

DEVELOPMENTS IN THE FIELD

A Fast and Fair Energy Transition: How Community Legal Action and New Legislation are Shaping the Global Shift to Renewable Energy

Elodie Aba 

Senior Legal Researcher, Business & Human Rights Resource Centre
Email: aba@business-humanrights.org

Abstract

Legal action by communities affected by climate change against high carbon corporate emitters is on the rise. At the same time, with the acceleration of a transition to a net-zero carbon economy, communities impacted by the implementation and operation of renewable energy projects are increasingly challenging shortcomings in the shift to renewable energy through ‘just transition litigation’. This strategy aims to ensure that respect for human rights is at the heart of the new energy paradigm, and that human rights abuses by the fossil fuel and mining sectors are not replicated. Progressive legislative reforms may also contribute to ensuring a fast and fair transition. This article examines how legal action and legislation may provide communities and rights-holders with pathways to climate justice – and sheds light on the need for a rights-centred approach by corporate actors and governments to the new energy transition.

Keywords: climate justice; climate litigation; just transition; legal accountability; renewable energy

1. Introduction

As the transition to a net-zero carbon economy is intensifying to meet the goals of the 2015 Paris Agreement, investment in renewable energy and minerals at the heart of this transition must expand rapidly. However, this cannot come at the expense of human rights of local and Indigenous communities being asked to host these operations. We must ensure that the transition is both fast, and fair, and that companies and investors in the renewable energy and transition minerals sectors do not replicate the abuses of their fossil fuel predecessors. However, allegations of human rights infringements within the renewable energy value chain – from extraction of so-called transition minerals¹ such as copper and lithium, to the manufacture of renewable energy parts, to installations, such as wind and solar farms themselves – have been documented.² Community protests and litigation are consequently rising, and companies actively involved in the global shift to a net-zero carbon economy are facing increasing related financial, reputational and legal risk.

¹ Business & Human Rights Resource Centre, ‘Transition Minerals Tracker’, <https://www.business-humanrights.org/en/from-us/transition-minerals-tracker/> (accessed 3 March 2023).

² Business & Human Rights Resource Centre, ‘Renewable Energy & Human Rights Benchmark’, <https://www.business-humanrights.org/en/from-us/briefings/renewable-energy-human-rights-benchmark/> (accessed 24 March 2023).

In turn, and perhaps more importantly, the swift pace of the global energy transition is also under threat, unless states and companies can ensure it is fair to the communities being asked to host it.

This paper sets out growing evidence of a trend of so-called ‘just transition’ litigation against companies. As a subset of cases related to corporate climate justice, reflecting the ‘shift from a discourse on greenhouse gases and melting ice caps into a civil rights movement with the people and communities most vulnerable to climate impacts at its heart’,³ these matters seek to ensure the manner by which the shift to renewable energy occurs is just and rights-centred.⁴ Progressive legislative reforms may also contribute to ensuring a fast and fair transition.

II. Climate Change Litigation

Climate lawsuits have more than doubled since 2015,⁵ to reach a total of over 2,000 cases globally. Traditionally, they targeted states, but there has been an increase in strategic climate litigation against companies, with a particular focus on the following industries: fossil fuel, food and agriculture, transport, plastics and finance.⁶ Climate change litigation has functioned to enable rights-holders and their representatives to hold states and private actors accountable for their contributions to climate change and remedy of these impacts.

In 2019, Friends of the Earth Netherlands (Milieudefensie) and over 17,000 co-plaintiffs filed a lawsuit against Royal Dutch Shell plc to force the oil company to cut its emissions to align with the Paris Agreement⁷ – the global treaty to keep temperature increases well below 2°C compared with pre-industrial levels. In May 2021, a Dutch court agreed, ordering Shell to reduce emissions by 45% by 2030 compared with 2019 levels.⁸ It also highlighted the company’s duty of care towards Dutch citizens, under the Dutch Civil Code, and that the company’s current climate policy was not sufficiently ‘concrete’.⁹ The ruling was hailed as a landmark decision by climate advocates with major implications for corporate actors, as it is the first time a court ruled that a company must comply with the Paris Agreement.¹⁰ Shell’s appeal will be heard in 2023.¹¹

³ Mary Robinson, ‘Climate Justice’, *United Nations Blog* (31 May 2019), <https://www.un.org/sustainabledevelopment/blog/2019/05/climate-justice/> (accessed 3 March 2023).

