, is a complex exercise.⁶² Given however the difficult changes at stake, greater and better dialogue between land users and policy-makers is vital, to engender the momentous shifts needed to achieve net zero emissions.

The transition and the energy sector

The increasing traction gained by the concept of energy justice in academic and policy circles signals its growing relevance in the context of the climate crisis.⁶³ As societies grapple with the complexities of transitioning to zero-carbon energy systems, the pursuit of energy justice emerges not merely as a technical or economic policy objective but as a human rights imperative.⁶⁴ The notion of energy justice goes beyond the provision of equitable access to energy.⁶⁵ It embodies principles of fairness and equality in the distribution of energy's benefits and burdens, the decision-making processes surrounding energy policy, and the recognition of diverse needs and experiences of individuals and communities in the energy sector.⁶⁶

While access to energy is not explicitly recognised as a standalone right in international human rights law,⁶⁷ it is intrinsically tied to numerous recognised human rights, including the rights to health, an adequate standard of living, and development. The profound link between energy

⁶⁰ See for example UN Committee on Economic, Social and Cultural Rights 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation' (2011) UN Doc E/C.12/RUS/CO/5 (2011), 34.

⁶¹ Annalisa Savaresi 'Traditional knowledge and climate change: a new legal frontier?' (2017) (9)1 JHRE 32.

⁶² Ibid.

⁶³ McCauley D and others, 'Advancing Energy Justice: The Triumvirate of Tenets and Systems Thinking' (2013) 32 *International Energy Law Review* 107; Jenkins K and others, 'Energy Justice: A Conceptual Review' (2016) 11 *Energy Research & Social Science* 174; McCauley D and Heffron R, 'Just Transition: Integrating Climate, Energy and Environmental Justice' (2018) 119 *Energy Policy* 1.

⁶⁴ Margaretha Wewerinke-Singh, 'A human rights approach to energy: Realizing the rights of billions within ecological limits' (2022) 31(1) *RECIEL* 16.

⁶⁵ Benjamin Sovacool 'Energy Decisions Reframed as Justice and Ethical Concerns' (2016) 1 *Nature Energy* 1, 4. On the role of equity in international law more generally, see Catharine Titi, *The Function of Equity in International Law* (Oxford University Press 2021).

⁶⁶ Ibid.

⁶⁷ The only human rights treaty that expressly refers to energy is the Convention on the Elimination of All Forms of Discrimination Against Women, which requires State parties to 'take all appropriate measures to eliminate discrimination against women in rural areas ... and, in particular, shall ensure to such women the right ... to enjoy adequate living conditions, particularly in relation to ... electricity'. See Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 Art 14(2)(h). See further Stephen Tully, 'The Contribution of Human Rights to Universal Energy Access' (2006) 4 *Northwestern Journal of International Human Rights* 518; Adrian J. Bradbrook and Judith G. Gardam, 'Placing Access to Energy Services within a Human Rights Framework' (2006) 28 *Human Rights Quarterly* 389.

justice and human rights underscores the imperative of operationalising justice through energy governance, law, and litigation.⁶⁸

In terms of governance, energy justice principles should be embedded within the fabric of energy policy-making and implementation. This entails developing energy policies and programmes that promote equitable access, participatory decision-making, and recognition of diversity.⁶⁹ It also necessitates strong institutional mechanisms to monitor and ensure compliance with these principles,⁷⁰ such as for example just transition commissions, such as the one established in Scotland.⁷¹

International human rights law plays a critical role in this context, providing an established normative framework that mandates 'transformative, structural change to reduce disparities and challenge power imbalances'.⁷² The potential of human rights law to ensure greater accountability of governments and private actors for actions and inactions relating to energy is particularly significant.

The legal recognition and protection of the right to energy at the international, regional, or national level can arguably strengthen a rights-based approach to energy.⁷³ Such recognition, whether at the international, regional, or national level, can provide a solid legal foundation for energy justice.⁷⁴ It can also afford individuals and communities a legal avenue to claim their right to energy and seek redress for violations thereof.⁷⁵ Even without such recognition, however, energy justice and related goals on climate change and inequalities can be accommodated within the moral, legal, and institutional fabric of international human rights law.⁷⁶

⁶⁸ Adrian Bradbrook and Judith Gardam, 'Placing Access to Energy Services within a Human Rights Framework' (2006) 28 *Human Rights Quarterly* 389.

⁶⁹ Paul Munro, Greg van der Horst and Stephen Healy, 'Energy Justice for All? Rethinking Sustainable Development Goal 7 through Struggles over Traditional Energy Practices in Sierra Leone' (2017) 105 *Energy Policy* 635, 638.

