Renewable Energy Injustices: Promoting an African Communitarian Approach to Global Energy Justice Through International Law

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ABSTRACT

The energy transition has raised the profile of renewable energy as an energy source with several benefits. It has equally spotlighted a range of injustices generated by renewable energy development and use. Energy justice has emerged as a framework for conceptualising and addressing these injustices at the domestic and international levels. Although research on energy justice has increased in recent years, it has mainly relied on Western philosophical ideas that mirror the status quo of energy production and utilisation. This development has robbed energy justice of a more suitable approach for identifying and addressing renewable energy injustices. In this thesis, I propose a new conception of global energy justice based on an interpretation of African communitarianism that values relationality as expressed through identity and solidarity. To assess this proposition, I adopt the unfair distribution of renewable energy benefits in the international community as a test case. I propose the redistribution of financial, technological, and other capacity-based resources from developed and high-income countries to developing and low-income countries for renewable energy development. To operationalise this approach to global energy justice, I strategically re-interpret the Common but Differentiated Responsibilities principle and the duty to cooperate in line with African communitarianism to support resource redistribution. Institutions within international climate law, like the Conference of the Parties to the United Nations Framework Convention on Climate Change and the various human rights treaty- and non-treaty bodies within international human rights law, could help implement this re-interpretation through a variety of legal techniques. As a way of addressing emergent interpretative and implementation gaps, I also propose additional tools. Ultimately, my research contributes to existing energy justice scholarship by highlighting the significant contribution of non-Western philosophies in addressing renewable energy injustices and re-positioning international law as a tool for operationalising this approach to energy justice.

RELATED PUBLICATIONS AND CONFERENCE PRESENTATIONS

Book Chapter:

- Chitzi C. Ogbumgbada, Rasaki Stephen Dauda, and Eduardo G. Pereira, 'Sustainable Development and Off-Grid Renewable Electricity: Current Status and Challenges' in Ngozi Chinwa Ole and others (eds), *Regulatory Support for Off-Grid Renewable Electricity* (Routledge 2023) 36-51.

Book Review:

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Conference Presentations:

- 'A Historical Exposition on the Resilience of International Environmental Law in the Age of Global Isolationism' (Socio-Legal Studies Association Conference, Ulster University, April 2023).

- 'Operationalisation of Global Energy Justice: A Role for International Law?' (IX Postgraduate Colloquium on Environmental Law and Governance, Strathclyde Centre for Environmental Law and Governance, University of Strathclyde, June 2021).

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- 'Regulation of Renewable Energy in International Law: Challenges and Prospects' (VII Postgraduate Colloquium on Environmental Law and Governance, Strathclyde Centre for Environmental Law and Governance, University of Strathclyde, May 2019).

DECLARATION OF AUTHENTICITY AND AUTHOR'S RIGHTS

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

Chitzi C. Ogbumgbada
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DEDICATION

I dedicate this thesis to my father and mother for their support through the years.

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LIST OF ABBREVIATIONS

CBDR	Common but Differentiated Responsibilities
CDM	Clean Development Mechanism
CESCR	Committee on Economic, Social and Cultural Rights
COP	Conference of the Parties
CRC	Committee on the Rights of the Child
ECOSOC	Economic and Social Council
ETF	Enhanced Transparency Framework
GCF	Green Climate Fund
GEF	Global Environment Facility
GNI	Gross National Income
HDI	Human Development Index
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IEA	International Energy Agency
ILO	International Labour Organisation
IPCC	Intergovernmental Panel on Climate Change
IRENA	International Renewable Energy Agency
ITLOS	International Tribunal for the Law of the Sea
NDCs	Nationally Determined Contributions
NGOs	Non-Governmental Organisations
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
OPEC	Organisation of the Petroleum Exporting Countries
SDGs	Sustainable Development Goals
TWAIL	Third World Approaches to International Law
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme

UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNTC	United Nations Treaty Collection
UNTS	United Nations Treaty Series
UPR	Universal Periodic Review
WMO	World Meteorological Organisation
WTO	World Trade Organisation

