



Utrecht University

Leaving no one behind: EU climate action, human rights and a ‘just transition’

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Master Thesis Public International Law (LL.M.)

1 July 2022 — Utrecht University

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Student Number: 6488005

Word Count: 18,862

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List of Abbreviations

CCS	Directive on the geological storage of CO ₂
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEE	Climate, energy, and environmental (research areas)
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CoE	Council of Europe
DEVE	European Parliament's Committee on Development
DG	Directorate-General
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EGD	European Green Deal
EP	European Parliament
ESC	European Social Charter
ESR	Effort Sharing Regulation
ETS	Emissions Trading Scheme
EU	European Union
FPIC	Free, Prior and Informed Consent
FRA	EU Fundamental Rights Agency
GHG	Greenhouse gas (emissions)
IA	Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPCC	Intergovernmental Panel on Climate Change
IHRL	International Human Rights Law
ILO	International Labor Organization

JTF	Just Transition Fund
JTM	Just Transition Mechanism
JTS	Just Transition Scheme
LULUCF	Land Use, Land-Use Change and Forestry (Regulation)
OHCHR	UN Office of the High Commissioner of Human Rights
REDII	(second) revised EU Renewable Energy Directive 2018/2001
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNECE	UN Economic Commission for Europe
UNFCCC	UN Framework on Climate Change
UN HRC	UN Human Rights Council

Introduction

In 2019, *Sabo and Others* filed a landmark case with the European General Court in Luxembourg in which they argued that the European Union (EU) Renewable Energy Directive 2018/2001 (also known as RED II)¹ must be nullified as its treatment of forest biomass fuels would accelerate widespread deforestation, increase greenhouse gas (GHG) emissions, and violate the plaintiffs' human rights.² The applicants asserted that multiple fundamental rights were to be violated by the Directive,³ including the right to private and family life,⁴ the right to manifest religion,⁵ the right to education,⁶ the right to property,⁷ the rights of the child,⁸ the right to a high level of human health protection,⁹ and a right to a high level of environmental protection.¹⁰ These rights are claimed to be infringed upon by, *inter alia*, the current and future destruction of sacred forest sites in Estonia;¹¹ severe noise and air pollution caused by the combustion of forest biomass in France;¹² and to loss of traditional family hunting values, flood protection, wildlife habitat, and damage to property due to the harvesting of the surrounding forests or peat bogs in the United States, France, Slovakia, and Ireland.¹³ Despite their further claims of access to justice under the Aarhus Convention,¹⁴ their case was deemed inadmissible due to a lack of individual and direct concern,¹⁵ which was confirmed in appeal.¹⁶

The *Sabo case* (or EU Biomass Case), and the EU's handling of it, are illustrative of a trend that has grown in Europe in the context of climate action. Climate change is viewed as simply

¹ Parliament and Council Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (RED II) [2018] OJ L328/82

² Case T-141/19 *Sabo and Others v Parliament and Council* [Action brought on 4 March 2019] OJ C 148/60

³ Application for Annulment pursuant to Article 263 TFEU, *Sabo and Others v Parliament and Council*, paras 187-202 <<https://eubiomasscase.org/wp-content/uploads/2019/08/EU-Biomass-Case-Main-Arguments.pdf>> accessed on May 3, 2022

⁴ Article 7 CFREU

⁵ Article 10 CFR

⁶ Article 14 CFR

⁷ Article 17 CFR

⁸ Article 24 CFR

⁹ Article 35 CFR

¹⁰ Article 37 CFR

¹¹ Application for Annulment pursuant to Article 263 TFEU, *Sabo and Others v Parliament and Council*, para 123(a); See <<https://eubiomasscase.org/wp-content/uploads/2019/08/EU-Biomass-Case-Main-Arguments.pdf>> accessed on May 3, 2022

¹² *ibid*, para 123(b)

¹³ *ibid*, para 123

¹⁴ *ibid*, para 129; Aarhus Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (entered into force Oct. 30, 2001)

¹⁵ Case T-141/19 *Sabo and Others v Parliament and Council* [2020] ECLI:EU:T:2020:179, para 51

¹⁶ Case C-297/20 *Sabo and Others v Parliament and Council* [2021] ECLI:EU:C:2021:24, para 44

an issue of getting to net zero carbon emissions without considering the potential violations of civil, political, economic, social and cultural rights of different individuals and groups of people that such a tremendous structural transformation may cause. Human rights coherence is largely left as an afterthought, seemingly playing no significant role in the setting of specific EU GHG emission reduction targets for 2020, 2030 or 2050 as part of the European Green Deal (EGD).¹⁷

This trend is quite surprising considering that the application of human rights law to issues related to climate change is widespread. There is abundant scholarship on the relationship between human rights and climate change,¹⁸ focusing on intersecting themes, comparisons, and issues of human rights implications that come with state responsibility in addressing climate change, as well as the historic climate change jurisprudence that called for the responsibility of both States and the private sector – illustrated markedly by *Urgenda Foundation v Kingdom of the Netherlands*¹⁹ and later in, *Milieudefensie et al. v. Royal Dutch Shell*.²⁰ In these cases, climate action itself was presented as a human rights obligation. But *how* climate action is designed and implemented should also correspond with States’ obligations under the human rights framework. In 2015, the Paris Agreement emphasized that all its Parties should ‘respect, promote and consider their respective obligations on human rights when taking climate action’.²¹ This was not meant to create new human rights obligations, but rather to act as an essential reminder that all Parties to the Paris Agreement must adhere to their respective existing human rights obligations when designing and implementing climate action. In this regard, the notion of a ‘just transition’ – a phrase commonly used to recognize impacts on the rights of workers and labor conditions in transformations compelled by climate change and

¹⁷ European Commission, ‘A European Green Deal’ <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed on May 6, 2022

¹⁸ Margaretha Wewerinke-Singh, ‘State responsibility for human rights violations associated with climate change’ in Sébastien Jodoin, Sébastien Duyck and Alyssa Johl (eds), *Forthcoming, Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018); Sumudu Atapattu, *Human rights approaches to climate change: challenges and opportunities*. (1st edn, Routledge 2015); Ottavio Quirico and Mouloud Boumghar *Climate change and human rights* (1st edn, Routledge 2016); Stephen Humphreys and Mary Robinson (eds) *Human rights and climate change*. (1st edn, CUP 2010)

¹⁹ Supreme Court of the Netherlands (Hoge Raad), *State of the Netherlands v. Urgenda Foundation* (December 20, 2019) ECLI:NL:HR:2019:2007

²⁰ District Court of The Hague, *Milieudefensie et al. v Royal Dutch Shell PLC* (26 May 2021) C/09/571932/HA ZA 19-379, English Version (Milieudefensie v RDS)

²¹ Paris Agreement (Dec. 13, 2015), in UNFCCC, COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add, 1 (Jan. 29, 2016), Preamble

sustainability²² – has been invoked to demand the sharing of the benefits of decarbonization and to support those who will be rendered even more vulnerable, jobless, displaced, or unequal due to the necessary fundamental societal transformations.²³

One of the main challenges of adopting a human rights-based approach to climate action is the necessity of finding practicable and effective solutions to mitigate or adapt to global warming, while simultaneously considering the rights of all individuals and communities who are affected by the various parts of this complex, cumulative and widespread problem.²⁴ As the failure to act on climate change and the taking of mitigation and adaptation measures may result in human rights violations, States are confronted with the need to balance conceivably conflicting human rights obligations. This may lead to a wave of ‘just transition litigation’ – ‘cases that rely in whole or in part on human rights to question the distribution of the benefits and burdens of the transition away from fossil fuels and towards net zero emissions.’²⁵ The complexities inherent in climate change and climate action thus creates significant challenges for States in terms of balancing conflicting human rights imperatives.

1.1 Research question and scope

Although the possible human rights implications of climate action are a global issue, addressing the challenges faced in every region is infeasible for one thesis. Therefore, EU climate action, and specifically the EGD, will be used as case study to provide insight into the (possible) human rights impacts of certain climate policies by applying a human rights framework, proposed by this thesis, for the promotion of a ‘just transition’ and what is required for the promotion of a ‘just transition’. With 27 Member States, 440 million citizens in an area over 4 million km², and representing 16% of the world’s GDP,²⁶ the EU and its climate policies will have far reaching impacts within and outside of Europe. Its Green Deal, announced by the

²² See ILO, ‘Guidelines for a just transition towards environmentally sustainable economies and societies for all. Geneva: International Labour Organisation.’ (2015) <http://www.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/documents/publication/wcms_432859.pdf> accessed on May 6, 2022

²³ Annalisa Savaresi and Joana Setzer, ‘Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers.’ (2021) *J. Hum. Rights Environ.* 1, 3; Fergus Green and Ajay Gambhir ‘Transitional assistance policies for just, equitable and smooth low-carbon transitions: who, what and how?.’ (2020) *Climate Policy* 20.8 902, 905

²⁴ Bridget Lewis, ‘Balancing human rights in climate policies’ in Ottavio Quirico and Mouloud Boumghar *Climate change and human rights* (1st edn, Routledge 2016), 52.

²⁵ Savaresi and Setzer, *supra* note 23, 3; Green and Gambhir, *supra* note 23, 905

²⁶ European Commission, ‘Facts and figures on life in the European Union’, <https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/life-eu_en> accessed on May 6, 2022

Commission in 2019,²⁷ is an unprecedented effort at the level of the EU to make the transition towards a modern, resource-efficient, and competitive economy by reducing GHG emissions by at least 55% by 2030 and achieving carbon neutrality by 2050.²⁸ The EU has long been considered a forerunner in implementing progressive climate policies and advancing emissions reductions required to attain the 1.5°C target.²⁹ As the Commission stated in 2018, ‘the EU has been at the forefront of addressing the root causes of climate change and strengthening a concerted global response in the framework of the Paris Agreement’.³⁰ This is exemplified in the EU’s reduction of GHG emissions by 31% below 1990 levels in 2020.³¹ This illustrates the importance of a research on EU climate action, as its structural transformation has the possibility to have consequential negative human rights impacts on its citizens as well as on those living outside of the EU, while in fact it should promote a ‘just transition’. Besides, the case study can also provide useful insights for climate action in other areas. This leads to the primary research question of this thesis:

‘To what extent does EU climate action promote a ‘just transition’?’

This research question will be answered by examining three sub-questions. Firstly, what does EU climate action, and specifically the European Green Deal, entail and what role do human rights play in its laws and policies? Secondly, what does international human rights law require for the fulfilment of a ‘just transition’? And thirdly, to what extent may substantive economic, social, and cultural rights, civil and political rights, indigenous rights, and the procedural right to access to justice be affected by EU climate action?

1.2 Methodology

This thesis will critically evaluate EU climate action, and specifically the EGD, through the prism of the concept of a ‘just transition’ and human rights. To answer the primary research question, a combination of a descriptive and normative evaluative approach will be taken. To

²⁷ European Commission, ‘The European Green Deal’ (Communication) COM (2019) 640 final

²⁸ European Commission, ‘A European Green Deal’ <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed on May 6, 2022

²⁹ Benjamin K Sovacool et al, ‘Dispossessed by decarbonisation: Reducing vulnerability, injustice, and inequality in the lived experience of low-carbon pathways’ (2021) *World Development* 137 1

³⁰ European Commission, ‘A Clean Planet for all A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy’ (Communication) COM (2018) 773 final 4

³¹ European Environmental Agency, ‘Is Europe reducing its greenhouse gas emissions?’ (December 3, 2021) <<https://www.eea.europa.eu/themes/climate/eu-greenhouse-gas-inventory>> accessed on May 6, 2022

this end, the following international human rights law (IHRL) standards will be used to assess EU climate action, namely the Charter of Fundamental Rights of the European Union (CFREU), European Convention of Human Rights (ECHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Aarhus Convention. Many legal issues arise from the multi-layered nature of European climate action and its intersection with IHRL, not only regarding the application or interpretation of human rights within the context of climate action, but also in view of their interaction. Even though the CFREU is currently the leading human rights instrument for evaluating the adherence of EU laws and action with human rights in the EU, it covers only the implementation of EU law by the EU or its Member States.³² Consequently, other international human rights documents should and can also be applied to EU climate action, as the CFREU stipulates that it does not restrict or adversely affect human rights as recognized in international law and by international agreements to which all Member States are party.³³ Furthermore, it considers rights incorporated in the CFREU to be in the same ‘meaning and scope’ as the equivalent rights embodied by the ECHR.³⁴ This thesis will mainly rely on academic literature, but also on case law and other secondary sources.

1.3 Structure

The research of this thesis cannot commence without first elaborating upon the interrelation between IHRL, climate change and the EU, since this relationship forms the basis of the analysis of this thesis. The first chapter will therefore be devoted to laying the groundwork for this topic, exploring the interaction between climate change and IHRL, as well as the development of human rights in Europe. The second chapter will be descriptive, aiming to delineate the topic of analysis, EU climate action and the EGD, as it draws upon the information made available by the EU to outline the different policies that aim to reduce GHG emissions of the Union by 55% by 2030 and make the EU carbon neutral by 2050. In doing so, this chapter aims to answer the sub-question ‘what does EU climate action, and specifically the European Green Deal, entail and what role do human rights play in its laws and policies?’. The primary research question necessitates a clear description of the concept of a ‘just transition’ in the context of IHRL. Therefore, the third chapter will be devoted to the creation of a human rights framework to be used to analyze the extent to which EU climate action promotes a just

³² Article 51(1) CFR

³³ Article 53 CFR

³⁴ Article 52(3) CFR

transition, considering the applicable human rights to be considered for the advancement of a 'just transition'. Thereby, the sub-question 'what does international human rights law require for the fulfilment of a 'just transition' will be answered. The fourth and final chapter will delve into the human rights that are (potentially) affected by EU climate action, aiming to examine three groups of substantial rights and one procedural right. Accordingly, this chapter will answer the sub-question 'to what extent may substantive economic, social, and cultural rights, civil and political rights, indigenous rights, and the procedural right to access to justice be affected by EU climate action?'. Lastly, in the concluding chapter the primary research question will be answered and evaluated.