⁴ Annalisa Savaresi and Joana Setzer, ‘Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers’ (2022) 13:1 *Journal of Human Rights and the Environment* 7, https://www.elgaronline.com/view/journals/jhre/13/1/article-p7.xml?tab_body=fulltext (accessed 3 March 2023).

⁵ Joana Setzer and Catherine Higham, ‘Global Trends in Climate Change Litigation: 2022 Snapshot’, *The Grantham Research Institute at LSE* (30 June 2022), <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/> (accessed 3 March 2023).

⁶ *Ibid.*

⁷ Friends of the Earth International, ‘Friends of the Earth Netherlands Submits Legal Summons in Historic Climate Case Against Shell’ (5 April 2019), <https://www.foei.org/friends-of-the-earth-netherlands-submits-legal-summons-in-historic-climate-case-against-shell/> (accessed 20 March 2023).

⁸ Daniel Boffey, ‘Court Orders Royal Dutch Shell to Cut Carbon Emissions by 45% by 2030’, *The Guardian* (26 May 2021), <https://www.theguardian.com/business/2021/may/26/court-orders-royal-dutch-shell-to-cut-carbon-emissions-by-45-by-2030> (accessed 6 March 2023).

⁹ *Ibid.*

¹⁰ Friends of the Earth, ‘Historic Victory: Judge Forces Shell to Drastically Reduce CO₂ Emissions’ (26 May 2021), <https://www.foei.org/historic-victory-judge-forces-shell-to-drastically-reduce-co2-emissions/> (accessed 6 March 2023).

¹¹ Isabella Kaminski, ‘Why 2023 Will be a Watershed Year for Climate Litigation’, *The Guardian* (4 January 2023), <https://www.theguardian.com/environment/2023/jan/04/why-2023-will-be-a-watershed-year-for-climate-litigation> (accessed 30 March 2023).

Numerous cases have also been filed by communities from the Global South against companies for their alleged contributions to climate change. On 30 January 2023, four Indonesian fishermen from the island of Pari at high risk of subsequent rising sea levels filed a lawsuit against the cement company Holcim in Switzerland for its role in contributing to climate change.¹² They claim the company should provide compensation for damage already caused on the island and finance flood protection measures.¹³ They are also asking Holcim to reduce its carbon emissions by 43% by 2030 and by 69% by 2040 (compared with the company's 2019 emissions) to align with the Paris Agreement's goals.¹⁴ More importantly, the communities argued their legal action 'seek[s] to contribute to preserving the livelihoods of millions of people, primarily in the Global South, that are existentially threatened by climate change'.¹⁵ A similar lawsuit was filed by a Peruvian farmer against German energy company RWE in 2015, demanding the company pay compensation relative to the percentage it has contributed to global warming. The plaintiff argued that the company is a major emitter of greenhouse gases and that its activities contributed to rising temperatures that threaten to melt two glaciers that would flood his land.¹⁶ As a result, the compensation would finance the mitigation costs incurred by the plaintiff and his town to prevent the risk of flooding in the area. The case is ongoing and could set an important precedent for the region in respect of climate impact and corporate obligations.

As a recent lawsuit against BNP Paribas¹⁷ over the bank's financial support of oil and gas projects demonstrates, climate change lawsuits will likely continue and expand to other sectors beyond the fossil fuel companies traditionally targeted. They will also be complemented by 'just transition litigation' that seeks to put human rights at the centre of the transition to a greener world.