Chapter I

Introduction

1. Background

Renewable energy has been gaining considerable attention[1] at the global,[2] regional,[3] and domestic levels.[4] Renewable energy is energy that is generated from natural sources that are replenished at the same rate as they are consumed.[5] These sources include solar, wind, geothermal, tidal, wave, modern biomass and hydro.[6] They are otherwise known as the primary sources of renewable energy and are contrasted with conventional energy sources such as coal, crude oil, natural gas, oil shales, bitumen, tar sands, and heavy oil.[7] The latter are finite in nature, and are produced by the decomposition of fossilised plants and animals within the earth's crust.[8] For the purposes of this thesis, references to renewable energy not only encompass the primary sources of renewable energy, but also include secondary applications of the energy source for electricity, cooking, heating, cooling, transport fuels, and industrial

[1] See IRENA, 'Renewables Take Lion's Share of Global Power Additions in 2021' (*IRENA Press Release,* 11 April 2022*)* <Renewables Take Lion's Share of Global Power Additions in 2021 (irena.org)> accessed 09 September 2023. The International Renewable Energy Agency (IRENA) is a creature of international law with the mandate to promote the widespread adoption and utilisation of renewable energy worldwide. See the Statute of IRENA (adopted 26 January 2009, entered into force 8 July 2010) 2700 UNTS. While renewable energy has been deployed in various forms for centuries, newer renewable technologies have nevertheless greatly increased its potential to be deployed on a rapid scale. See Michaël Aklin and Johannes Urpelainen, *Renewables: The Politics of a Global Energy Transition* (Massachusetts Institute of Technology Press 2018) 3.

[2] See Stuart Bruce, 'International Law and Renewable Energy: Facilitating Sustainable Energy for All' (2013) 14 Melbourne Journal of International Law 18; Marco Citelli, Marco Barassi and Ksenia Belykh, 'Renewable Energy in the International Arena: Legal Aspects and Cooperation' (2014) 2(1) Groningen Journal of International Law 1.

[3] See e.g., the European Union Renewable Energy Directive 2018/2001/EU, which commits member countries of the EU to source at least 32% of their total energy from renewable energy sources by 2030.

[4] Several countries have enacted renewable energy laws in the context of climate change mitigation. See Grantham Research Institute on Climate Change and the Environment, 'Climate Change Laws of the World' (*London School of Economics*) <Climate Change Laws of the World (climate-laws.org)> accessed 09 September 2023 for a compendium of some of these laws.

[5] Bent Sørensen, *Renewable Energy: Its Physics, Engineering, use, Environmental Impacts, Economy and Planning Aspects* (3rd edition Elsevier Academic Press 2004) 16.

[6] ECOSOC, 'Specifications for the Application of the United Nations Framework Classification for Fossil Energy and Mineral Reserves and Resources 2009 to Renewable Energy Resources', 19 July 2016, ECE/Energy/2016/4, para 6.

[7] Otto C. Kopp, 'Fossil Fuel' (*Encyclopedia Britannica, 25 November 2022*) <Fossil fuel | Meaning, Types, & Uses | Britannica> accessed 09 September 2023.

[8] Cutler J. Cleveland and Christopher Morris, *Dictionary of Energy* (Elsevier 2006) 171.

uses. The wide range of potential uses of renewable energy increases the scale of the potential benefits they offer.[9]

To this effect, renewable energy has the potential to contribute towards the mitigation of anthropogenic climate change caused by the emission of greenhouse gases (GHG) by substituting for conventional energy sources[10] and ultimately facilitating the transition to a low-carbon future.[11] The transition to a low-carbon energy future, otherwise called the energy transition and which is already underway, mainly hinges on the phasing out of conventional sources of energy by the second half of this century in favour of alternative sources of energy like renewable energy.[12] The ultimate ambition of the transition is to keep climate change in check. Climate change affects every geographical area in the world, though some areas are more vulnerable than the others.[13] The effects of climate change are already being felt across the world. For example, July 2023 was the warmest month on record,[14] with the period characterised by spells of heatwaves that have become a common occurrence in recent times.[15] Increased temperature is however not the only consequence of the dangerous warming of the earth. Other catastrophic ramifications include regular drought spells, sea level

[9] Joel Jaeger, 'Explaining the Exponential Growth of Renewable Energy' (*World Resources Institute,* 20 September 2021) <How the Renewable Energy Sector is Growing so Rapidly | World Resources Institute (wri.org)> accessed 09 September 2023.