Chapter 1: Human rights, Europe, and climate change

In order to look at EU climate action through the prism of human rights, an analysis of the applicability of IHRL on climate change, as well as an explanation of the development of human rights law in Europe within the Council of Europe (CoE) and within the EU is necessary. Therefore, this background chapter provides an overview of the relevant provisions within IHRL in light of the effects of climate change, as well as an examination of evolution of European human rights law within the CoE and the EU.

1.1 International human rights law and climate change

International human rights protection originated from the adoption of the UN Charter in 1945.³⁵ After the Second World War, the UN was established with the adoption of the UN Charter to advance international peace and security, international co-operation, and respect for human rights and fundamental freedoms.³⁶ Human rights are included in the UN Charter in Articles 1, 55 and 56, but not in a detailed way, leading the UN General Assembly to adopt the Universal Declaration of Human Rights (UDHR) in 1948.³⁷ Even though it is non-binding, it was the first document to set out fundamental human rights to be universally protected and is widely considered as having sparked, and led the way for, the adoption of more than seventy human rights treaties employed today on a permanent basis at global and regional levels.³⁸ There are nine international human rights treaties currently in force which aim to protect human rights that are particularly relevant to climate change, such as the rights to life, health, adequate standard of living, namely: Article 6 ICCPR; Articles 12 and 13 ICESCR; Article 5 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD); Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Articles 6, 24 and 28 of the Convention on the Rights of the Child (CRC); and Articles 10 and 25 of the Convention on the Rights of Persons with Disabilities (CRPD). Most of these treaties

³⁵ Marlies Hesselman, 'EU Climate Law and Human Rights' in Edwin Woerdman, Martha Roggenkamp, and Marijn Holwerda (eds), *Essential EU Climate Law* (Edward Elgar Publishing, 2021) 259

³⁶ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 1

³⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

³⁸ United Nations, 'Universal Declaration of Human Rights' <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed on May 8, 2022

have been ratified almost universally.³⁹ Every EU Member State is a party to these treaties and the EU is a party to the CRPD directly.⁴⁰

The most important body for the monitoring of the human rights embodied by UN Charter and the UDHR is the UN Human Rights Council (UN HRC).⁴¹ It has been given the competence to review the human rights records of all UN Member States, adopt non-binding resolutions on gross and systemic human rights violations and clarify States' human rights obligations.⁴² The UN HRC receives support from the UN Office of the High Commissioner of Human Rights (OHCHR) and by its 'special procedures' – independent working groups and rapporteurs with thematic or country mandates.⁴³ Currently, there is a Special Rapporteur on human rights and the environment,⁴⁴ but no special procedure on human rights and climate change specifically. Each individual human rights treaty is supervised by its own treaty body, which consists of independent experts responsible for examining periodic reports, considering inter-State communications and individual communications, and drafting General Comments that interpret the meaning of specific treaty provisions.⁴⁵

Climate change will violate, and is already violating, many human rights.⁴⁶ According to the last report of the Intergovernmental Panel on Climate Change (IPCC), the effects of climate change, the warming of the atmosphere, and the acidification and warming of the oceans are already impacting agriculture, forests, the marine environment, water supplies, small islands, and low-lying coastal areas.⁴⁷ This is leading to, or increasing, extreme weather, loss of biodiversity and desertification.⁴⁸ If not slowed, the effects of global warming will deepen in severity and scope, with the IPCC predicting with high confidence that current trends in climate change will increase the number of people suffering death, hunger, malnutrition, disease and

³⁹ OHCHR, 'Status of Ratification Interactive Dashboard' <<https://indicators.ohchr.org/>> accessed on May 8, 2022

⁴⁰ *ibid*

⁴¹ UN General Assembly, *Human Rights Council: resolution / adopted by the General Assembly*, 3 April 2006, A/RES/60/251

⁴² Dinah L. Shelton, *Advanced Introduction to International Human Rights Law* (Edward Elgar Publishing, 2020) para 3.1.2

⁴³ *ibid*, para 3.1.3

⁴⁴ OHCHR, 'Special Rapporteur on human rights and the environment' <<https://www.ohchr.org/en/special-procedures/sr-environment>> accessed on May 8, 2022

⁴⁵ Shelton, *supra* note 42, para 3.1.4

⁴⁶ John H. Knox, 'Climate Change and Human Rights Law' (2009) 50e Va J Int'l L 163, 164

⁴⁷ IPCC, 'Climate Change 2022: Impacts, Adaptation and Vulnerability: Summary for Policymakers' (2022) 11

⁴⁸ *ibid*

harm from floods, fires, storms, droughts and heat waves.⁴⁹ These (or such) effects of climate change makes the threat of global warming for the enjoyment of human rights painfully clear.

More specifically, climate change has been recognized to affect the enjoyment of civil and political rights, and in particular the rights to life, property, and privacy.⁵⁰ UN HRC's General Comment No. 36⁵¹ recognized the pressing and serious threat on current and future generations' ability to enjoy of their rights to life,⁵² as well as the States duties to protect people against harmful conditions, including environmental threats such as climate change.⁵³ The right to life has been invoked in climate cases at UN treaty committees,⁵⁴ as well as in European climate litigation.⁵⁵

There are not as many authoritative interpretations of economic, social, and cultural rights in relation to climate change as there are fewer bodies that have the competence to clarify these rights on a case-by-case basis. However, the Committee on Economic, Social and Cultural Rights (CESCR) has made interpretations of economic, social and cultural rights in relation to climate change. In its 'Statement on Climate Change and the ICESCR' it emphasized that climate change already affects the rights to health, food, housing, water and sanitation, as well as impacts nutrition through loss of livelihoods, increases in poverty, changes in crop yields, and reduced access to food, water and sanitation.⁵⁶

Indigenous rights are affected by climate change, as the rights of indigenous peoples that rely on the natural environment can only be protected if that natural environment is protected.⁵⁷ Without the land and resources on which they rely, the physical and cultural survival of their

⁴⁹ *ibid*, 13

⁵⁰ Knox, *supra* note 46, 171

⁵¹ UN Human Rights Committee, *General Comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35

⁵² *ibid*, para 1

⁵³ *ibid*, para 26

⁵⁴ See *Ioane Teitiota v New Zealand* (2020) UN Human Rights Committee CCPR/C/127/D/2728/2016; *Sacchi et al v Argentina et al* (2021) UN Committee on the Rights of the Child CRC/C/88/D/104/2019

⁵⁵ For an overview of European climate litigation, see Climate Case Chart, 'Jurisdiction' <<http://climatecasechart.com/climate-change-litigation/non-us-jurisdiction/>> accessed June 9, 2022

⁵⁶ CESCR, *Climate Change and the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2018/1 (31 October 2018) para 4

⁵⁷ See for instance, OAS, Inter-American Court on Human Rights, 'Third Report on the Situation of Human Rights in Paraguay' (2001) OEA/Ser/LNII.1 10, doc. 52, ch. IX 50

community is threatened, and therefore the lands and resources they have traditionally used must be protected as to avert the dying out of their peoples.⁵⁸

Due to the relationship between human rights and climate change, there have been calls for the recognition and protection of a right to a healthy environment.⁵⁹ While there are some regional instruments that provide for a right to a healthy environment,⁶⁰ these efforts are fragmented and consequently do not create a uniform standard.⁶¹ Thus, an exact formulation of the right to an healthy environment has not been agreed upon, but it could be interpreted in trite terms as ‘the right to an ecologically balanced, sustainable, healthy, clean, or satisfactory environment that permits healthy living for human (and sometimes non-human) entities on Earth’.⁶² There have been some developments in the international recognition of this right, for instance through several reports by the UN Special Procedure on Human Rights and the Environment on the human rights obligations of States in relation to climate change.⁶³

Procedural rights are also very much linked to climate change as illustrated by the adoption of the Aarhus Convention, which establishes relevant procedural rights within environmental law.⁶⁴ There is some jurisprudence on such rights, for instance by the European Court of

⁵⁸ *Saramaka People v. Suriname* (2007) Inter-American Court on Human Rights (ser. C) No. 172, 95 (Nov. 28, 2007), 121

⁵⁹ Laura Horn, ‘The Implications of the Concept of a Common Concern of Human Kind on a Human Right to a Healthy Environment’ (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 233; Stephen J. Turner, *A Global Environmental Right* (Routledge, 2014); Ademola Oluborode Jegede, ‘Arguing the Right to a Safe Climate under the UN Human Rights System’ (2020) 9 *Int. Hum. Rights Law Rev.* 184; Louis Kotzé, ‘In Search of a Right to a Healthy Environment in International Law’ in John Knox and Ramin Pejman (eds), *The Human Right to a Healthy Environment in International Law* (CUP 2018) 136

⁶⁰ African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 *ILM* 58 (African Charter), Article 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in *Basic Documents Pertaining to Human Rights in the Inter- American System OEA/Ser L V/II.82 Doc 6 Rev 1* at 67 (1992), Article 11; League of Arab States, *Arab Charter on Human Rights*, 15 September 1994, Article 38; Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012, Article 28(f)

⁶¹ Kotzé, *supra* note 59, 137

⁶² *ibid.*, 136

⁶³ UN HRC, ‘The right to a clean, healthy and sustainable environment: non-toxic environment - Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (12 January 2022) A/HRC/49/53; UN HRC, ‘Good practices on the right to a safe, clean, healthy and sustainable environment’ (30 December 2019) A/HRC/43/53; UN HRC, ‘Report of the Special Rapporteur on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment on a safe climate’ (15 July 2019) A/74/161

⁶⁴ Aarhus Convention, *supra* note 14

Human Rights (ECtHR), which has seen complaints filed by individuals and groups with regards to States' climate policies.⁶⁵

It follows from the above that the relationship between climate change and human rights has received international attention, yet it has barely been included in climate change agreements. The adoption of HRC Resolution 10/4 on 'Human Rights and Climate Change' in 2009 first initiated international spotlight on the issue.⁶⁶ Its significance lies in its conclusion for the first time that climate change leads to both direct and indirect human rights impacts and that it will affect certain segments of society more severely.⁶⁷ This resolution was cited in the UN Framework Convention on Climate Change⁶⁸ (UNFCCC)'s Cancún Agreements in 2010, in which it was stated that all UNFCCC parties should respect human rights in all climate change related actions.⁶⁹ The Paris Agreement, which entered into force in 2016, sets out a new agenda for implementing the UNFCCC, and emphasized that all its 'Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity'.⁷⁰ This is stated in the preamble of the agreement and it is all it says on the subject of human rights, making it merely a recognition that States should take into account their human rights obligations when undertaking climate action – arguably insufficient considering the interrelatedness of climate change and human rights.⁷¹

1.2 Europe and human rights

While the UN was being established, European human rights initiatives were also being developed. The CoE was created in 1949 and immediately adopted the ECHR in 1950, which

⁶⁵ *Fügerskiöld v. Sweden* App no 37664/04 (ECHR, 26 February 2008); *Vecbaštika and Others v Latvia*, App no 52499/11 (ECHR, 19 November 2019)

⁶⁶ UN HRC, *Resolution 10/4 Human rights and climate change*, 25 March 2009, A/RES/10/4; UN HRC, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, 15 January 2009, A/HRC/10/61

⁶⁷ *ibid*

⁶⁸ UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189

⁶⁹ Decision 1/CP.16, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention' UNFCCC/CP/2010/7/Add.1, 15 March 2011, 2 (LCA Decision)

⁷⁰ Paris Agreement, *supra* note 21, Preamble

⁷¹ Alan Boyle, 'Climate change, the Paris Agreement and human rights' (2018) 67.4 ICLQ 759, 770

entered into force in 1953.⁷² The EU developed its own charter of human rights in the form of the CFREU, which was adopted in 2000.⁷³ Ever since a fundamental rights discourse started to develop in the EU system in the 1970s, there has been tension between the two organizations, as, according to some, further activity in this area may render the CoE irrelevant.⁷⁴ The ‘Memorandum of Understanding between the Council of Europe and the European Union’, adopted in 2007,⁷⁵ aims to overcome this concern by stipulating that the EU will refer to the relevant CoE norms and consider its monitoring bodies’ decisions and conclusions when developing human rights standards, while this does not hinder the EU from setting a higher standard of protection.⁷⁶ Furthermore, the CFREU recognizes the multifaceted nature of human rights protection in the EU in Article 53, in which it stipulates that it does not restrict or adversely affect human rights as recognized in international law and by international agreements to which all Member States are party.⁷⁷ It considers rights incorporated in the CFREU to be in the same ‘meaning and scope’ as the equivalent rights embodied by the ECHR.⁷⁸ In addition to its own Charter of Rights, the Lisbon Treaty (2009)⁷⁹ has stipulated the accession of the EU to the ECHR,⁸⁰ raising issues of competence as well as many procedural and substantive issues. This section describes the evolution of European human rights law within the CoE and within the EU, as well as their particular applicability to climate change.