III. Just Transition Litigation

A fast-growing subset of climate litigation, just transition litigation, reflects increasing willingness of affected communities and individuals to seek vindication of their rights in the context of a rapidly expanding renewable energy sector. This category of climate cases focuses not on adaptation and climate mitigation measures, nor on stopping the global shift to renewable energy, but rather uses human rights arguments to assess the 'distribution of benefits and burdens'¹⁸ of the transition away from fossil fuels and towards net-zero emissions. In other words, the cases seek to shape the manner in which the transition to renewable energy occurs, from the perspective of rights-holders.

Investment in renewable energy technologies, including wind farms and solar installations, and the demand for minerals essential for these sectors has seen dramatic,

¹² Friends of the Earth International, 'Four Indonesians File Climate Litigation Against Holcim' (1 February 2023), <https://www.foei.org/climate-litigation-against-holcim/> (accessed 6 March 2023).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Business & Human Rights Resource Centre, 'RWE Lawsuit (re Climate Change)', <https://www.business-humanrights.org/en/latest-news/rwe-lawsuit-re-climate-change/> (accessed 6 March 2023).

¹⁷ Oxfam International, 'French NGOs take BNP Paribas to Court in World's First Climate Lawsuit Against a Commercial Bank' (23 February 2023), <https://www.oxfam.org/en/press-releases/french-ngos-take-bnp-paribas-court-worlds-first-climate-lawsuit-against-commercial> (accessed 20 March 2023).

¹⁸ Annalisa Saversi and Joana Setzer, 'A First Global Mapping of Rights-Based Climate Litigation Reveals a Need to Explore Just Transition Cases in More Depth', Grantham Research Institute (29 March 2022), <https://www.lse.ac.uk/granthaminstitute/news/a-first-global-mapping-of-rights-based-climate-litigation-reveals-a-need-to-explore-just-transition-cases-in-more-depth/> (accessed 21 March 2023).

necessary growth. So too has the scope for human rights infringements along the renewable energy value chain. Research into the human rights policies and practices of the renewable energy¹⁹ and transition minerals²⁰ sectors increasingly highlights the risk that these industries – critical to the global transition to a net zero carbon economy – replicate patterns of abuse endemic to traditional extractive sectors.

An emerging trend²¹ of cases, often brought by Indigenous peoples and other communities affected by these projects and sectors, seeks to challenge these abuses, including forced relocation, poor consultation processes, failures to respect the Indigenous right to free, prior and informed consent and violations of the rights to a healthy environment and clean water. While obstacles to accessing justice remain significant for such communities and other rights-holders, these efforts suggest an increased appetite by affected communities and their representatives to turn to courts to advance their rights in the energy transition. Importantly, courts in jurisdictions across the world are signalling increasing receptivity to these cases.

In Norway, traditional Sámi reindeer herders succeeded in their landmark fight against the 151 turbines of the Fosen wind farm project, which they allege encroached on their grazing lands. The Norway Supreme Court agreed,²² adding that the licences issued by the government for the turbines were invalid given the turbines' considerable negative impact on the Sámi's ability to enjoy their own culture, in breach of Article 27 of the International Covenant on Civil and Political Rights.²³ This watershed ruling has significant potential to impact other projects being developed on lands used by the Sámi herders,²⁴ who have highlighted the transition to green energy 'should not come at the expense of the rights of Indigenous people'.²⁵ Similarly, in Mexico, the Unión Hidalgo communities challenged EDF's Gunaa Sicarú wind energy project, accusing EDF of settling illegally on communal lands through secret agreements to divide the local community and against the consultation process.²⁶ In June 2022, the Mexican company Comisión Federal de Electricidad cancelled its electricity supply contract with EDF, leading to the *de facto* abandonment of the Gunaa Sicarú wind energy project.²⁷

¹⁹ Business & Human Rights Resource Centre, note 2.

²⁰ Business & Human Rights Resource Centre, note 1.