⁷⁰ *Ibid.*

⁷¹ See for example Just Transition Commission <<https://www.justtransition.scot>> accessed 27 October 2023.

⁷² Inga Winkler and Carmel Williams, 'The Sustainable Development Goals and Human Rights: A Critical Early Review' (2017) 21 *International Journal of Human Rights* 1023, 1024.

⁷³ For a discussion see Stephen Tully, 'The Contribution of Human Rights to Universal Energy Access' (2006) 4 (3) *Northwestern Journal of International Human Rights* 518, 531; Stephen Tully, 'The Human Right to Access Electricity' (2006) 19 (3) *Electricity Journal* 30, 39; Lars Löfquist, 'Is There a Universal Human Right to Electricity?' (2018) 24 *International Journal of Human Rights* 711; Adrian Bradbrook, Judith 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.

⁷⁴ See further Manuel Solis, 'Chapter 4: Human Rights Versus Human Needs: Debating the Language for Universal Access to Modern Energy Services' in Jordi Jaria i Manzano, Nathalie Chalifour and Louis Kotzé (eds), *Energy, Governance and Sustainability* (Edward Elgar 2016) 56, 60 ; and Kaisa Huhta *Conceptualising Energy Justice in the Context of Human Rights Law*, (2023) 41(4) *Nordic Journal of Human Rights*, 378-392.

⁷⁵ *Ibid* Cf Tully (n 65), 38 (discussing concerns about overstretching legal interpretation, capacity constraints of human rights monitoring mechanisms and implementation challenges).

⁷⁶ Solis, (n 66), 60.

Litigation is an increasingly important instrument for energy justice. It enables challenges to energy policies and practices that perpetuate inequities or disregard the rights of marginalised or disadvantaged groups. Several landmark cases illustrate the power of litigation in enforcing energy justice principles and advancing a human rights-based approach to energy. An early example addressing access to energy is *Free Legal Assistance Group and Others v Zaire*, where the African Commission on Human and Peoples' Rights considered that a state's failure to provide access to safe drinking water and electricity may constitute a violation of the right to the highest attainable standard of health.⁷⁷

Other cases have dealt with the impacts of fossil fuel extraction on local communities.⁷⁸ As early as 2006, the Special Representative of the UN Secretary-General for human rights and transnational corporations, John Ruggie, conducted a review of 65 cases of corporate-related human rights abuses occurring during the previous five years. The review disclosed that, at that time, oil, gas, and mining companies comprised two-thirds of the companies implicated in these abuses and that the extractive industries were responsible for 'most allegations of the worst abuses, up to and including complicity in crimes against humanity.'⁷⁹

Within the extractive sector, the oil and gas industry has a particularly grim track record.⁸⁰ The impacts of Shell's operations in Nigeria and Chevron's operations in Ecuador and Peru can be considered as the 'original' business and human rights case studies, illustrating numerous issues concerning corporate activity and human rights. These include extrajudicial killings, infringement upon indigenous peoples' rights, as well as land and environmental degradation.

The devastating environmental and human rights consequences of oil exploration and extraction in the Ogoniland region by the Shell Petroleum Development Company have been the focal point of a legal saga. Nigerian, British, Dutch courts, and the African Commission have all found violations of human rights, including the rights to a satisfactory environment and the right to health. This underscores the significance of distributive justice in energy-related activities.⁸¹

More recently, pathbreaking climate litigation has underscored the state's obligation to ensure energy policies align with climate and human rights commitments. *Earthlife Africa Johannesburg v Minister of Environmental Affairs* case⁸² provides a compelling illustration of litigation addressing the procedural dimension of energy justice. In this case, a South African

⁷⁷ *Free Legal Assistance Group and Others v Zaire* (1997) 4 IHRR 89.

⁷⁸ Annalisa Savaresi and Marisa McVey, 'Human Rights Abuses by Fossil Fuel Companies' (*Climate Defenders Report*, 31 December 2020) <<https://350.org/climate-defenders/>> accessed 27 October 2023, 8.

⁷⁹ *Ibid* 25.

⁸⁰ See Michael Watts, 'Righteous Oil? Human Rights, The Oil Complex and Corporate Social Responsibility' (2005) 30 (1) *Annual Review of Environment and Resources* 373, 401.

⁸¹ *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* [2005] AHRLR 151 (NgHC 2005); *Shell Pet. Dev. Co. (Nig.) Ltd. v Isaiah* [2001] 11 NWLR (Pt.723) 168, 236; *The Bodo Community v Shell Petroleum Development Company of Nigeria Ltd* [2015] EWHC HT-2015-00024.