1.2.1 The Council of Europe

The CoE currently consists of 46 Member States, including all 26 EU Member States.⁸¹ All CoE Member States must ratify the ECHR in order to join the organization, but they do not have to ratify the other protocols to the ECHR or the European Social Charter (ESC) – another important CoE human rights treaty.⁸² All EU members are either party to the original version

⁷² Statute of the Council of Europe (adopted in London on 5 May 1949, entry into force 3 August 1949) ETS No. 001

⁷³ EU, *Charter of Fundamental Rights of the European Union*, (CFREU) 18 December 2000, 2000/C 364/01

⁷⁴ Olivier de Schutter, 'The Two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe' (2008) 14 *Colum J Eur L* 509, 511

⁷⁵ Memorandum of Understanding Between the Council of Europe and the European Union (May 10, 2007) adopted at the 117th Session of the Committee of Ministers held in Strasbourg

⁷⁶ *ibid*, paras 17-19

⁷⁷ Article 53 CFR

⁷⁸ Article 52(3) CFR

⁷⁹ EU, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01

⁸⁰ Article 6(1) TEU

⁸¹ CoE, '46 Member States' <<https://www.coe.int/en/web/portal/46-members-states>> accessed May 9, 2022

⁸² CoE, *European Social Charter*, (ESC) 18 October 1961, ETS 35; CoE, *European Social Charter (Revised)*, (Revised ESC) 3 May 1996, ETS 163

of the ESC of 1961 or the revised one of 1995.⁸³ The ECHR, which mostly protects civil and political rights, is supervised by the ECtHR, which may receive individual complaints against States and adopts decisions binding on Convention States.⁸⁴ The ESC,⁸⁵ which mostly protects social and economic rights, is supervised by the European Committee of Social Rights, which may receive collective complaints against States and adopt non-binding decisions.⁸⁶

There are authoritative interpretations of both the ECHR and the ESC in the context of environmental issues.⁸⁷ Especially the ECtHR has developed detailed jurisprudence under the right to life and privacy of Articles 2 and 8.⁸⁸ The ECHR may lack a right to a healthy environment, but the rights to life and privacy may still be violated when environmental harm effects attain a certain minimum level of severity.⁸⁹ These rights may also be involved in the mitigation of natural disasters, such as mud slides, earthquakes and floods.⁹⁰ States are obligated to take steps to protect against the harm,⁹¹ whether caused by private actors or by the state itself.⁹² It is likely that the ECtHR has to give its opinion on States' obligation to successfully implement the Paris Agreement to prevent natural disasters resulting from unmitigated climate change with two climate cases currently pending before the Court: *Cláudia Duarte Agostinho and Others v Portugal and 32 other States*⁹³ and *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others*.⁹⁴ The first case concerns six Portuguese youth who filed a complaint against 33 States alleging human rights violations

⁸³ Hesselman, *supra* note 35, 268

⁸⁴ Articles 34-35 ECHR

⁸⁵ ESC, *supra* note 82; ESC (Revised), *supra* note 82

⁸⁶ Article 25 ESC (Revised)

⁸⁷ CoE, 'Factsheet on Environment and the European Convention on Human Rights' (April 2022)

<https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf> accessed May 9, 2022; European Committee of Social Rights, Complaint No. 30/2005, MFHR v Greece [Decision on Merits of 6 December 2006]

⁸⁸ *ibid*

⁸⁹ See *Lopez Ostra v Spain* App no 16798/90 (ECHR, 9 December 1994) para 51; *Kyrtatos v Greece* App no 41666/98 (ECHR, 22 May 2003), para 52; *Fadeyeva v Russia* App no 55723/00 (ECHR, 9 June 2005) paras 68-69; *Dubetska v Ukraine* App no 30499/03 (ECHR, 10 February 2011) paras 105-106

⁹⁰ See *Öneryildiz v Turkey* App no 48939/99 (ECHR, 30 November 2004); *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02 (ECHR, 20 March 2008); *Koldyadenko and Others v Russia* App nos 17423/05, 20534/05, 20678/05, 24283/05, and 35673/05 (ECHR, 28 February 2012); *Hadzhiyska v Bulgaria* App no 20701/09 (ECHR, 15 May 2012); *Özel and Others v Turkey* App nos 14350/05, 15245/05, and 16051/05 (ECHR, 17 November 2015)

⁹¹ *Hatton and Others v The United Kingdom* App no 36022/97 (ECHR, 8 July 2003) para 120; *Özel and Others* case, *supra* note 90, paras 170-174

⁹² *Özel and Others* case, *supra* note 90, para 189

⁹³ *Cláudia Duarte Agostinho and Others v Portugal and 32 other States* App no 39371/20 (ECHR, Communication of 2 September 2020)

⁹⁴ *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others* App no 53600/20 (ECHR, Communication of 26 November 2020)

due to insufficient action on climate change, seeking an order demanding those States to take more ambitious climate action.⁹⁵ The second case involves a group of senior Swiss women who filed a complaint at the ECtHR claiming that certain Swiss Governmental bodies are in violation of their obligations under the ECHR by not moving Switzerland towards emission reduction in order to be consistent with the aim of keeping global temperatures well below 2 degrees above pre-industrial levels.⁹⁶

1.2.2 The European Union

The predecessor of the EU, the European Economic Community (EEC) was established by the Treaty of Rome in 1957.⁹⁷ The EEC was aimed at ensuring peace, economic and social progress, and working towards a political unification of Europe through economic integration.⁹⁸ Fundamental rights were not included in early EEC treaties, but the European Court of Justice (ECJ) did assert that human rights were a part of the general principles of EEC law which could be derived from the ECHR and international human rights law.⁹⁹ It was only in 1992 with the Treaty of Maastricht¹⁰⁰ that fundamental rights were specifically referenced in the founding treaties, and the 2007 Lisbon Treaty¹⁰¹ established Article 2 TEU to assert that human rights were part of the European values upon which the EU is founded.¹⁰² The EU adopted its own human rights document, the CFREU, in 2000,¹⁰³ which protects a range of rights and became legally binding through the Lisbon Treaty.¹⁰⁴ The Council of the EU has established the EU Fundamental Rights Agency (FRA) to promote the values incorporated in the CFREU, rather than supervise its implementation and constancy.¹⁰⁵

⁹⁵ For more information about the case see Climate Case Chart, ‘Duarte Agostinho and Others v. Portugal and 32 Other States’ <<http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/>> accessed June 7, 2022

⁹⁶ For more information about the case see Climate Case Chart, ‘Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others’ <<http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>> accessed June 7, 2022

⁹⁷ EU, *Treaty establishing the European Economic Community (Consolidated version)*, Rome Treaty, 25 March 1957

⁹⁸ EU, ‘Summary of the Treaty establishing the European Economic Community’ (14 March 2017) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0023>> accessed May 9, 2022

⁹⁹ Hesselman, *supra* note 35, 270

¹⁰⁰ EU, *Treaty on European Union (Consolidated version)*, Treaty of Maastricht, 7 February 1992

¹⁰¹ Lisbon Treaty, *supra* note 79

¹⁰² Article 2 TEU

¹⁰³ CFREU, *supra* note 73

¹⁰⁴ Lisbon Treaty, *supra* note 79, Article 6

¹⁰⁵ EU, Council of the European Union, *Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights*, 15 February 2007, No 168/2007

The CFREU rights most important in relation to global warming are the right to human dignity; the right to life; the right to respect for private and family life; the right to property; the rights to cultural, religious, and linguistic diversity; the rights of the child; the rights of the elderly; the integration of persons with disabilities; the right to a high level of health protection; and a high level of environmental protection.¹⁰⁶ The CFREU is currently the leading human rights instrument for evaluating the adherence of EU laws and action with human rights in the EU and covers the implementation of EU law by the EU or its Member States.¹⁰⁷ Yet, as described by Hesselman, the many CFREU rights relevant to climate change have received very minimal attention in the development and implementation of EU climate action, as EU law-makers inadequately assess how new EU climate laws may negatively affect human rights.¹⁰⁸

¹⁰⁶ Articles 1, 2, 7, 17, 21-26, 35, 37 CFR

¹⁰⁷ Article 51(1) CFR

¹⁰⁸ Hesselman, *supra* note 35, 272-277

Chapter 2: EU climate action

For EU climate action to be examined from a human rights perspective, EU climate action itself should first be delineated, and thereafter the role human rights play in current EU climate action should be analyzed. Therefore, this chapter will explore the development of EU climate action, current EGD policies and laws relevant to this research, and the role human rights play in those EGD policies and laws. By doing so, the question ‘what does EU climate action, and specifically the European Green Deal, entail and what role do human rights play in its laws and policies?’ will be answered.

1.1 The development of EU climate action

EU climate action originated in the 1980s with the European Parliament (EP) first illuminating the serious nature of global warming in 1986, after which the Commission recognized that the increasing concentration of CO₂ in the atmosphere was a global issue that should be addressed internationally.¹⁰⁹ Yet, the first attempts to comprehensive EU climate action at the start of the 1990s failed,¹¹⁰ with GHG emissions even increasing the following years.¹¹¹ EU policies to tackle climate change developed gradually, shaped by international developments such as the 1997 Kyoto Protocol. The adoption of this Protocol had a significant influence on the first generation of EU climate legislation, boosting the development of European climate action.¹¹² In 2005, the EU launched the Emissions Trading Scheme (ETS),¹¹³ and two years later it adopted a comprehensive climate legislative package with unilateral climate targets – the so-called 20-20-20 targets.¹¹⁴ These aimed to reduce GHG emissions by 20 percent, increase the share of renewable energies in EU energy consumption to 20 percent, and raise energy

¹⁰⁹ Resolution of the European Parliament of 12 September 1986 on measures to be taken in research and energy policy to combat the increasing concentration of CO₂ in the atmosphere [1986] A2-68/86; European Commission, ‘Communication to the Council ‘Greenhouse Effect and the Community’’ COM (1988) 656 final; see Edwin Woerdman, Martha Roggenkamp, and Marijn Holwerda (eds) *Essential EU Climate Law* (Edward Elgar Publishing, 2021) 23

¹¹⁰ *ibid* 24

¹¹¹ European Environmental Agency (EEA), ‘Total greenhouse gas emission trends and projections in Europe’ <<https://www.eea.europa.eu/ims/total-greenhouse-gas-emission-trends>> accessed May 16, 2022

¹¹² Woerdman et al., *supra* note 118, 10

¹¹³ Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 [2018] OJ L 76 [hereinafter ETS]; see European Commission, ‘Development of EU ETS (2005-2020)’ <https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets/development-eu-ets-2005-2020_en> accessed May 16, 2022

¹¹⁴ European Commission, ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘20 20 by 2020 – Europe’s climate change opportunity’’ COM (2008) 30 final 3

efficiency by 20 percent.¹¹⁵ The EU's ambition to play a leading role in tackling climate change was also reflected in the Lisbon Treaty,¹¹⁶ as well as in Article 37 CFREU¹¹⁷ – a provision on environmental protection. Article 194 TFEU now included the EU's aim to advance the development of renewable energy, energy saving and energy efficiency.¹¹⁸ Furthermore, addressing global warming was identified as one of the priorities of EU environmental policy in Article 191(1) TFEU.¹¹⁹ The EU and its Member States were also now obliged to cooperate with third countries and international organizations in addressing climate change under Article 191(4) TFEU.¹²⁰ The Paris Agreement (2015) was a big achievement for EU diplomacy and encouraged the EU to strengthen its 2030 targets on emission reduction, renewable energy, and energy efficiency.¹²¹

1.2 The European Green Deal

In December 2019, the European Commission published its proposal for 'The European Green Deal', which was to serve as 'a new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net GHG emissions in 2050 and where economic growth is decoupled from resource use'.¹²² Simultaneously, the Commission ensured that this transition was to be just and inclusive – guaranteeing that the most vulnerable groups would not bear the costs of the transition¹²³ – considering it an essential precondition for a successful transition towards a carbon-zero economy. The first goal on the road to 2050 is to reduce net EU GHG emissions to 55% below 1990 levels by 2030,¹²⁴ moving beyond the 40% reduction target set in 2018.¹²⁵

¹¹⁵ *ibid*, 2-3

¹¹⁶ Woerdman et al., *supra* note 109, 26

¹¹⁷ Article 37 CFR

¹¹⁸ Article 194 TFEU

¹¹⁹ Article 191(1) TFEU

¹²⁰ Article 191(4) TFEU

¹²¹ Sebastian Oberthür 'Hard or soft governance? The EU's climate and energy policy framework for 2030' (2019) 7.1 *Politics and Governance* 17

¹²² European Commission, 'The European Green Deal' (Communication) COM (2019) 640 final 2

¹²³ *ibid*, 16

¹²⁴ European Commission, 'Delivering the European Green Deal' <https://ec.europa.eu/clima/eu-action/european-green-deal/delivering-european-green-deal_en> accessed on May 16, 2022

¹²⁵ Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 [2018] OJ L 156 [hereinafter ESR]