²¹ Annalisa Savaresi and Joana Setzer, 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2022) 13:1 *Journal of Human Rights and the Environment* 7, https://www.elgaronline.com/view/journals/jhre/13/1/article-p7.xml?tab_body=fulltext (accessed 3 March 2023).

²² AFP, 'Norway Court Rules Two Windfarms Harming Sami Reindeer Herders', *The Guardian* (11 October 2021), <https://www.theguardian.com/world/2021/oct/11/norway-court-rules-two-windfarms-harming-sami-reindeer-herders-turbines-torn-down> (accessed 24 March 2023).

²³ Supreme Court of Norway, 'Licences for Wind Power Development on Fosen Ruled Invalid as the Construction Violates Sami Reindeer Herders' Right to Enjoy their own Culture' (11 October 2021), <https://www.domstol.no/en/supremecourt/rulings/2021/supreme-court-civil-cases/hr-2021-1975-s/> (accessed 30 March 2023).

²⁴ Victoria Klesty and Nora Buli, 'Sami Protesters, Greta Thunberg, End Demonstrations Against Wind Turbines' (3 March 2023), *Reuters*, <https://www.reuters.com/world/europe/sami-protesters-greta-thunberg-end-demonstrations-against-wind-turbines-2023-03-03/> (accessed 30 March 2023).

²⁵ Jan M Olsen, 'Norway's Leader Meets Indigenous Sami as Protests End' (3 March 2023), AP, <https://apnews.com/article/norway-protest-wind-farm-sami-reindeer-25fed73e79b5ce9aff8eef9d53af7dc8> (accessed 24 March 2023).

²⁶ Tom Azzopardi, 'Mexico Cancels Contract with Controversial EDF Wind Farm', *Wind Power Monthly* (7 June 2022), <https://www.windpowermonthly.com/article/1788903/mexico-cancels-contract-controversial-edf-wind-farm> (accessed 24 March 2023).

²⁷ ProDESC, 'Setback to EDF in Mexico! The Zapotec Community of Unión Hidalgo and ProDESC Achieve the Definitive Cancellation of the Wind Park Megaproject Gunaa Sicarú' (2 June 2022), <https://prodesc.org.mx/en/setback-to-edf-in-mexico-the-zapotec-community-of-union-hidalgo-and-prodesc-achieve-the-definitive-cancellation-of-the-wind-park-megaproject-gunaa-sicarú/> (accessed 31 March 2023).

Comparable community challenges related to land rights and failed consultation processes in respect of the transition are appearing globally. Numerous allegations of human rights abuses linked to energy projects in Kenya, for example, have led to affected communities approaching courts.²⁸ In 2014, the Laisamis and Marsabit communities in northern Kenya filed a lawsuit challenging land title deeds granted to the Lake Turkana Wind Power Project, the largest of its kind in sub-Saharan Africa. They claim that proper consultation and free, prior and informed consent protocols were not followed.²⁹ In October 2021, a judge agreed, declaring the deeds to the land irregular and unlawful.³⁰ Commentary around the case noted the verdict was ‘an important reminder that the green transition can only succeed if it puts human rights at its core. There is a great risk involved if the rights of Indigenous Peoples are violated and if they are not fully part of the transition as equal partners’.³¹ The rise of cases challenging the approaches of corporate actors to renewable energy developments represents a risk for these companies, investors, and – perhaps most importantly – the pace of the global shift to a sustainable climate.³²

IV. Legislative Efforts

Legislative advances, combined with litigation, may also aid in facilitating climate justice and a fast and fair transition. Global momentum behind these new regulatory frameworks prioritizing and safeguarding human rights in business and industries relevant to the transition is notable in jurisdictions across the world.