[10] See Valérie Masson-Delmotte and others, 'Summary for Policymakers' in Valérie Masson-Delmotte and others (eds), *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Cambridge University Press 2018) para c.2.2. Renewable energy also has the potential to substitute for other types of heavily polluting energy sources such as nuclear energy, though nuclear is being promoted as a complement to renewable energy. See IEA, 'Nuclear Power and Secure Energy Transitions' (2022) <https://www.iea.org/reports/nuclear-power-and-secure-energy-transitions> accessed 09 September 2023. Opposition to the use of nuclear energy is nevertheless still high. See Aditi Verma, Ali Ahmad and Francesca Giovannini, 'Nuclear Energy, Ten Years After Fukushima' (2021) 591 Nature 199, 201 ('If nuclear energy is to have a meaningful role in deep carbonization, perspectives that up to now have been excluded from the design, development and policymaking process must have a seat at the table').

[11] See IRENA, 'Energy Transition Outlook: Global Outlook' <Outlook (irena.org)> accessed 09 September 2023.

[12] Other complementary measures include energy efficiency, hydrogen, and electrification. See ibid.

[13] Examples include coastal communities, small island states and poor countries. See Leonard A. Nurse and others, 'Small islands' in IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014) 1616; see also Miriam Cullen, ''Eaten by the sea': Human Rights Claims for the Impacts of Climate Change Upon Remote Subnational Communities' (2018) 9 (2) Journal of Human Rights and the Environment 171.

[14] See WMO, 'July 2023 Confirmed as Hottest Month on Record' <July 2023 confirmed as hottest month on record | World Meteorological Organization (wmo.int)> accessed 09 September 2023.

[15] Ayesha Tandon, 'Record-Breaking 2023 Heat Events are 'not rare anymore' due to Climate Change' (*CarbonBrief,* 25 July 2023) <Record-breaking 2023 heat events are 'not rare anymore' due to climate change - Carbon Brief> accessed 09 September 2023.

rise, wildfires, loss of species, famine and forced displacement.[16] The effects of climate change also have adverse peace and security implications.[17] The link between climate change on the one hand and conflict and instability on the other hand is well known and has in fact been the theme of various studies.[18]

The world therefore faces an existential crisis in which the earth may continue to suffer from irreversible consequences because of the effects of climate change. If global warming exceeds the threshold of 2°C, the Intergovernmental Panel on Climate Change (IPCC)[19] has argued, the earth's very survival would be in grave danger.[20] The Paris Agreement on Climate Change, which was negotiated at the 21st climate change conference in Paris in 2015, as one of the international legal responses to climate change, explicitly recognises this threshold. The agreement commits contracting states parties to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue further efforts to control the temperature increase to 1.5°C above pre-industrial levels.[21] Based on the current emissions trajectory, the IPCC has suggested that the world is on its way to exceeding the 2°C tipping point.[22] This situation makes a case for the continued and rapid development and deployment of renewable energy and other clean sources of energy,[23] even though it is recognised that renewable energy on its own cannot resolve the climate change question

[16] UN, 'Causes and Effects of Climate Change' <Causes and Effects of Climate Change | United Nations> accessed 09 September 2023; WMO, 'Exceptional Heat and Rain, Wildfires and Floods Mark Summer of Extremes' <Exceptional heat and rain, wildfires and floods mark summer of extremes | World Meteorological Organization (wmo.int)> accessed 09 September 2023.

[17] Ragnhild Nordås and Nils Petter Gleditsch, 'Climate Change and Conflict' (2007) 26 Political Geography 627, 628.