The EGD is shaped around eight areas for action which the Commission considers to be strongly interlinked and mutually reinforcing.¹²⁶ These areas are: (1) increasing the EU's climate ambition for 2030 and 2050; (2) supplying clean, affordable and secure energy; (3) mobilizing industry for a clean and circular economy; (4) building and renovating in an energy and resource efficient way; (5) accelerating the shift to sustainable and smart mobility; (6) from 'Farm to Fork': designing a fair, healthy and environmentally friendly food system; (7) preserving and restoring ecosystems and biodiversity; and (8) a zero pollution ambition for a toxic-free environment.¹²⁷ The first climate action initiatives under the EGD include: (1) the European Climate Pact, which aims to engage citizens and every part of society in climate action; (2) the 2030 Climate Target Plan, which intends to further reduce net GHG emissions by at least 55% by 2030; (3) the EU Strategy on Climate Adaptation, which goal is to make the EU climate-resilient society by 2050 and completely adapted to the inevitable impacts of climate change; and (4) European Climate Law, which writes the EGD GHG targets into EU law.¹²⁸ As part of European Climate Law, the Commission adopted the Fit for 55 legislative package in July 2021 – a series of legislative proposals setting out how it intends to achieve carbon neutrality in the EU by 2050.¹²⁹ Furthermore, the EU has established several key instruments to achieve its 2030 climate targets, of which the ETS,¹³⁰ the Effort Sharing Regulation (ESR),¹³¹ and the Land Use, Land-Use Change and Forestry Regulation (LULUCF Regulation)¹³² are the three main pillars.¹³³

The first pillar, the ETS, works on the basis of the cap-and-trade principle, which means that the total amount of GHG emissions by the covered energy-intensive industries has a cap which is reduced every year. However, these installations may buy or receive emission allowances

¹²⁶ European Commission, 'The European Green Deal' (Communication) COM (2019) 640 final 4

¹²⁷ *ibid*

¹²⁸ European Commission, 'European Green Deal' <https://ec.europa.eu/clima/eu-action/european-green-deal_en> accessed on May 16, 2022

¹²⁹ *ibid*

¹³⁰ ETS, *supra* note 113

¹³¹ ESR, *supra* note 125

¹³² Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU [2018] OJ L 156 [hereinafter LULUCF Regulation]

¹³³ European Commission, 'Effort Sharing 2021-2030: targets and flexibilities' <https://ec.europa.eu/clima/eu-action/effort-sharing-member-states-emission-targets/effort-sharing-2021-2030-targets-and-flexibilities_en> accessed May 16, 2022

within this cap as needed.¹³⁴ Directive 2018/410¹³⁵ has amended the original ETS Directive¹³⁶ to increase the directive's cost-effectiveness and to promote investments for a low-carbon transition.¹³⁷ Those sectors that are not covered by the ETS, such as transport, buildings, agriculture and waste, are bound by the ESR to reduce their GHG emissions.¹³⁸ As part of the Fit for 55 legislative package, the Commission has proposed amendments to the ESR to reach the target of 55% net GHG reductions by 2030, compared to 1990 levels, increasing the reduction target for the relevant sectors from the current 29% to 50% by 2030, compared to 2005.¹³⁹ Moreover, the more ambitious national targets for Member States have to be fair and cost-efficient.¹⁴⁰ The third main pillar, the LULUCF Regulation, aims to ensure that GHG emissions from land use, land use change or forestry cannot exceed the total amount of removal of trees, plants and soil in the period of 2021-2030 – the so-called 'no-debit rule'.¹⁴¹ In simple terms, this means that any deforestation must be compensated by equivalent afforestation. The new proposed amendments to the LULUCF Regulation will set new net removal targets for Member States to reverse the trend of the decreasing carbon sink, aims to make the land use, forestry and agriculture sector climate neutral by 2035, and will simplify the rules as well as enhance the monitoring.¹⁴²

Other relevant legislative instruments are the directive on the geological storage of CO₂ (CCS Directive)¹⁴³ and the (second) revised Renewable Energy Directive (REDII).¹⁴⁴ The REDII establishes a legal framework for the development of renewable energy across all sectors of

¹³⁴ European Commission, 'EU Emissions Trading System (EU ETS) <https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en> accessed May 16, 2022

¹³⁵ ETS, *supra* note 113

¹³⁶ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275

¹³⁷ European Commission, 'EU Emissions Trading System (EU ETS) <https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en> accessed May 16, 2022

¹³⁸ ESR, *supra* note 125

¹³⁹ European Commission, 'Increasing the ambition of the EU's Effort Sharing Regulation' <https://ec.europa.eu/clima/eu-action/european-green-deal/delivering-european-green-deal/increasing-ambition-eus-effort-sharing-regulation_en> accessed on May 16, 2022

¹⁴⁰ *ibid*

¹⁴¹ European Commission, 'Land Use, Forestry and Agriculture' <https://ec.europa.eu/clima/eu-action/european-green-deal/delivering-european-green-deal/land-use-forestry-and-agriculture_en> accessed May 16, 2022

¹⁴² *ibid*

¹⁴³ Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] OJ L 140 [hereinafter CCS Directive]

¹⁴⁴ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328 [hereinafter REDII]

the EU economy.¹⁴⁵ The revised version of the REDII, which was proposed by the Commission in July 2021, aims to increase the target share of renewable energy in the gross final energy consumption to 40% by 2030 and will strengthen the measures for transport or heating and cooling.¹⁴⁶ The CCS Directive supplements the promotion of natural carbon sinks (LULUCF Regulation), facilitating the implementation of technologies that store CO₂ in storage sites to prevent its emission into the atmosphere.¹⁴⁷ CO₂ is captured at its source (e.g. a factory) and transported to a suitable storage site where it is put in deep subsoil layers.¹⁴⁸ The gas is believed to stay there for hundreds or even thousands of years.¹⁴⁹ The CCS Directive aims to ensure that there is no significant risk of carbon leakage or damage to human health or the environment.¹⁵⁰

1.3 The role of human rights in the European Green Deal

In order to examine the possible human rights impacts of the EGD, it is important to explore the direct and indirect role human rights have played and are playing in structural changes that are proposed by the EGD. This section will specifically examine the Better Regulation agenda, the Just Transition Mechanism (JTM), and human rights in the setting of present GHG reduction targets for the EU and in the legislation that underpins the fulfillment of those targets.

1.3.1 The Better Regulation agenda

The Better Regulation agenda aims to improve the quality of EU law and policymaking by requiring the Commission to assess the expected impact of their proposed laws and policies.¹⁵¹ An essential element of this agenda is to guarantee that all EU laws and policies are in conformity with fundamental rights.¹⁵² A key for the Commission's Better Regulation agenda are Impact Assessments (IAs) which must be carried out on new policy and legislative proposals that may have significant economic, social or environmental impact.¹⁵³ In relation to human rights, IAs must assess whether initiatives comply with the CFREU, as well as examine

¹⁴⁵ *ibid*

¹⁴⁶ *ibid*

¹⁴⁷ European Commission, 'A legal framework for the safe geological storage of carbon dioxide' <https://ec.europa.eu/clima/eu-action/carbon-capture-use-and-storage/legal-framework-safe-geological-storage-carbon-dioxide_en> accessed May 16, 2022

¹⁴⁸ Woerdman et al., *supra* note 109, 33

¹⁴⁹ *ibid*

¹⁵⁰ CCS Directive, *supra* note 143, para 19-20

¹⁵¹ European Commission, 'Better Regulation: why and how' <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en> accessed May 16, 2022

¹⁵² European Commission, 'Better Regulation Guidelines' SWD(2021) 305 final 33

¹⁵³ European Commission, 'Impact assessments' <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en> accessed May 16, 2022

the beneficial and negative effects of new legislative proposals while taking into account how it may affect some groups in society differently than others.¹⁵⁴ EU policy makers can use the fundamental rights check-list to screen policy options,¹⁵⁵ and should consult the case law of the CJEU, the ECtHR, and, where appropriate, the opinions and general comments of the UN monitoring bodies.¹⁵⁶

Yet, the ‘fundamental rights culture’¹⁵⁷ that the Commission aims to create with initiatives such as the Better Regulation agenda and its IAs has not been made practice. IAs seem to be supporting and defending policy already created instead of properly assessing its human rights impacts.¹⁵⁸ Overall, the Better Regulation agenda has arguably not made fundamental rights an integral part of EU decision-making processes.¹⁵⁹ This may be due to several reasons: (1) the silo effects of the Commission’s organization into different Directorate-General (DGs);¹⁶⁰ (2) inconsistencies with human rights is not guaranteed to be acted upon;¹⁶¹ (3) lack of skill, familiarity and awareness by EU policy-makers to apply human rights law to various forms of legislation;¹⁶² (4) superficial application of impact assessments;¹⁶³ and/or (5) mere political expediency.¹⁶⁴

1.3.2 The Just Transition Mechanism

The JTM is created as a key tool to support a fair transition in which no one is left behind.¹⁶⁵ To do so, it will help mobilize around €55 billion over the period 2021-2027 to support the workers and citizens of the regions most impacted by the transition.¹⁶⁶ The Commission thus acknowledges the socio-economic impacts that the transition to a carbon neutral Europe

¹⁵⁴ European Commission, ‘Better Regulation Toolbox’ SWD(2021) 305 final 242-246

¹⁵⁵ *ibid*, 243-244

¹⁵⁶ *Ibid*, 247

¹⁵⁷ European Commission, ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’ COM(2010) 573 final (Strategy Paper)

¹⁵⁸ Mark Dawson, *The Governance of EU Fundamental Rights* (1st edn, CUP 2017) 92

¹⁵⁹ Hesselman, *supra* note 40, 274; Israel de Jesús Butler, ‘Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission’ (2012) 37 *European Law Review* 397, 409; Dawson, *supra* note 167, 93.

¹⁶⁰ Dawson, *supra* note 158, 92

¹⁶¹ Butler, *supra* note 159, 417

¹⁶² Hesselman, *supra* note 35, 274-275

¹⁶³ Butler, *supra* note 159, 417

¹⁶⁴ Hesselman, *supra* note 35, 275

¹⁶⁵ European Commission, ‘The Just Transition Mechanism: making sure no one is left behind’ <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en> accessed on May 16, 2022

¹⁶⁶ *ibid*

inevitably will have, especially in certain parts of the EU such as coal mining regions.¹⁶⁷ In these areas there is a clear risk that industries will be lost and workers will lose their jobs.¹⁶⁸ The JTM therefore aims to alleviate the socio-economic impacts and ‘leave no one behind’.¹⁶⁹

The JTM consists of three main pillars, namely the Just Transition Fund (JTF), which expects to mobilize around €25.4 billion in investments, the InvestEU Just Transition Scheme (JTS), which aims to mobilize €10-15 billion in mostly private sector investments, and the Public Sector Loan Facility, which plans to mobilize €18.5 billion of public investment.¹⁷⁰ People most vulnerable to the transition should be protected by the JTM by offering re-skilling opportunities, investing to fight energy poverty, facilitating employment opportunities in new sectors and those in transition, and by facilitating access to affordable, clean and secure energy.¹⁷¹

1.3.3 Human rights and EU reduction targets and legislation

Notwithstanding the Better Regulation agenda and the JTM, fundamental rights play a marginal role in current EU climate laws and policies, as well as in the proposals for revision of those same laws and policies. In the Commission’s ‘Vision for a Clean Planet for All’ as well as in the Commission’s Communication on the EGD, the European Pillar of Social Rights is mentioned as a guiding document to ensure no one is left behind, yet it is limited to workers’ rights.¹⁷² The three main pillars in EU climate law to reach the 2030 CO₂ reduction targets barely mention human rights. The current ETS Directive merely mentions that it respects fundamental rights and observes the principles established by the CFREU.¹⁷³ Moreover, the current ESR¹⁷⁴ and LULUCF¹⁷⁵ Directives do not even mention fundamental rights in their texts. Only the impact assessment of the ESR Directive states that the proposal respects fundamental rights and contributes to fulfilment of a high level of environmental protection as

¹⁶⁷ *ibid*

¹⁶⁸ Ruven C Fleming and Romain Mauger, ‘Green and just? An update on the ‘European Green Deal’’ (2021) 18.1 *Journal for European Environmental & Planning Law* 164, 170-171

¹⁶⁹ European Commission, ‘The Just Transition Mechanism: making sure no one is left behind’ <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en> accessed on May 16, 2022

¹⁷⁰ *ibid*

¹⁷¹ *ibid*

¹⁷² European Commission, ‘Our Vision for A Clean Planet for All: Social Transition’ (November 2018) 1 <https://ec.europa.eu/clima/system/files/2018-11/vision_3_social.pdf> accessed May 16, 2022; European Commission, ‘The European Green Deal’ (Communication) COM (2019) 640 final 4

¹⁷³ ETS, *supra* note 113, para 32

¹⁷⁴ ESR, *supra* note 125

¹⁷⁵ LULUCF Regulation, *supra* note 132

embodied in Article 37 CFREU.¹⁷⁶ The LULUCF Directive’s impact assessment vaguely states that it is consistent with the CFREU because it mainly addresses Member States as institutional actors.¹⁷⁷ It is important to note that the proposals for revisions of the ETS Regulation, the ESR Regulation, and the LULUCF Regulation, do state that they respect fundamental rights and observe the principles recognized by the CFREU, as well as pursue the objective of a high level of environmental protection in accordance with Article 37 CFREU.¹⁷⁸ The new European Climate Law also mentions this in a similar way.¹⁷⁹ However, none of these documents further elaborates upon their exact alignment with the CFREU, nor do they refer to the ECHR or to any of the relevant legal developments within the UN.