In Sierra Leone, a 2022 law aims to improve practices and accountability in the minerals sector,³³ in part to limit negative impacts of mining activities on communities and environment.³⁴ This unprecedented law requires communities to give their explicit consent to the project prior to mining, grants women equal land rights, and bars mining and agribusiness in ecologically sensitive areas.³⁵ Researchers have noted ‘there is not a

²⁸ Business & Human Rights Resource Centre, ‘Fast and Fair Renewable Energy for Africa: Lessons from Kenya’ (14 June 2022), <https://www.business-humanrights.org/en/from-us/briefings/fast-and-fair-renewable-energy-for-africa-lessons-from-kenya/> (accessed 24 March 2023).

²⁹ IWGIA, ‘The Cost of Ignoring Human Rights and Indigenous Peoples’ (10 November 2021), <https://www.iwgia.org/en/news/4562-the-cost-of-ignoring-human-rights-and-indigenous-peoples.html> (accessed 24 March 2023).

³⁰ *Ibid.*

³¹ *Ibid.* See also IWGIA, ‘Kenya: The Impact of Renewable Energy Projects on Indigenous Communities in Kenya. The Cases of the Lake Turkana Wind Power Project and the Olkaria Geothermal Power Plants. IWGIA Report 28’ (16 December 2019), <https://www.iwgia.org/en/resources/publications/3535-the-impact-of-renewable-energy-project-on-indigenous-communities-in-kenya.html> (accessed 30 March 2023).

³² See more details on a lithium mine case in the US here: <https://www.business-humanrights.org/en/latest-news/usa-construction-begins-on-lithium-mine-after-appeals-court-rejects-request-for-emergency-injunction/> (accessed 30 March 2023).

³³ Parliament of the Republic of Sierra Leone, ‘Parliament Passes Mines and Development Act 2022’ (9 August 2022), https://www.parliament.gov.sl/uploads/press_release/pdf/PARLIAMENT%20PASSES%20MINES%20AND%20MINERAL%20DEVELOPMENT%20ACT%202022%20-%209th%20AUGUST,%202022.pdf (accessed 20 March 2023)

³⁴ *Ibid.*

³⁵ For more information, see Business & Human Rights Resource Centre, ‘Sierra Leone Enacts Unprecedented Laws Requiring Explicit Community Consent, Land Rights for Women, and Strong Environmental Protection’, <https://www.business-humanrights.org/en/latest-news/sierra-leone-enacts-unprecedented-laws-requiring-explicit-community-consent-land-rights-for-women-and-strong-environmental-protection/> (accessed 20 March 2023).

legal regime anywhere, in either hemisphere, that grants such robust rights to communities facing harm'.³⁶

The development of mandatory human rights and environmental due diligence legislation across the world also holds promise for communities seeking to assert their rights and to fight companies' negative impact. The 2017 French Duty of Vigilance Law³⁷ requires large companies operating in the country to publish an annual 'vigilance plan' identifying human rights and environmental risks and measures to prevent abuse resulting from the activities of the company, and its subsidiaries, suppliers and subcontractors. In case of non-compliance, any individual with a legitimate interest can file a legal complaint; communities and their representatives have moved quickly to do so. In 2019, civil society organizations filed a lawsuit against TotalEnergies, for alleged failure to consider the human and environmental impact of its Tilenga and EACOP mega oil projects in Uganda in accordance with the French law. The court did not examine the case on the merits.³⁸ In 2020, non-governmental organizations (NGOs) and local authorities used this law in a lawsuit against TotalEnergies,³⁹ seeking that Total reduce its carbon emissions.⁴⁰ In February 2023, the same law was used to sue BNP Paribas in 'the world's first climate of the law against a commercial bank'.⁴¹ NGO plaintiffs argue that BNP is in breach by continuing to finance fossil fuel companies.⁴²

At the European Union level,⁴³ the proposed Corporate Sustainability Due Diligence Directive⁴⁴ would impose similar corporate due diligence requirements within the regional block. Notable calls by civil society to strengthen the future regulation include requests to specifically include climate due diligence in the Directive, as well as ensure civil liability for corporate actors that fall foul of the law's requirements.⁴⁵

³⁶ Namati, 'Sierra Leone Passes Globally Unprecedented Legislation Related to Climate and the Environment' (8 August 2022), <https://namati.org/news-stories/sierra-leone-passes-globally-unprecedented-legislation-on-climate-environment/> (accessed 20 March 2023).