[18] See Jon Barnett and W. Neil Adger, 'Climate Change, Human Security and Violent Conflict' (2007) 26(6) Political Geography 639; Ole Magnus Theisen, Nils Petter Gleditsch and Halvard Buhaug, 'Is Climate Change a Driver of Armed Conflict?' (2013) 117(3) Climatic Change 613; Kendra Sakaguchi, Anil Varughese and Graeme Auld, 'Climate Wars? A Systematic Review of Empirical Analyses on the Links between Climate Change and Violent Conflict' (2017) 19(4) International Studies Review 622; Mark Nevitt, 'Is Climate Change a Threat to International Peace and Security?' (2021) 42 Michigan Journal of International Law 527.

[19] The IPCC is the preeminent international body that advises on the scientific aspects of climate change.

[20] See Valérie Masson-Delmotte and others (eds), *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2021).

[21] See the Paris Agreement Under the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS, art. 2(1)(a). It has been argued that a fixation on the increase in average global surface temperature, represented by the 2°C warming goal, is 'wrong-headed' and that such a preoccupation obscures more important carbon-centric metrics such as atmospheric carbon-dioxide concentrations, ocean heat content, and high-latitude temperatures. See David G. Victor and Charles F. Kennel, 'Ditch the 2°C warming' (2014) 514 Nature 30, 30. For a rebuttal of this position, however, see Bill Hare and others, 'Rebuttal of ''Ditch the 2°C warming goal!''' (2014) Climate Analytics 1.

[22] See Masson-Delmotte and others (n 20).

[23] Examples of other clean energy sources include energy efficiency, carbon capture and storage, and others.

which has been described as a 'super wicked problem' owing to its complex features requiring complex and involved solutions.[24] Nevertheless, renewable energy has the potential to greatly strengthen the challenge to the menace of climate change, ultimately reducing its incidence. This is aided by the fact that the supply potential of renewable energy is vast and inexhaustible.[25] Thus, while the sun is likely not to shine always (for instance at night), it will nevertheless not cease shining; while the wind will not blow all the time, it will nevertheless not cease blowing. Theoretically, therefore, renewable energy resources could supply all of earth's clean energy needs. It has been postulated that the quantum of solar energy that reaches the earth's surface each year is 8000 times more than the total primary energy requirement of the world.[26] One hour's worth of this reflected solar energy would be enough to meet the energy needs of the whole of humanity for a full year.[27] This makes renewable energy particularly attractive for climate change mitigation, as it ensures a comparatively cleaner and sustainable source of energy for humanity.

While climate change mitigation is the primary benefit of renewable energy, there are a range of other secondary benefits of renewable energy usage. For example, renewable energy has the potential to improve energy access especially for communities and households facing the challenge of lack of access to energy.[28] Energy access can support a broad range of services such as education, primary health care, sanitation, nutrition and can be utilised for productive end-uses such as agriculture, thereby enabling people to lead useful and flourishing lives.[29] In addition, renewable energy has the potential to aid countries to achieve or maintain their energy security objectives;[30] it can also facilitate the provision of economic benefits such as green employment and enhanced economic development especially in areas needing these most.[31] While these secondary benefits of renewable energy can also be provided by

[24] See Richard J. Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94 (5) Cornell Law Review 1153, 1159-1160.
[25] For a philosophical perspective on the ownership of renewable energy, see Paul Fagan, 'Who Owns Renewable Energy? An Argument for Lockean-Inspired Ownership' (2020) 25 (2) Ethics and the Environment 119.
[26] See Volker Quaschning, *Renewable Energy and Climate Change* (John Wiley and Sons Ltd 2010) 77.
[27] ibid.
[28] Chitzi C. Ogbumgbada, Rasaki Stephen Dauda, and Eduardo G. Pereira, 'Sustainable Development and Off-grid Renewable Electricity: Current Status and Challenges' in Ngozi Chinwa Ole and others (eds), *Regulatory Support for Off-Grid Renewable Electricity* (Routledge 2023) 36-37.
[29] IRENA, *Off-grid Renewable Energy Solutions: Global and Regional Status and Trends* (IRENA 2018) 1.
[30] Scott V. Valentine, 'Emerging Symbiosis: Renewable Energy and Energy Security' (2011) 15 Renewable and Sustainable Energy Reviews 4572, 4575-576; Nofri Yenita Dahlan and others, 'Energy Security: Role of Renewable and Low-Carbon Technologies' in Muhammad Asif (ed), *Handbook of Energy and Environmental Security* (Elsevier 2022) 44-49.
[31] IRENA, *Renewable Energy Benefits: Measuring the Economics* (IRENA 2016).