⁸² *Earthlife Africa v Minister of Environmental Affairs and others*, Founding Affidavit [22 August 2016] filed before the High Court of South Africa Gauteng Division.

court ruled that the state had failed to undertake a comprehensive climate change impact assessment before constructing a coal-fired power plant, thereby violating principles of environmental justice, a subset of energy justice.⁸³

Familiar tensions associated with extractive industries are however also increasingly reported, in the pursuit of projects and policies aimed to deliver a transition away from fossil fuel-based economies. The Business and Human Rights Centre has compiled a catalogue of alleged human rights abuses committed by renewable energy companies⁸⁴ and foreign investors, in the pursuit of minerals to enable the transition.⁸⁵ Indigenous peoples all over the world have complained of violations of the right to free, prior and informed consent perpetrated in the context of processes for the approval of wind farm projects.⁸⁶ Similarly, Indigenous peoples have challenged the decision to approve solar energy projects, alleging violations of their rights to be adequately informed and consulted under federal law.⁸⁷ International human rights bodies have also increasingly received complaints challenging the construction of hydroelectric dams,⁸⁸ alleging, amongst others, breaches of human rights associated with Indigenous people's rights associated with their traditional land uses, culture. Litigation thus continues to expand and evolve, providing a critical tool for enforcing energy justice and advancing the human rights-based approach to energy. This growing body of practice shows the urgent need to ensure that the transition should be socially equitable.

Conclusion

In an evolving global landscape where strategies to address the climate emergency are increasingly taking root, it is vital to acknowledge and address the urgent distributive and restorative justice questions that emerge from the transition. These questions pivot around determining who can and should bear the costs of the massive reforms needed to transition away from fossil fuels and toward achieving net zero emissions. The evidence expounded in this paper shows how human rights are the last and often only resort to voice the plight of groups who are adversely affected by climate change, as well as by climate change response measures.

Human rights law and bodies therefore play a crucial role in the normative framework to ensure that the transition towards net zero societies is inclusive, equitable, and just for all. Here, like elsewhere, human rights law and remedies enable applicants to raise grievances that might otherwise be overlooked. And while human rights may protect interests that might seem to be

⁸³ *Ashgar Leghari v Federation of Pakistan* [4 September 2015] Lahore High Court WP no 25501/2015.

⁸⁴ Business & Human Rights Resource Centre, 'Renewable Energy & Human Rights Benchmark 2021' (2 November 2021) <<https://www.business-humanrights.org/en/from-us/briefings/renewable-energy-human-rights-benchmark-2/>> accessed 27 October 2023.

⁸⁵ Business & Human Rights Resource Centre, 'Transition Minerals Tracker' <<https://www.business-humanrights.org/en/from-us/transition-minerals-tracker/>> accessed 27 October 2023.

⁸⁶ See for example *Comunidad Indígena Zapoteca De Juchitán De Zaragoza* <<https://prodesc.org.mx/la-comunidad-indigena-zapoteca-de-juchitan-de-zaragoza/>> accessed 27 October 2023; *Statnett SF v Sør-Fosen sjite* [11 October 2021] Supreme Court of Norway No. HR-2021-1975-S.

⁸⁷ See for example *Quechan Tribe of Fort Yuma Indian Reservation v. United States Dept. of Interior* [2010] S D Cal 755 F. Supp. 2d 1104.

⁸⁸ See for example the complaint *Consórcio Norte Energia lawsuit (re Belo Monte dam in Brazil)* [2011] IACHR.

at loggerheads with climate action, these tensions should not be regarded as dysfunctional. Instead, they emphasise the need to develop a rights-based approach to the energy transition and to net zero emissions, shining a spotlight on those most affected by the climate emergency and by climate change responses. By focusing on the impacts on the rights of individuals and communities, a human rights lens emphasizes the implications of social and environmental justice for climate governance.⁸⁹

More research in this area is necessary, moving beyond simplistic narratives that focus on win-win logics. Greater attention needs to be paid to the complexities associated with the transition, of the difficult questions they raised. While the literature has so far only considered these matters at the theoretical, policy level,⁹⁰ much more empirical engagement is needed with the practice of the law, to gauge how these tensions may be adjudicated and eventually resolved.⁹¹ In this context, human rights law has an important role to play, which is yet to be fully explored.

⁸⁹ Jodoin, Savaresi and Wewerinke-Singh, 47, 53.

⁹⁰ Johansson V, 'Just Transition as an Evolving Concept in International Climate Law' (2023) 35 *Journal of Environmental Law* 229; Müllerová H and others, 'Building the Concept of Just Transition in Law: Reflections on Its Conceptual Framing, Structure and Content' [2023] *Environmental Policy and Law* 1.

⁹¹ Savaresi A and others (n 28).