³⁷ Duty of Vigilance Law 2017 (France), <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/> (accessed 20 March 2023).

³⁸ Business & Human Rights Resource Centre, 'Total Lawsuit (re Failure to Respect French Duty of Vigilance Law in Operations in Uganda)', <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/> (accessed 31 March 2023). In 2021, France's Supreme Court rejected the jurisdiction of the commercial courts and recognized the jurisdiction of the civil court. In February 2023, the court dismissed the case and said it was 'inadmissible' on procedural grounds. The plaintiffs can appeal the decision.

³⁹ Business & Human Rights Resource Centre, 'TotalEnergies Lawsuit (re Climate Change, France)', <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-climate-change-france/> (accessed 20 March 2023).

⁴⁰ Notre Affaire à Tous, 'Climate Change: Paris and New York Join the Legal Action Against TotalEnergies' (21 September 2022), <https://notreaffaireatous.org/wp-content/uploads/2022/09/Total-case-press-release.docx-1.pdf> (accessed 20 March 2023).

⁴¹ Friends of the Earth France, Notre Affaire à Tous and Oxfam France, 'French NGOs take BNP Paribas to Court in World's First Climate Lawsuit Against a Commercial Bank' (23 February 2023), <https://www.oxfam.org/en/press-releases/french-ngos-take-bnp-paribas-court-worlds-first-climate-lawsuit-against-commercial> (accessed 20 March 2023).

⁴² Ibid.

⁴³ See here for additional updates on the process: <https://www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies/> (accessed 20 March 2023).

⁴⁴ European Commission, 'Proposal for a Directive on Corporate Sustainability Due Diligence and Annex' (23 February 2022), https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en (accessed 20 March 2023).

⁴⁵ Civil society statement on the proposed EU Corporate Sustainability Due Diligence Directive (May 2022), https://media.business-humanrights.org/media/documents/CSO_statement_CSDDD_EN_bpByp6L.pdf (accessed 20 March 2023).

At the global level, negotiation of a UN Legally Binding Instrument on Business and Human Rights⁴⁶ offers further hope to communities seeking improved corporate accountability for climate change impacts and a fair transition to clean energy. The current draft provides for civil liability.⁴⁷

V. Conclusion

The growing spectre of climate justice and just transition litigation should function as a deterrent to abusive corporate human rights practices, and fundamentally change the calculus of risk in boardrooms across the globe for both companies and their investors over time.⁴⁸ Growth of legislation at domestic, regional and global levels should also contribute to this new reality. Together, these shifts bring into stark relief the reality that a global transition to renewable energy depends on a human rights-centred approach to be just and sustainable.

Acknowledgements. I would like to thank Michael Clements, Director of International Programmes at the Business & Human Rights Resource Centre, for her expertise and critical review of this article.

Competing interest. The author declares none.

Financial support. No funding was received for this article.

⁴⁶ See here for more details: <https://www.business-humanrights.org/en/big-issues/binding-treaty/> (accessed 20 March 2023).

⁴⁷ Human Rights Council, 'Text of the Third Revised Draft Legally Binding Instrument', A/HRC/52/41/ADD.1 (23 January 2023), <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F52%2F41%2Fadd.1&Language=E&DeviceType=Desktop&LangRequested=False> (accessed 20 March 2023).

⁴⁸ Damian Carrington, 'Shell Directors Personally Sued Over "Flawed" Climate Strategy', *The Guardian* (9 February 2023), <https://www.theguardian.com/environment/2023/feb/09/shell-directors-personally-sued-over-flawed-climate-strategy> (accessed 20 March 2023).