conventional energy sources,[32] renewable energy technologies are not only preferable because of their climate change mitigation benefits. For example, decentralised renewable energy technologies can provide cost-effective electricity and clean cooking solutions[33] particularly to areas where central electric grids, especially those relying on fossil fuels, are limited.[34] Additionally, the ubiquity of renewable energy sources makes renewable energy an attractive tool for ensuring or maintaining energy security, because it may mean that renewable energy is less susceptible to the kinds of crises[35] inherent in the deployment of conventional energy sources.[36]

When the above benefits of renewable energy are considered in a holistic and integrated manner, they also engage global developmental goals, especially the seventeen goals enshrined in the Sustainable Development Goals (SDGs).[37] These goals relate to poverty eradication; zero hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation and infrastructure; reduced inequalities; sustainable cities and communities; responsible consumption and production; climate action; sustainable use of oceans and seas; sustainable use of terrestrial ecosystems, sustainable management of forests, combating desertification, and halting land degradation and biodiversity loss; peace, justice and strong institutions; and partnering for the achievement of the goals.[38] Renewable energy can therefore facilitate the achievement of many of these goals and their associated targets.[39] Connected to this is the argument that renewable energy, as a source of energy that is generally 'clean', has a principal role to play in the realisation of a broad range of human rights.[40] This is especially the case as both the SDGs and human rights intersect in many ways.[41]

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[32] See John Soussan, *Primary Resources and Energy in the Third World* (Routledge 1988) 34.
[33] IRENA, *Off-grid Renewable Energy Solutions to Expand Electricity Access: An Opportunity not to be Missed* (IRENA 2019) 5.
[34] Carlo Vezzoli and others, *Designing Sustainable Energy for all: Sustainable Product-Service System Design Applied to Distributed Renewable Energy* (Springer 2018) 23.
[35] Such as geopolitical wars and market volatility.
[36] For more on this, see Chapter 2 of this thesis.
[37] UNGA, Resolution 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development', 25 September 2015, A/RES/70/1.
[38] ibid 14.
[39] Wayan G. Santika and others, 'From Goals to Joules: A Quantitative Approach of Interlinkages Between Energy and the Sustainable Development Goals' (2019) 50 Energy Research and Social Science 201, 201.
[40] OHCHR, 'Renewable Energy and the Right to Development: Realizing Human Rights for Sustainable Development' <https://www.ohchr.org/sites/default/files/2022-05/KMEnergy-EN.pdf> accessed 09 September 2023.
[41] Alexandra Harrington, 'Sustainable Development Goals' in Christina Binder and others, *Elgar Encyclopedia of Human Rights* (Edward Elgar 2022) 349-354.

Despite the above benefits, there are significant issues that are associated with renewable energy development and use. These issues mainly engage the concepts of justice and ethics, and therefore require attention and redress.[42] For example, there is a problem of distribution that has characterised the development of renewable energy worldwide.[43] In many developed and high-income parts of the world,[44] it may be observed that the pace of renewable energy development has been rapid and widespread.[45] By contrast, in several developing and low-income areas of the world, renewable energy penetration has been underwhelming, especially because of barriers like the lack of financial resources to incentivise renewable energy investments or the absence of appropriate technologies for renewable energy.[46] The implication of this is that there is an inequitable and unfair distribution of renewable energy benefits in the international community.[47]

The crisis of distribution is exacerbated by several underlying structural issues. The first is extreme poverty that pervades several developing countries, made worse in many cases by trends such as globalisation.[48] The second, directly linked to the first issue, is the inability of the people living in these countries to meet their basic needs. Many of these countries struggle with a lack of access to energy for example. In 2020, an estimated 800 million people were without access to electricity in the world. Three-quarters of that number were people living in sub-Saharan Africa, amounting to around 580 million people without electricity access for

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[42] Hugh Dyer, 'Ethical Dimensions of Renewable Energy' in Hugh Dyer and Maria Julia Trombetta (eds), *International Handbook of Energy Security* 443.