To conclude, the EGD entails an extensive set of climate policies and laws, with the ETS, ESR and the LULUCF Regulation as its three main pillars, all working towards the goal of a zero-carbon EU economy in 2050. While the EU aims take negative human rights effects into consideration with the Better Regulation Agenda and the JTM, these are insufficient. The Better Regulation agenda has arguably not made fundamental rights an integral part of EU decision-making processes,¹⁸⁰ and the JTM merely focusses on specific industries, workers, and jobless citizens. Furthermore, human rights seem to have played a very minimal role, if

¹⁷⁶ European Commission, ‘Impact Assessment: accompanying the document Proposal for a Regulation of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 for a resilient Energy Union and to meet commitments under the Paris Agreement and amending Regulation No 525/2013 of the European Parliament and the Council on a mechanism for monitoring and reporting greenhouse gas emissions and other information relevant to climate change’ [2016] SWD (2016) 247 final 25

¹⁷⁷ European Commission, ‘Impact Assessment: accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry into the 2030 climate and energy framework and amending Regulation No 525/2013 of the European Parliament and the Council on a mechanism for monitoring and reporting greenhouse gas emissions and other information relevant to climate change’ [2016] COM (2016) 479 final SWD (2016) 246 final 24

¹⁷⁸ See European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement’ [2021] COM(2021) 555 final 9-10; European Commission, ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and Regulation (EU) 2015/757’ [2021] COM(2021) 551 final 14; European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2018/841 as regards the scope, simplifying the compliance rules, setting out the targets of the Member States for 2030 and committing to the collective achievement of climate neutrality by 2035 in the land use, forestry and agriculture sector, and (EU) 2018/1999 as regards improvement in monitoring, reporting, tracking of progress and review’ [2021] COM (2021) 554 final 8

¹⁷⁹ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’) [2021] OJ L 243 para 6

¹⁸⁰ Hesselman, *supra* note 35, 274; Butler, *supra* note 159, 409; Dawson, *supra* note 158, 93

any role at all, in setting the EU reduction targets for 2030 and 2050, nor in the development of EU climate legislation.

Chapter 3: The legal framework of a ‘just transition’

The primary research question necessitates a clear description of the concept of a ‘just transition’ in the context of IHRL. Therefore, this chapter aims to define and expand the concept of a ‘just transition’ and establish an international human rights framework which can be used to analyze the extent to which EU climate action – and potentially climate action in other areas – supports a ‘just transition’. The concept of a ‘just transition’ is expanded beyond its original understanding and moved into the realm of human rights, embedding it in an international human rights framework including economic, social, and cultural rights, civil and political rights, indigenous rights, and the right to access to justice.¹⁸¹ By doing so, the question ‘what does international human rights law require for the fulfilment of a ‘just transition?’ will be answered.

1.1 Expanding the concept of a ‘just transition’

The concept of a ‘just transition’ was first popularized by some national trade unions in the 1980s,¹⁸² after which it was promoted by international trade unions during international negotiations and conventions on climate change.¹⁸³ The term was used to advocate for green jobs – decent jobs that contribute to preserve or restore the environment¹⁸⁴ – as an essential part of the transition to renewable energy.¹⁸⁵ This transition was considered to entail a complete shutdown of several unsustainable industries, spurring a ‘just transition’ movement that placed the jobs argument at the center of the just transition concept.¹⁸⁶ In the final agreement of the Cancún Climate Change Conference in 2010 it was stressed that the shift to a zero-carbon society should ensure ‘a just transition of the workforce that creates decent work and quality jobs’.¹⁸⁷ Since Cancún, the ‘just transition’ concept has been elaborated upon by ILO and

¹⁸¹ This framework could potentially be expanded to include access to information and public participation in decision-making – the other two procedural rights of the Aarhus Convention – yet for the purpose of this thesis only the right to access to justice will be examined

¹⁸² Judson Abraham, ‘Just transitions for the miners: Labor environmentalism in the Ruhr and Appalachian coalfields’ (2017) 39.2 *New Political Science* 218, 222

¹⁸³ Sebastiano Sabato and Boris Fronteddu, ‘A socially just transition through the European Green Deal?’ (2020) *ETUI Research Paper-Working Paper* 8

¹⁸⁴ The definition of green jobs is contentious, but this definition is taken from the ILO: see ILO, ‘What is a green job?’ (13 April 2016) <[https://www.ilo.org/global/topics/green-jobs/news/WCMS_220248/lang--en/index.htm](https://www.ilo.org/global/topics/green-jobs/news/WCMS_220248/lang-en/index.htm)> accessed June 7, 2022

¹⁸⁵ Abraham, *supra* note 182, 222.

¹⁸⁶ Darren McCauley and Raphael Heffron, ‘Just transition: Integrating climate, energy and environmental justice’ (2018) 119 *Energy Policy* 1

¹⁸⁷ LCA Decision, *supra* note 69, para 10

academic literature, and, as will be argued in this thesis, should be further expanded within a human rights framework.

1.1.1 'Just transition' and the ILO

In 2015, the ILO adopted a set of non-binding guidelines for a just transition addressing the protection of workers affected by energy and climate policies.¹⁸⁸ These guidelines state that a just transition should ensure the right to work, provide green jobs for displaced workers, find localized solutions, and consider the gender dimension of environmental challenges and opportunities to promote equitable outcomes.¹⁸⁹ Green growth and the just transition framework are considered to be consistent with, and an integral part of, the implementation of sustainable development, and could help realize some of the Sustainable Development Goals (SDGs) such as those related to the creation of quality jobs, social inclusion and social protection, as well as the eradication of poverty.¹⁹⁰ This conceptual understanding of a 'just transition' and the recognition of its necessity has gained more extensive support, as it was included in the Paris Agreement (2015),¹⁹¹ as well as promoted by the UN Solidarity and Just Transition Silesia Declaration (2018)¹⁹² and the Just Transition Declaration¹⁹³ established at the Climate Change Conference in Glasgow (2020). Lastly, the EU's JTM – as discussed in chapter two – is based on the ILO's understanding of a 'just transition', focusing on workers and citizens of the regions most impacted by the transition towards a zero-carbon society.¹⁹⁴

1.1.2 'Just transition' in academic literature

The 'just transition' concept has been further developed in academic literature, specifically within climate, energy, and environmental (CEE) research areas.¹⁹⁵ Yet in each area, a 'just transition' takes on a different meaning due to each particular conceptualization of justice¹⁹⁶ –

¹⁸⁸ ILO, *supra* note 22

¹⁸⁹ *ibid*

¹⁹⁰ *ibid*, 4; Sabato and Fronteddu, *supra* note 183, 9

¹⁹¹ Paris agreement, *supra* note 21, preamble

¹⁹² UNFCCC, *Solidarity and Just Transition Silesia Declaration* (2018) COP24, Katowice <<https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=134978&token=91237abd5b4e38c1e7c2e4364b2b8e7095d8e0fd>> accessed May 27, 2022

¹⁹³ UN Climate Change Conference UK 2021, 'Supporting the conditions for a just transition internationally (the Just Transition Declaration)' (2021) <<https://ukcop26.org/supporting-the-conditions-for-a-just-transition-internationally/>> accessed May 27, 2022

¹⁹⁴ European Commission, 'The Just Transition Mechanism: making sure no one is left behind' <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en> accessed on May 16, 2022

¹⁹⁵ Raphael J. Heffron and Darren McCauley, 'What is the 'just transition'?' (2018) 88 *Geoforum* 74

¹⁹⁶ *ibid*

energy justice,¹⁹⁷ environmental justice,¹⁹⁸ and climate justice.¹⁹⁹ These can, in brief and simple terms, be defined as: (1) energy justice concerns the application of human rights throughout the energy life-cycle;²⁰⁰ (2) environmental justice refers to the equal treatment of all citizens and to their involvement in the development, implementation and enforcement of environmental regulations and policies;²⁰¹ and (3) climate justice involves sharing the benefits and burdens of climate change through the application of human rights.²⁰² However, Heffron and McCauley move beyond the CEE research areas, arguing that a ‘just transition’ should combine all three perspectives,²⁰³ and that it should be based on three forms of justice:²⁰⁴ (1) distributional justice – the fair distribution of costs and benefits;²⁰⁵ (2) procedural justice – equal opportunity to be involved in environmental decision-making;²⁰⁶ (3) restorative justice – the rehabilitation of those harmed in the process.²⁰⁷ A combination of these three forms of justice as well as the three understandings of justice promoted by the CEE research communities, Heffron and McCauley argue, must be included in a conceptualization of a ‘just transition’.²⁰⁸ Although there is still not one definition of just transition, there seems to be an overarching consensus that a just transition requires at least the following: it should be a fair and equitable process, preventing, mitigating and minimizing all injustices emanating from a transition to a zero-carbon society.²⁰⁹

1.1.3 ‘Just transition’ and human rights

The significant research of the CEE community avoids discussing more practical ways of thinking, refraining from debating the legal context of ‘justice’ and a ‘just transition’.²¹⁰ It is

¹⁹⁷ Darren A. McCauley, Raphael J Heffron, Hannes Stephan & Kirsten Jenkins, ‘Advancing energy justice: the triumvirate of tenets.’ (2013) 32.3 *International Energy Law Review* 107

¹⁹⁸ Stella M. Čapek, ‘The “environmental justice” frame: A conceptual discussion and an application.’ (1993) 40.1 *Social problems* 5-24; Gordon P. Walker & Harriet Bulkeley, ‘Geographies of Environmental Justice’ (2006) 37(5) *Geoforum* 655

¹⁹⁹ Simon Caney, ‘Two kinds of climate justice: avoiding harm and sharing burdens’ (2014) 22.2 *Journal of Political Philosophy* 125

²⁰⁰ Heffron and McCauley, *supra* note 195, 74

²⁰¹ *ibid*

²⁰² *ibid*

²⁰³ *ibid*

²⁰⁴ McCauley and Heffron, *supra* note 186, 1

²⁰⁵ *ibid*, 3

²⁰⁶ *ibid*, 4

²⁰⁷ *ibid*, 5

²⁰⁸ Heffron and McCauley, *supra* note 195

²⁰⁹ Aparajita Banerjee and Geertje Schuitema, ‘How just are just transition plans? Perceptions of decarbonisation and low-carbon energy transitions among peat workers in Ireland’ (2022) 88 *Energy Research & Social Science* 102616, 2

²¹⁰ Heffron and McCauley, *supra* note 195, 76

often unclear in CEE justice literature what form of justice is precisely needed and how this conceptual understanding of justice should be applied and implemented in practice.²¹¹ For instance, human rights law cannot promote the fair distribution of costs and benefits (distributional justice) of climate policies, if those harmed will not be rehabilitated (restorative justice).²¹² Researchers apply different forms of justice through one of the CEE areas, yet it remains unclear how or whether these forms of justice can be achieved in a ‘just transition’.²¹³ Yet, a combination of these justices, for instance through a just transition framework proposed by Heffron and McCauley,²¹⁴ can still not easily be applied practically (for instance in a legal context) in guaranteeing a ‘just transition’, as it remains very conceptual. Yet, a legal framework arguably could.

Therefore, a human rights law framework, with the different forms of justice at its basis, could be a first step into the right direction. Principles of justice and equality form the foundations of international human rights law,²¹⁵ making it only fitting that an international human rights framework applicable to a ‘just transition’ should be embedded in the three forms of justice – distributional, procedural and restorative. A fair distribution of costs and benefits (distributional justice), equal opportunity to be involved in environmental decision-making (procedural justice) and the rehabilitation of those harmed in the process (restorative justice) can only be achieved when the ‘just transition’ concept is expanded beyond its original intention of protecting the rights of workers, as originally proposed by the ILO.²¹⁶ Consequently, this thesis proposes an expansion of the current understanding of a ‘just transition’ through the creation of a human rights law framework, including substantive civil and political, and economic, social, and cultural rights, substantive group rights – indigenous rights and the right to a healthy environment – and certain procedural rights, namely the right to access to information, right to public participation in decision-making, and right to access to justice (see Figure 1). For the purpose of limiting the scope of this thesis, only some substantive civil and political, economic, social and cultural rights, indigenous rights, and the procedural right to access to justice will be discussed in detail.

²¹¹ *ibid*

²¹² *ibid*

²¹³ *ibid*; Tazim Jamal & Rob Hales, ‘Performative justice: New directions in environmental and social justice’ (2016) 76 *Geoforum* 176

²¹⁴ Heffron and McCauley, *supra* note 195

²¹⁵ Jerome J Shestack, ‘The philosophic foundations of human rights’ (1998) 20.2 *Human Rights Quarterly* 201

²¹⁶ ILO, *supra* note 22

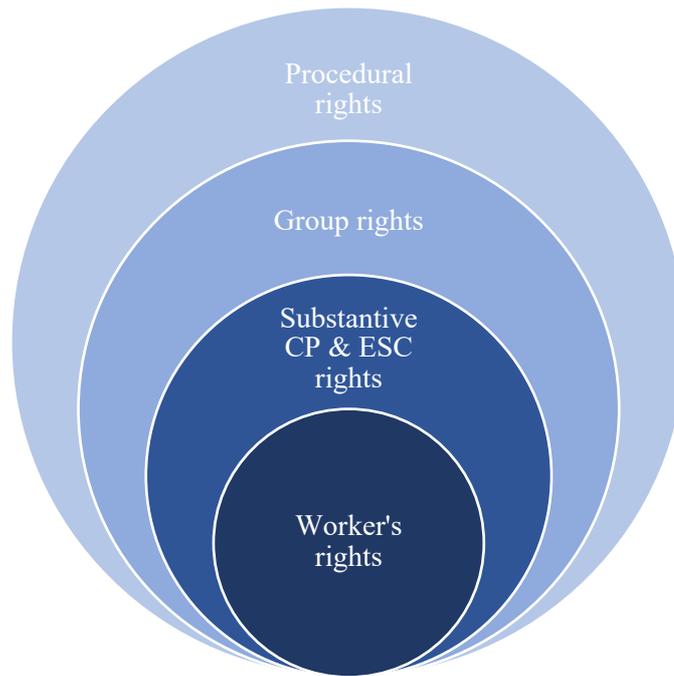


Figure 1: A depiction of the expanded concept of a ‘just transition’ with the perspective of human rights

1.2 A human rights framework for the promotion of a ‘just transition’

While climate change will affect and is already affecting many human rights, as discussed in chapter 1, this does not provide States with a licence to neglect the protection of human rights in the name of climate action. The Vienna Declaration (1993) recognized that ‘all human rights are universal, indivisible and interdependent and interrelated’.²¹⁷ Without the right to an adequate standard of living, health, or equal access to available work, for instance, civil and political rights would also be negatively impacted, if not be rendered meaningless.²¹⁸ A transition to a zero-carbon economy must take this into account in order to be ‘just’. The application of a human rights framework to this necessary structural societal transformation will help make the transition a fair and equitable process, preventing, mitigating, and minimizing all injustices emerging from a transition to a zero-carbon society.