[43] See IRENA, 'Renewable Energy Electricity Generation and Installed Capacity: Regional Trends' <Regional Trends (irena.org)> accessed 09 September 2023.

[44] In this thesis, I adopt the classification of countries as low-income economies or developing countries or countries of the Global South and high-income economies or developed countries or countries of the Global North according to criteria developed by the World Bank, the Organisation for Economic Cooperation and Development (OECD) and the UN. Some of these criteria include Gross National Income per capita and eligibility for official development assistance. See World Bank, 'World bank Country and Lending Groups: Country Classification' <World Bank Country and Lending Groups – World Bank Data Help Desk> accessed 09 September 2023; World Bank, 'GNI Per Capita, Atlas Method' <GNI per capita, Atlas method (current US$) | Data (worldbank.org)> accessed 09 September 2023; OECD, 'DAC List of ODA Recipients' <DAC List of ODA Recipients - OECD> accessed 09 September 2023; UN, 'Least Developed Countries Category' <LDC Category | Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States> accessed 09 September 2023. For difficulties in adequately categorising countries, however, see Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006) 165-175.

[45] IRENA, 'Renewable Energy Electricity Generation and Installed Capacity: Regional Trends' (n 43).

[46] See Ogbumgbada, Dauda, and Pereira, 'Sustainable Development and Off-grid Renewable Electricity: Current Status and Challenges' (n 28) 41-42.

[47] Sanya Carley and David M Konisky, 'The Justice and Equity Implications of the Clean Energy Transition' (2020) 5 Nature Energy 569, 572-573.

[48] See Michel Chossudovsky, *The Globalization of Poverty and the New World* Order (2nd edn, Global Research Publishers 2003); Ann E. Harrison, *Globalization and Poverty* (University of Chicago Press 2007).

that year.[49] The people in these countries are even more vulnerable to both new and emerging ills such as global pandemics and the effects of climate change.[50] They may be regarded as essentially existing on the fringes or margins of development. Their condition raises a broad ethical question of whether a duty of assistance can be owed to distant members of the international community. This is a knotty issue that raises the further question of whether material outcomes, including renewable energy benefits, should be fairly distributed across all sections of the international community to combat ills such as poverty, climate change, global pandemics, environmental pollution, and others.[51] It is a question that has long been debated within moral and political philosophy,[52] but one which has provoked intense debates in recent times especially within the legal sphere.[53]

In addition to the issue of distribution, there are other ethical issues that have arisen in connection with the global development of renewable energy. For example, there is considerable concern about the costs which the global energy transition has imposed on human society. Developing countries that possess significant reserves of conventional energy sources appear to occupy a precarious position for instance. The contentious question here is whether these countries should jettison their supplies of crude oil, natural gas, and coal in

[49] IEA, *World Energy Outlook 2020* (IEA 2020) 18.

[50] Tom Bundervoet, Maria Eugenia Davalos, and Natalia Garcia, 'The Short-Term Impacts of COVID-19 on Households in Developing Countries: An Overview Based on a Harmonized Data set of High-Frequency Surveys (English) (*World Bank Group,* 15 March 2021) <http://documents.worldbank.org/curated/en/285001615830629714/The-Short-Term-Impacts-of-COVID-19-on-Households-in-Developing-Countries-An-Overview-Based-on-a-Harmonized-Data-Set-of-High-Frequency-Surveys> accessed 09 September 2023.

[51] See Erich Fromm, *To Have or To Be?* (Sphere Books Ltd 1979); David Held, *Cosmopolitanism: Ideals and Realities* (Polity Press 2010). See also Michael Blake and Patrick Taylor Smith, 'International Distributive Justice' in Edward N. Zalta (ed), *Stanford Encyclopaedia of Philosophy* (Summer 2020 Edition) <https://plato.stanford.edu/archives/sum2020/entries/international-justice> accessed 09 September 2023.

[52] See Peter Singer, 'Famine, Affluence, and Morality' (1972) 1(3) Philosophy and Public Affairs 229; Onora O'Neill, *Faces of Hunger: An Essay on Poverty, Development and Justice* (George Allen and Unwin 1986); Henry Shue, *Basic Rights* (2nd edn, Princeton University Press 1996). *Cf Garrett* Hardin, 'Lifeboat Ethics: The Case Against Helping the Poor' in William Aikens and Hugh LaFollette (eds), *World Hunger and Morality* (Prentice Hall 1977).

[53] Illustrative examples of this claim include Diane Desierto, 'Equitable COVID Vaccine Distribution and Access: Enforcing International Legal Obligations under Economic, Social, and Cultural Rights and the Right to Development' (*EJIL: Talk!*, 2 February 2021) <Equitable COVID Vaccine Distribution and Access: Enforcing International Legal Obligations under Economic, Social, and Cultural Rights and the Right to Development – EJIL: Talk! (ejiltalk.org)> accessed 09 September 2023; Boniface Chimpango, 'Vaccine Nationalism and Equitable Access to COVID-19 Pharmaceuticals: TRIPS Agreement under Trial (Again)' (2021) 20 (3) Journal of International Trade Law and Policy 166. *Cf* Rana Moustafa Essawy, 'The Legal Duty to Cooperate amid COVID-19: A Missed Opportunity?' (*EJIL: Talk!*, 22 April 2020) < The Legal Duty to Cooperate amid COVID-19: A Missed Opportunity? – EJIL: Talk! (ejiltalk.org)> accessed 09 September 2023.

favour of cleaner alternatives like renewable energy.[54] On many occasions, this question is answered in the negative,[55] given that such an abandonment could potentially have far-reaching socio-economic implications for petroleum-rich countries. Indeed, conventional energy provides employment, infrastructure, and government revenue in many of these countries.[56] The potential problem of costs has led to demands for decarbonisation measures to be tailored to specific circumstances, and to avoid placing undue burdens on vulnerable countries.[57] A further, but related issue of costs, concerns the effects of the energy transition on labour.[58] Communities and peoples associated with the fossil fuels industry are likely to encounter a loss of livelihoods if corporations engaged in conventional energy exploitation were to cease operations.[59] An additional injustice relates to the fact that some renewable energy projects have been found to generate negative environmental and social costs on peoples and communities.[60] Energy and mining companies engaged in the extraction of natural resources used for renewable energy technologies have for instance been known to perpetrate several human rights abuses,[61] with many of these occurring in developing parts of the world.[62]

The above injustices demonstrate the fact that while renewable energy development is an important facet of the energy transition, it is nevertheless associated with the generation of

[54] UN, 'Guterres: ''Global addiction to fossil fuels'' must end and a ''renewables revolution'' jumpstarted' (*UN News,* 18 September 2022) <Guterres: 'Global addiction to fossil fuels' must end and a 'renewables revolution' jumpstarted | UN News> accessed 09 September 2023.

[55] Muhammadu Buhari, 'How Not to Talk with Africa about Climate Change' (*The Washington Post*, 09 November 2022) <Opinion | Muhammadu Buhari: How not to talk with Africa about climate change - The Washington Post> accessed 09 September 2023.

[56] See John Soussan, *Primary Resources and Energy in the Third World* (Routledge 1988) 34. But they also produce effects such as rent-seeking behaviour and resource curse which are exacerbated by the existence of weak institutions and enforcement mechanisms in countries sitting atop considerable resources. See Alexandre Henry, 'Transmission Channels of the Resource Curse in Africa: A Time Perspective' (2019) 82 Economic Modelling 13, 13-14.

[57] Yacob Mulugetta and others, 'Africa Needs Context-Relevant Evidence to Shape its Clean Energy Future' (2022) 7 Nature Energy 1015, 1017.

[58] Ann M. Eisenberg, 'Just Transitions' (2019) 92 Southern California Law Review 273, 275-276.