1.2.1 Civil and political rights

The first set of substantive rights that must be considered when promoting a ‘just transition’ are certain civil and political rights. The right to private and family life (Article 17 ICCPR; Article 8 ECHR; Article 7 CFREU) the right to manifest religion (Article 18 ICCPR; Article 9

²¹⁷ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993 A/CONF.157/23, para 5

²¹⁸ Eibe Riedel, ‘Economic, Social and Cultural Rights’ in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, 2009) 137

ECHR; Article 10 CFREU) and the right to property (Article 1 ECHR, Protocol 1; Article 17 CFREU) must be taken into account when developing climate policies. In the *Sabo case*, for instance, the applicants argued that their right to private and family life was affected by excessive noise caused by biofuel plants or the loss of traditional hunting family values due to the harvesting of the surrounding forests or peat bogs.²¹⁹ Furthermore, one applicant in this case argued that his right to manifest religion was violated due to the destruction of ancient religious forest sites, such as forest groves, for the production of biofuels.²²⁰ The right to property was also argued to have been violated in the *Sabo case*, as trees in the personal surroundings of the applicants were (going to be) cleared for the production of wood-pellets.²²¹ Taking the possible effects on the enjoyment of these rights in mind would allow for the creation of climate policies based on a fair distribution of costs and benefits, thus grounding such policies in the principles of distributive justice.²²²

1.2.2 Economic, social, and cultural rights

The second set of substantive rights that must form part of a human rights framework to promote a ‘just transition’ are certain economic, social, and cultural rights. The most straightforward one – as it has formed the core of every discussion of a ‘just transition’ – is the right to work (Article 6 ICESCR; Articles 15, 27, 31 CFREU). Part of the right to decent work is social protection, which includes employment security, as it supports human dignity and security in the workplace.²²³ Sufficient employment security is therefore arguably necessary in order to fulfil the right to work.²²⁴ In instances of structural change, the ILO recommends that ‘selective measures directly connected with the employment of individual workers or categories of workers’ should be taken,²²⁵ as well as that measures should be adopted ‘to prevent the emergence and growth of unemployment or underemployment resulting from

²¹⁹ Application for Annulment pursuant to Article 263 TFEU, *Sabo and Others v Parliament and Council*, para 123

²²⁰ *ibid*, para 123(a)

²²¹ *ibid*, para 123

²²² McCauley and Heffron, *supra* note 186, 3

²²³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18, para 31

²²⁴ Sean Stephenson, ‘Making jobs work: The right to work, jobs and green structural change’ *Sustainable development law on climate change, Legal working paper series* (2010) 6

²²⁵ ILO, ‘Recommendation No. 122, Recommendation concerning Employment Policy’ in Conventions and Recommendations Adopted by the International Labour Conference, 1919-1966 (Geneva: International Labour Office, 1966), para 8; The ILO defines structural change as ‘long-term and substantial change taking the form of shifts in demand, of the emergence of new sources of supply, national or foreign (including supplies of goods from countries with lower costs of production, or of changes in the size of the labour force’: *ibid*, para 13(2)

structural changes'.²²⁶ As the transition to a zero-carbon economy will inevitably have far-reaching socio-economic impacts, a 'just transition' should ensure the right to work and provide green jobs for displaced workers.²²⁷ If workers lose their jobs without being provided with new green jobs, the right to an adequate standard of living (Article 11 ICESCR) may also be affected. According to Article 11 ICESCR, the right to an adequate standard of living includes 'adequate food, clothing, and housing',²²⁸ which may be threatened due to job loss related to the transition. Poorly implemented climate policies may also result in a violation of the right to health (Article 12 ICESCR; Article 35 CFREU). For example, forest protection initiatives and large infrastructure projects such as dams that may lead to involuntary relocation of the communities living in that area may lead to mental and physical health impacts for those communities involved.²²⁹ Lack of adequate compensation for the health problems resulting from social problems, loss of land and livelihoods, and community breakdown,²³⁰ may arguably constitute a violation of the right to health. Therefore, such climate (mitigation) policies should be grounded in the principles of distributive and restorative justice.

1.2.3 Indigenous rights

A 'just transition' must involve 'addressing the critical needs of indigenous peoples ... [as it] is the best way of ensuring that no one is left behind'.²³¹ Indigenous peoples are often among the most marginalized and least affluent of the world's population, and there should therefore be specific attention to their circumstances when designing and implementing climate policies.²³² When transitioning to a zero-carbon society, States must guarantee the rights of indigenous peoples,²³³ including their right to self-determination (Article 3 UNDRIP), to land

²²⁶ *ibid*, para 13

²²⁷ ILO, *supra* note 22

²²⁸ *ibid*

²²⁹ Sanna Markkanen and Annela Anger-Kraavi, 'Social impacts of climate change mitigation policies and their implications for inequality' (2019) 19.7 *Climate Policy* 827, 832; Michael M Cernea, 'Social impacts and social risks in hydropower programs: Preemptive planning and counter-risk measures.' (2004) *Keynote address: Session on social aspects of hydropower development. United Nations Symposium on Hydropower and Sustainable Development Beijing, China*; Leonard B Lerer and Thayer Scudder, 'Health impacts of large dams' (1999) 19.2 *Environmental impact assessment review* 113

²³⁰ *ibid*

²³¹ UN Department of Economic and Social Affairs, 'Reaching the furthest behind first is the answer to leaving no one behind' (2017) <<https://www.un.org/development/desa/en/news/sustainable/reaching-furthest-behind.html>> accessed 27 May, 2022

²³² UN General Assembly, 'Transforming our world: The 2030 agenda for sustainable development' (2015) para 23

²³³ Dorothee Cambou and Greg Poelzer, 'Enhancing energy justice in the Arctic: An appraisal of the participation of Arctic indigenous peoples in the transition to renewable energy' in David C Natcher and Timo Koivurova (eds) *Renewable Economies in the Arctic* (Routledge, 2021) 184, 187

and natural resources (Article 10 UNDRIP), and to maintain their culture (Article 11 UNDRIP).²³⁴ Moreover, it is essential that the right of indigenous peoples to engage in the development of transition policies is considered.²³⁵ Multiple international instruments include the duty of States to consult and cooperate in good faith with Indigenous peoples, as to receive their free and informed consent prior to the approval of any plan that may affect indigenous peoples' traditional lands or territories and other resources (Article 32 UNDRIP).²³⁶ Indigenous peoples' right to participation based on the principle of 'Free, Prior and Informed Consent' (FPIC) is the essence of their right to self-determination, and must therefore be respected and protected by States, as well as protected by companies, particularly when climate policies involve their lands and resources and the preservation of their culture.²³⁷ Thus, climate policies that may affect the rights of indigenous peoples must be based on the principles of distributive justice – ensuring a fair distribution of costs and benefits – and procedural justice – providing them with the opportunity to be involved in environmental decision-making.²³⁸

1.2.4 Right to access to justice

A transition can only be 'just' if the individuals involved can enjoy their right to access to justice to challenge climate policies that may hinder the enjoyment of some of their human rights. The right to access to justice (Articles 2 and 14 ICCPR; Articles 6, 13, 35, 46 ECHR; Articles 47, 51, 52(3) CFREU) contains two essential elements,²³⁹ namely the right to access to judicial forums of sufficient quality and the right to a legal remedy for the violation of human rights (Article 2(3) ICCPR; Article 13 ECHR; Article 47 CFREU). Regarding environmental matters, the Aarhus Convention establishes procedural rights in the entire field of environmental law.²⁴⁰ Its third pillar recognizes the right to access to justice to enforce the right of access to environmental information (Article 9.1) and the right of the public to participate in public decision-making that affects the environment (Article 9.2), as well as the capacity to challenge actions by private or public entities that violate national environmental law (Article

²³⁴ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, [hereinafter UNDRIP] 2 October 2007, A/RES/61/295

²³⁵ Cambou & Poelzer, *supra* note 233, 188

²³⁶ See also ILO, *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989

²³⁷ Cambou & Poelzer, *supra* note 233, 188; UN HRC, 'United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011)

²³⁸ McCauley and Heffron, *supra* note 186, 4-5

²³⁹ Catherine Redgwell, 'Access to Environmental justice' in Francesco Francioni (eds) *Access to justice as a human right* (OUP, 2007) 287-288

²⁴⁰ Aarhus Convention, *supra* note 14

9.3). The Convention's wide scope implies that climate change policy is covered, but it is unclear what this exactly entails.²⁴¹ According to the Aarhus Convention Implementation Guide (2014),²⁴² there are three key barriers to access to justice: (1) restrictive rules on standing; (2) the lack of, or insufficient access to, remedies; (3) inadequate or no enforcement. In the context of climate policies, States sometimes reduce procedural requirements in order to reach the strict GHG emissions reduction targets.²⁴³ There may be tensions between the need for a quick transition to a zero-carbon society, on the one hand, and allowing individuals to enjoy their right to access to justice to challenge the policies delivering such a transition, on the other.²⁴⁴ Yet, the foregoing shows that States must consider the principles of procedural and restorative justice in the process of transitioning to a zero-carbon society, as only then distributional justice can be attained.

1.2.5 Limitations to the enjoyment of such human rights

The rights included in this human rights framework for a 'just transition' are not absolute, meaning that they are not ensured for all times and places without any possibility of limitation or derogation.²⁴⁵ They may thus be limited as long as these restrictions have a legal basis (prescribed by law, accessible and foreseeable), have a legitimate aim, and are necessary (in a democratic society) to achieve that aim – the limitation test.²⁴⁶ Here, overarching principles of non-discrimination and proportionality apply as well.²⁴⁷ It is arguably inevitable that some human rights will be restricted in the process of the transition to a zero-carbon society. Yet, for the transition to be 'just', it is necessary for any climate policies that may result in a restriction of any human right that this limitation test is applied. Only if this test is fulfilled the restrictions are in conformity with human rights law, and such climate policies promote a 'just transition'.

1.3 Conclusion: IHRL and a 'just transition'

This chapter has aimed to put forward an IHRL framework for the promotion of a 'just transition'. It has become clear that many more human rights than mere worker's rights should

²⁴¹ Marjan Peeters and Sandra Nóbrega, 'Climate Change-related Aarhus Conflicts: How Successful are Procedural Rights in EU Climate Law?' (2014) 23.3 *Review of European, Comparative & International Environmental Law* 354

²⁴² UN Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (2nd ed, 2014) 187-207

²⁴³ Peeters and Nóbrega, *supra* note 241, 354

²⁴⁴ *ibid*, 355

²⁴⁵ Shelton, *supra* note 42, chapter 6, section 6.3

²⁴⁶ *ibid*

²⁴⁷ *ibid*

be considered when designing and implementing climate policies. IHRL requires economic, social, and cultural rights, civil and political rights, indigenous rights, and the right to access to justice to also be taken into account. Only then, a transition to a carbon-zero society is truly 'just', having its foundations in the principles of distributive, procedural and restorative justice, as well as in the CEE research areas.

Chapter 4: The human rights implications of EU climate action

After establishing a human rights framework to analyze the extent to which climate policies promote a ‘just transition’, EU climate action will be used as a case study to provide insight into how certain human rights can (potentially) be negatively affected by climate policies. By doing this, this chapter aims to answer the sub-question ‘to what extent may substantive economic, social, and cultural rights, civil and political rights, indigenous rights, and the procedural right to access to justice be affected by EU climate action?’.

1.1 The human rights implications of the ETS and ESR

As discussed in chapter two, the EU’s transition to a carbon neutral Europe is primarily driven by ETS and ESR – the first two main pillars of the EGD that cover energy intensive industries, such as coal mining, and other industries, such as transport, construction, agriculture, and waste, binding them to significantly reduce their GHG emissions.²⁴⁸ These EU climate laws will inevitably have significant socio-economic impacts – impacts acknowledged by the Commission itself.²⁴⁹ The groups identified to be most at risk are: ‘fossil energy-intensive and trade-exposed States and subnational communities; companies in the fossil fuel production sectors and energy utilities reliant on centralized fossil fuel-based electricity generation; workers in these industries; and poor and middle income consumers facing higher energy and food prices due to fossil fuel subsidy removal and carbon pricing’.²⁵⁰ While new green jobs will be created, some jobs will be lost. As discussed in the previous chapter, employment security is covered by the right to decent work.²⁵¹ Consequently, the right to work of individuals whose jobs are at stake due to the ETS and ESR are at risk. Besides, the right to an adequate standard of living – as included in the proposed human rights framework in the previous chapter – may also be violated as a consequence of job loss, as they may be unable to provide themselves with ‘adequate food, clothing and housing’.²⁵² In order to be in conformity with the

²⁴⁸ ETS, *supra* note 113; ESR, *supra* note 125

²⁴⁹ European Commission, ‘The Just Transition Mechanism: making sure no one is left behind’ <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en> accessed on June 2, 2022

²⁵⁰ Dieter Helm, *Burn out – The endgame for fossil fuels* (YUP, 2017); Adrien Vogt-Schilb & Stephane Hallegatte, ‘Climate policies and nationally determined contributions: Reconciling the needed ambition with the political economy’ (2017) 6.6 Wiley Interdisciplinary Reviews: Energy and Environment e256 1; Thomas Spencer, Michel Colombier, Oliver Sartor, Amit Garg, Vineet Tiwari, Jesse Burton, Tara Caetano, Fergus Green, Fei Teng & John Weisman, ‘The 1.5°C target and coal sector transition: At the limits of societal feasibility’ (2018) 18(3) *Climate Policy* 335; as cited in Green and Gambhir, *supra* note 22, 905.

²⁵¹ CESCR GC No. 18, *supra* note 223, para 31

²⁵² Article 11 ICESCR

human rights framework of the previous chapter, ‘selective measures directly connected with the employment of individual workers or categories of workers’ must be taken,²⁵³ and measures ‘to prevent the emergence and growth of unemployment or underemployment resulting from structural changes’²⁵⁴ must be adopted.

The Commission provides for such measures with the JTM (see chapter 2), which includes the Just Transition Fund, to support those regions, sectors, and workers that are hit hardest, offering re-skilling opportunities, investing to fight energy poverty, facilitating employment opportunities in new sectors and those in transition, and by facilitating access to affordable, clean and secure energy.²⁵⁵ However, the just transition policies in the EGD with its focus on targeted territories and sectors as well as on social investment oriented policies may not be completely in line with the ILO’s understanding of a just transition.²⁵⁶ While such targeted measures arguably fulfil obligations under the right to work and ILO’s recommended context-sensitive approach,²⁵⁷ the ILO recommends that those measures should not be an alternative to guaranteeing social rights to all EU citizens, and social investment oriented policies should be implemented on top of basic social protection and social inclusion policies.²⁵⁸ That said, the Commission has mentioned the European Pillar of Social Rights as a guiding document to ensure that no one is left behind, which contains a comprehensive list of social rights addressed to all European citizens.²⁵⁹ It therefore seems that the EU sufficiently considers the human rights impacts – specifically the impact on the right to work and the consequent impact on the right to an adequate standard of living – of the ETS and ESR, having satisfactory mechanisms in place to ensure its citizens’ enjoyment of their fundamental rights. Consequently, these regulations adhere to the standards for the promotion of a ‘just transition’ proposed in the previous chapter.

²⁵³ ILO Recommendation No. 122, *supra* note 225, para 8

²⁵⁴ *ibid*, para 13

²⁵⁵ European Commission, ‘The Just Transition Mechanism: making sure no one is left behind’ <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en> accessed on May 16, 2022

²⁵⁶ Sabato and Fronteddu, *supra* note 183, 17

²⁵⁷ ILO Guidelines, *supra* note 22, para 13(f)

²⁵⁸ *ibid*, 13(e)

²⁵⁹ European Commission, ‘Our Vision for A Clean Planet for All: Social Transition’ (November 2018) 1 <https://ec.europa.eu/clima/system/files/2018-11/vision_3_social.pdf> accessed May 16, 2022; European Commission, ‘The European Green Deal’ (Communication) COM (2019) 640 final 4

1.2 The human rights implications of the LULUCF Regulation

As discussed in chapter two, the third main pillar of the EGD, the LULUCF Regulation, aims to make the land use, forestry and agriculture sector climate neutral by 2035, by requiring all deforestation to be compensated by equivalent afforestation – the so-called no-debit rule.²⁶⁰ The Regulation’s legislative history shows that the use of forests and lands for forestry-related biomass production, as well as forest preservation as climate sinks, may lead to human rights violations.²⁶¹ Specifically, the EP’s Committee on Development (DEVE) raised concerns about the negative human rights impact on indigenous people and economically disadvantaged local communities that rely on forests and lands, which could be facing displacement due to carbon sink-related projects, such as deforestation, afforestation or reforestation.²⁶² The EP proposed that the LULUCF Regulation should respect the rights of indigenous communities, as well as human rights and worker’s rights in general.²⁶³ While this was not included in the final text, it does demonstrate that biomass and carbon sink projects may negatively affect the human rights of communities living in the areas in which they are implemented.²⁶⁴ The human rights framework for the promotion of a ‘just transition’ proposed in the previous chapter includes indigenous peoples’ right to land and natural resources,²⁶⁵ and their right to engage in the development and implementation of climate policies that may affect their rights.²⁶⁶ The exclusion of any consideration of the rights of indigenous peoples within the LULUCF Regulation raises serious questions as to the negative impacts by carbon-sink related projects for the rights of indigenous peoples. In fact, the UN Special Rapporteur for the Rights of Indigenous Peoples has already urged Sweden, Finland, and Norway that they must guarantee

²⁶⁰ European Commission, ‘Land Use, Forestry and Agriculture’ <https://ec.europa.eu/clima/eu-action/european-green-deal/delivering-european-green-deal/land-use-forestry-and-agriculture_en> accessed May 16, 2022

²⁶¹ Hesselman, *supra* note 35, 278

²⁶² European Parliament, ‘Report on the proposal for a regulation of the European Parliament and of the Council on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry into the 2030 climate and energy framework and amending Regulation No 525/2013 of the European Parliament and the Council on a mechanism for monitoring and reporting greenhouse gas emissions and other information relevant to climate change’ (17 July 2017) COM(2016)0479 – C8-0330/2016 – 2016/0230(COD) 42

²⁶³ European Parliament, ‘Amendments adopted by the European Parliament on 13 September 2017 on the proposal for a regulation of the European Parliament and of the Council on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry into the 2030 climate and energy framework and amending Regulation (EU) No 525/2013 of the European Parliament and the Council on a mechanism for monitoring and reporting greenhouse gas emissions and other information relevant to climate change’ (13 September, 2017) COM(2016)0479 – C8-0330/2016 – 2016/0230(COD) Amendment 14

²⁶⁴ Hesselman, *supra* note 35, 278

²⁶⁵ Article 10 UNDRIP

²⁶⁶ Cambou & Poelzer, *supra* note 233, 188

that their climate policies are in line with the rights of European indigenous peoples.²⁶⁷ The UN Rapporteur pressed these countries to develop such policies in consultation with the representatives of those indigenous peoples that may be negatively impacted and guarantee that any climate policy-related projects do not negatively affect the livelihoods of Sami people.²⁶⁸ This clearly shows that the LULUCF Regulation will have serious human rights violations, and consequently does not live up to standards for a ‘just transition’ advanced in the previous chapter.

1.3 The human rights implications of the CCS Directive

As discussed in chapter two, the CCS Directive supplements the promotion of natural carbon sinks (LULUCF Regulation) by facilitating the implementation of technologies that store CO₂ in storage sites to prevent emission into the atmosphere.²⁶⁹ This may lead to similar human rights issues as the LULUCF Regulation, as indigenous people and poor local communities that rely on forests and lands could be facing displacement due to CCS. In order to be in conformity with the human rights framework developed in the previous chapter, indigenous communities should be consulted and provide their free and informed consent of the development of a CCS project that may affect their traditional lands or territories and other resources.²⁷⁰ Besides, the CCS Directive states that a storage site may only be selected if there is no significant risk of carbon leakage or damage to health or the environment – reflecting the standards for a ‘just transition’ defined in the previous chapter.²⁷¹ Yet, there are many uncertainties with regard to health impacts in the long term. Carbon leakage may eventually cause damage to human health,²⁷² violating those affected people’s right to health. Furthermore, CCS may cause reservoir-induced seismicity as well as the sinking or rising of the earth’s surface, which could damage buildings and infrastructure.²⁷³ Such damage may

²⁶⁷ UN HRC, ‘Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People’ (6 June 2011) UN Doc. A/HRC/18/35/ADD.2, paras 55–61, 86

²⁶⁸ *ibid*

²⁶⁹ European Commission, ‘A legal framework for the safe geological storage of carbon dioxide’ <https://ec.europa.eu/clima/eu-action/carbon-capture-use-and-storage/legal-framework-safe-geological-storage-carbon-dioxide_en> accessed May 16, 2022

²⁷⁰ Cambou & Poelzer, *supra* note 233, 188; Article 32 UNDRIP

²⁷¹ CCS Directive, *supra* note 143, para 19-20

²⁷² P Lako, A. J. van der Welle, M. Harmelink, M. D. C. van der Kuip, A. Haan-Kamminga, F. Blank, J. De Wolff & M. Nepveu ‘Issues concerning the implementation of the CCS Directive in the Netherlands’ (2011) 4 *Energy Procedia* 5479, 5482; M Harmelink, A. van der Welle, P. Lako, H. Groenenberg, M. van der Kuip, M. Nepveu, F. Blank, J. De Wolff, A. Haan-Kamminga & M. Roggenkamp, ‘Support to the implementation of the CCS Directive. Overview and analysis of issues concerning the implementation of the CCS directive in the Netherlands’ (2010) 7

²⁷³ Lako, *supra* note 272, 5482; Harmelink et al., *supra* note 272, 73

constitute a violation of the right to property of those who own those buildings or infrastructure. Moreover, CCS operations may contaminate water reservoirs used for drinking water extraction,²⁷⁴ which could be found to be a violation of the right to an adequate standard of living, or the associated right to adequate housing. The European Committee of Social Rights found that the right to adequate housing, which is included in Article 31 of the Revised ESC, include specific obligations in relation to access to safe drinking water.²⁷⁵ Any contamination of drinking water reservoirs may therefore be a violation of the right to an adequate standard of living or the right to adequate housing. These possible violations of the rights to health, property and an adequate standard of living would not be in conformity with the human rights standards for a ‘just transition’ advanced in the previous chapter. Thus, the varied negative human rights impacts that the CCS Directive may have, must be considered in order to promote a ‘just transition’.

1.4 The human rights implications of the REDII

As discussed in chapter two, the REDII establishes a legal framework for the development of renewable energy across all sectors of the EU economy.²⁷⁶ Renewable energy projects may have various human rights impacts, especially due to the Directive’s new binding renewable energy target for the EU for 2030 of at least 32%.²⁷⁷ Similarly to the human rights implications of the ETS and ESR, the strict target established by the REDII may affect EU citizens’ enjoyment to the right to work. Fossil-fuel industries will have to descale quickly, causing the job security of workers in those industries to be challenged. As argued in the section on ETS and ESR, lack of job security could be a violation of the right to work.²⁷⁸ Job loss could also affect the right to an adequate standard of living of those people involved, as they may be unable to provide themselves with ‘adequate food, clothing and housing’.²⁷⁹ In order to be in conformity with the previously defined standards for the promotion of a ‘just transition’, the EU must adopt measures to guarantee employment for workers and to prevent unemployment resulting from the implementation the REDII.²⁸⁰ However, it seems that the EU sufficiently

²⁷⁴ Harmelink et al., *supra* note 272, 73; William CG Burns ‘Human rights dimensions of bioenergy with carbon capture and storage: A framework for climate justice in the realm of climate geoengineering’ (2016) *Climate justice: Case studies in global and regional governance challenges* 149, 162

²⁷⁵ *European Roma Rights Centre v. Italy*, Complaint No. 27/2004, Decision on the Merits, (European Committee of Social Rights, 7 December 2005)

²⁷⁶ REDII, *supra* note 144

²⁷⁷ *ibid*, para 8

²⁷⁸ Stephenson, *supra* note 224, 6

²⁷⁹ Article 11 ICESCR

²⁸⁰ ILO Recommendation No. 122, *supra* note 225, paras 8, 13

considers the impact on the right to work and the consequent impact on the right to an adequate standard of living of the REDII, as it has established the JTM to soften the impact of this Directive to support the workers affected.²⁸¹ The EU therefore adheres to the requirements of the human rights framework for the promotion of a ‘just transition’, as developed in the previous chapter.

While the potential negative effects of the REDII on the right to work and the consequent impact on the right to an adequate standard of living are considered, the human rights implications of the promotion of certain renewable energy sources are not. Biofuels are one of such sources promoted by the REDII,²⁸² having significant human rights implications. The *Sabo* case (or *Biomass* case), discussed in the introduction of this thesis, exemplifies the far-reaching human rights implications biomass fuels could have. In this case, the applicants argued that the REDII must be nullified as its treatment of forest biomass fuels would accelerate widespread deforestation, increase GHG emissions, and violate the plaintiffs’ human rights.²⁸³ It was asserted that multiple fundamental rights were to be violated by the Directive,²⁸⁴ including the right to private and family life, the right to manifest religion, the right to education, the right to property, the rights of the child, the right to a high level of human health protection, and a right to a high level of environmental protection. These rights are claimed to be infringed upon by, *inter alia*, the current and future destruction of sacred forest sites in Estonia;²⁸⁵ severe noise and air pollution caused by the combustion of forest biomass in France;²⁸⁶ and to loss of traditional family hunting values, flood protection, wildlife habitat, and damage to property due to the harvesting of the surrounding forests or peat bogs in the United States, France, Slovakia, and Ireland.²⁸⁷ Despite their further claims of access to justice under the Aarhus Convention,²⁸⁸ their case was deemed inadmissible due to a lack of individual

²⁸¹ European Commission, ‘The Just Transition Mechanism: making sure no one is left behind’ <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en> accessed on May 16, 2022

²⁸² REDII, *supra* note 144, Article 26

²⁸³ Case T-141/19 *Sabo and Others v Parliament and Council* [Action brought on 4 March 2019] OJ C 148/60

²⁸⁴ Application for Annulment pursuant to Article 263 TFEU, *Sabo and Others v Parliament and Council*, paras 187-202 <<https://eubiomasscase.org/wp-content/uploads/2019/08/EU-Biomass-Case-Main-Arguments.pdf>> accessed on May 3, 2022

²⁸⁵ Application for Annulment pursuant to Article 263 TFEU, *Sabo and Others v Parliament and Council*, para 123(a) <<https://eubiomasscase.org/wp-content/uploads/2019/08/EU-Biomass-Case-Main-Arguments.pdf>> accessed on May 3, 2022

²⁸⁶ *ibid*, para 123(b)

²⁸⁷ *ibid*, para 123

²⁸⁸ *ibid*, para 129; Aarhus Convention, *supra* note 14

and direct concern,²⁸⁹ which was confirmed in appeal.²⁹⁰ The individual and direct concern requirement creates two of the three key barriers to access to justice illustrated by the Aarhus Implementation Guide (2014), as it is a restrictive rule on standing and creates a lack of, or insufficient access to, remedies.²⁹¹ It thus hinders the enjoyment of the two essential elements of the right to access to justice,²⁹² as it prevents access to judicial forums and interferes with the right to a legal remedy for the violation of human rights. Following the human rights framework of the previous chapter, the various negative human rights implications of the REDII prevents the promotion of a ‘just transition’ within the EU, as well as raises issues of access to justice for individuals negatively affected by the REDII.

Besides human rights impacts within the EU, the promotion of biofuels through the REDII also affects the rights of those living in third countries. Biofuels, such as palm oil, are mainly produced outside of the EU.²⁹³ Biofuel plantation expansion in those countries is often done at the expense of food production, leading to spikes in food prices.²⁹⁴ According to a 2008 report by Oxfam,²⁹⁵ the REDII biofuel targets have – at least partly – created a huge demand for biofuels such as palm oil, exacerbating food price crises, and consequently bringing 30 million into poverty, and putting 60 million indigenous people at risk.²⁹⁶ Biofuel expansion has also led to many land grabs from vulnerable populations such as indigenous people,²⁹⁷ due to unclear and contested property rights.²⁹⁸ The REDII biofuel targets thus arguably lead to broad range of indirect human rights violations in third countries, including the right to food, right to an adequate standard of living and indigenous rights. These should be considered in order to be in conformity with the human rights framework for promoting a ‘just transition’. Therefore, EU Member States must do everything in their power to prevent such human rights violations in their scramble for biofuels driven by the REDII biofuel targets. For instance, the ICESCR Committee recommended to Belgium that it must ‘systematically conduct human rights impact

²⁸⁹ Case T-141/19 *Sabo and Others v Parliament and Council* [2020] ECLI:EU:T:2020:179, para 51

²⁹⁰ Case C-297/20 *Sabo and Others v Parliament and Council* [2021] ECLI:EU:C:2021:24, para 44

²⁹¹ Aarhus Convention Implementation Guide, *supra* note 242, 187-207

²⁹² Redgwell, *supra* note 239, 287-288

²⁹³ Burns, *supra* note 274, 159

²⁹⁴ *ibid*

²⁹⁵ Oxfam, ‘Climate Wrongs and Human Rights: Putting people at the heart of climate change policy’ (2008) 15–16

²⁹⁶ *ibid*

²⁹⁷ ActionAid, ‘Caught in the Net: How “Net-Zero Emissions” Will Delay Real Climate Action and Drive Land Grabs’ (2015) 7

²⁹⁸ Frances Seymour, ‘Forests, climate change and human rights: managing risks and trade-offs’ in Stephen Humphreys and Mary Robinson (eds), *Human rights and climate change* (CUP, 2009) 220

assessments of Belgian firms' agrofuel activities in third countries', and guarantee that biofuel projects do not negatively impact the economic, social and cultural rights of local communities where they are implemented.²⁹⁹ Such impact assessments, taking account of the rights included in the human rights framework proposed in this thesis, could ensure REDII-related biofuel projects in third countries adhere to the standards advanced in chapter three.

Another way for EU Member States to reach the REDII binding renewable energy targets is the development of wind energy projects, such as wind farms. Nordic countries – Norway, Sweden and Finland – have set up many wind farms in areas where indigenous Sámi people live.³⁰⁰ Wind turbines have significant adverse effects on reindeer herding, as it can disturb grazing and calving areas, affect the migration of reindeer, and increase the workload and costs for reindeer herders.³⁰¹ Due to the increase in the development of wind farms, Sámi reindeer herding communities also experience cumulative effects of such projects.³⁰² The impacts of such projects on the indigenous rights of the Sámi has been criticized by several UN reports,³⁰³ and have led to an increasing number of court cases,³⁰⁴ with little to no avail. According to Cambou, this is, firstly, due to national courts' tendency to rule against Sámi interests, and secondly, due to the lack of resources of Sámi reindeer herding communities to file lawsuits, forcing Sámi people to either represent themselves or call upon Sámi lawyers.³⁰⁵ For instance, the Norwegian Fossen project – one of the largest onshore wind projects in Europe with 273 wind turbines – has been approved despite concerns, protests and court petitions from Sámi reindeer herding communities, who have traditionally used the land where the wind farm is being built,³⁰⁶ and calls from the UN Committee on the Elimination of Racial Discrimination, which requested Norway to delay any authorization of the project in order to consider the complaint from the Sámi communities.³⁰⁷ Such disregard of indigenous rights and the right to

²⁹⁹ UN Committee on Economic Social and Cultural Rights, 'Concluding Observations on Belgium' (2013) UN Doc. E/C.12/BEL/CO/4, paras 22–23

³⁰⁰ Cambou & Poelzer, *supra* note 233, 190

³⁰¹ *ibid*, 197-198

³⁰² *ibid*, 198

³⁰³ UN HRC, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland' (2011) UN Doc. A/HRC/18/35/Add.2; UN HRC, 'Special Rapporteur on the rights of indigenous peoples on the human rights situation of the Sámi people in the Sápmi region of Norway, Sweden and Finland' (2016) UN Doc. A/HRC/33/42/Add.3

³⁰⁴ Dorothee Cambou, 'Uncovering injustices in the green transition: Sámi rights in the development of wind energy in Sweden' (2020) 11 *Arctic Review* 320

³⁰⁵ *ibid*

³⁰⁶ Cambou and Poelzer, *supra* note 233, 198

³⁰⁷ Business & Human Rights Resource Centre, 'Norway to Build Wind Farm despite UN Calls to Suspend Project over Concerns of Impact on Indigenous Herders' Livelihoods' (2018) <<https://www.business->

access to justice is clearly inconsistent with the human rights framework to promote a ‘just transition’ proposed in the previous chapter.

Wind farms may also infringe upon the right to property, with individuals filing nuisance claims due to wind turbines close to their house,³⁰⁸ requiring a balancing of the state’s obligation to fulfil the right to a clean and healthy environment and the state’s obligation to respect its citizens right to property and right to private and family life. When the state’s activities are non-hazardous and aim to promote other human rights, the ECtHR tends not to find a severe interference with the enjoyment of the right to property.³⁰⁹ In *Fägerskiöld v. Sweden*, the ECtHR emphasized the environmental and societal benefits of wind energy, legitimizing a possible small interference with the enjoyment of the applicant’s property.³¹⁰ Thus, in some instances, the indirect human rights impact of the REDII may be outweighed by the state’s obligation to fulfil the right to a healthy and clean environment. Such limitations on rights included in the human rights framework proposed in chapter three are in conformity with the standards set for the promotion of a ‘just transition’ if they have a legal basis, a legitimate aim, and are deemed necessary to achieve that aim. Furthermore, it is important that those harmed in the process are adequately compensated as to promote restorative justice – an essential element of a ‘just transition’.

All in all, the REDII has led, and may lead to, various human rights impacts both within and outside of the EU and raises issues regarding access to justice for individuals negatively affected by the REDII. It is thus essential that these are considered fully when developing renewable energy projects to reach the renewable energy targets set in the Directive. Only then, the REDII will help create a ‘just transition’.

1.5 Conclusion: EGD and negative human rights impacts

The EGD and its three main pillars, the ETS, ESR, and LULUCF Regulation, as well as its CCS Directive and REDII, have significant (potential) human rights implications. The ETS and ESR could negatively affect the right to work, and consequently the right to an adequate

[humanrights.org/en/latest-news/norway-to-build-wind-farm-despite-un-calls-to-suspend-project-over-concerns-of-impact-on-indigenous-herders-livelihoods](https://www.humanrights.org/en/latest-news/norway-to-build-wind-farm-despite-un-calls-to-suspend-project-over-concerns-of-impact-on-indigenous-herders-livelihoods)> accessed June 6, 2022

³⁰⁸ Julia Dreyer, ‘A Right to Wind: Reconciling Environmental Human Rights and Private Property Rights in Europe’ (2015) 44 *Int’l L. News* 16

³⁰⁹ *ibid*, 21

³¹⁰ *Fägerskiöld v. Sweden*, *supra* note 65, 18-19

standard of living, of those individuals employed in unsustainable industries. However, the EU sufficiently acknowledges these negative impacts with the JTM, thus adhering to the human rights framework established in the previous chapter, and consequently promoting a ‘just transition’. The LULUCF Regulation may have implications for the rights of indigenous peoples, which currently seem to be inadequately considered, potentially resulting in human rights violations that would prevent the transition to a zero-carbon society from being ‘just’. Furthermore, the CCS Directive may also cause violations of indigenous rights, as well as the rights to health, property, and an adequate standard of living. These varied negative human rights impacts must be considered in order to promote a ‘just transition’ according to the standards proposed in chapter three. Lastly, the REDII may, similarly to the ETS and ESR, affect the right to work of EU citizens, and has been argued to have far-reaching human rights implications both within and outside the EU by the applicants of the *Sabo case*. Their lack of standing at the CJEU also arguably constitutes a violation of access to justice. The REDII biofuel targets also lead to a broad range of indirect human rights violations in third countries, which could be prevented with the institution of adequate IAs. Wind farms, a common solution for reaching the REDII renewable energy targets, may negatively affect the rights of indigenous people, who are in turn consistently denied their right to access to justice. While such wind farms may also interfere with the right to property and right to private and family life, these may be outweighed by the state’s obligation to fulfil the right to a healthy and clean environment – but the individuals negatively affected must be compensated. Overall, the various negative human rights implications of the REDII prevent the promotion of a ‘just transition’ within the EU and raises issues with regards to access to justice for individuals negatively affected by the REDII.

Conclusion

Climate change is currently still viewed as simply an issue of getting to net zero carbon emissions without considering the potential violations of civil, political, economic, social and cultural rights of different individuals and groups of people that such a tremendous structural transformation may cause. Human rights coherence is largely left as an afterthought – illustrated by this thesis in its analysis of EU climate action, and specifically the EGD. When human rights are considered in climate policies under the guise of a ‘just transition’, it tends to be limited to consideration for the impacts on the rights of workers and labor conditions in transformations compelled by climate change and sustainability. If we truly want to have a ‘just transition’, climate action should be consistent with human rights, ensuring that all voices – including disempowered vulnerable individuals and communities – are heard in the process.

This thesis aimed to expand the notion of a ‘just transition’ by creating a human rights framework that includes the applicable human rights to be considered for the promotion of a ‘just transition’, grounded in the different understandings of justice advanced in CEE research communities. By using EU climate action, and specifically certain directives and regulations of the new EGD, as a case study, human rights that are (potentially) affected by the EU’s climate policies were illuminated. This demonstrated that the EGD can have far-reaching implications for civil and political rights, economic, social and cultural rights and indigenous rights – rights that played no, or a very minimal role in the development and implementation of these policies. Not only certain EU citizens are negatively impacted by these policies, but individuals and communities living outside the EU as well. When individuals or communities want to challenge these policies, they are repeatedly denied access to justice. Only the impacts on the rights of workers are considered and accounted for. EU climate action thus seems to promote a ‘just transition’ only to the extent of putting mechanisms in place to provide relief to some specific groups of workers in certain regions of the EU, forgetting other important human rights, and consequently leaving so many others behind.

It is acknowledged, however, that a human rights-based approach to climate action does raise significant challenges for finding practicable and effective solutions to mitigate or adapt to global warming, while simultaneously considering the rights of all individuals and communities who are affected by the various parts of this complex, cumulative and widespread

problem.³¹¹ As the failure to act on climate change and the taking of mitigation and adaptation measures may result in human rights violations, the EU is confronted with the need to balance conceivably conflicting human rights obligations. Such conflicts may lead to a wave of ‘just transition litigation’ – ‘cases that rely in whole or in part on human rights to question the distribution of the benefits and burdens of the transition away from fossil fuels and towards net zero emissions.’³¹² The complexities inherent in climate change and climate action thus creates significant challenges for the EU in terms of balancing conflicting human rights imperatives.

While this balancing act is easier said than done, the case study of the EU demonstrates that no concrete attempt has really been made. The human rights framework for promoting a ‘just transition’ proposed in this thesis provides a starting point for illuminating the different human rights implications of this global structural transformation, allowing these to be considered, and consequently balanced appropriately. Only then, we can have a truly ‘just transition’.

³¹¹ Lewis, *supra* note 24, 52.

³¹² Saveresi and Setzer, *supra* note 23, 3; Green and Gambhir, *supra* note 23, 905

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