[59] Sophie Yeo, 'Clean Energy: The Challenge of Achieving a ''just transition'' for Workers' (*Carbon Brief*, 04 January 2017) <Clean energy: The challenge of achieving a 'just transition' for workers - Carbon Brief> accessed 09 September 2023.

[60] Naomi Roht-Arriaza, ''First, Do No Harm': Human Rights and Efforts to Combat Climate Change' (2009-2010) 38 Georgia Journal of International and Comparative Law 593; see also Ole Pederson, 'The Janus Head of Human Rights and Climate Change: Adaptation and Mitigation' (2011) 80 Nordic Journal of International Law 403.

[61] Business and Human Rights Resource Centre, 'Transition Minerals Tracker: 2021 Analysis', 4 <Transition_Minerals_Tracker_Global_analysis.pdf (business-humanrights.org)> accessed 09 September 2023.

[62] ibid.

issues that call for fair and just resolutions.[63] To this end, it is a central claim of this thesis that measures to address these issues should be framed and guided by the concept of energy justice.[64]

1.1. Energy Justice

Energy justice is a potentially useful framework for conceptualising and addressing issues of justice associated with all forms of energy,[65] including renewable energy.[66] Through an ethical lens,[67] energy justice identifies different ethical issues that are linked to the development, production, consumption and disposal of energy.[68] The concept therefore focuses on issues that *should* matter in relation to energy.[69] In this sense, energy justice is typically dissatisfied with existing states of affairs in the energy sector when these are deemed to be unjust, aiming instead for just outcomes.[70] Identifying the issues that should matter in relation to energy is however the first stage of the process. Energy justice additionally advocates for the redress of identified issues, such as those highlighted in the preceding section, working to make such

[63] Alexandra Harrington, 'Ensuring Just Transitions in the Switch to New Energy Sources and Associated Infrastructure in Times of Crisis' (*Indian Journal of Project, Infrastructure and Energy Law,* 08 June 2022) <Ensuring Just Transitions in the Switch to New Energy Sources and Associated Infrastructure in Times of Crisis | IJPIEL> accessed 09 September 2023.

[64] Karen Bickerstaff, Gordon Walker, and Harriet Bulkeley, 'Introduction: Making Sense of Energy Justice' in Karen Bickerstaff, Gordon Walker, and Harriet Bulkeley (eds), *Energy Justice in a Changing Climate* (Zed Books 2013) 2; Raya Salter, Carmen G. Gonzalez, and Elizabeth A Kronk Warner, 'Energy Justice: Frameworks for Energy Law and Policy' in Raya Salter, Carmen G. Gonzalez, and Elizabeth A. Kronk Warner (eds), *Energy Justice: US and International Perspectives* (Edward Elgar 2018) 2.

[65] Tedd Moya Mose and Mohammad Hazrati, 'Is Energy Justice in the Fossil Fuel Industry a Paradox?' in Geoffrey Wood and Keith Baker, *The Palgrave Handbook of Managing Fossil Fuels and Energy Transitions* (Palgrave Macmillan 2020) 529.

[66] See Benjamin K. Sovacool and others, 'Decarbonization and its Discontents: A Critical Energy Justice Perspective on Four Low-Carbon Transitions' (2019) 155 Climatic Change 581.

[67] Robert D. Bullard, 'Foreword' in Raya Salter, Carmen G. Gonzalez, and Elizabeth A. Kronk Warner (eds), *Energy Justice: US and International Perspectives* (Edward Elgar 2018) xv.

[68] Benjamin R. Jones, Benjamin K. Sovacool, and Roman V. Sidortsov, 'Making the Ethical and Philosophical Case for ''Energy Justice''' (2015) 37 Environmental Ethics 145.

[69] Benjamin K. Sovacool and Michael H. Dworkin, 'Energy Justice: Conceptual Insights and Practical Applications' (2015) 142 Applied Energy 435, 435; Gunter Bombaerts and others, 'Expanding Ethics Justice Across Borders: The Role of Global Philosophy' in Gunter Bombaerts and others (eds), *Energy Justice Across Borders* (Springer 2020) 4.

[70] Darren McCauley, *Energy Justice: Re-Balancing the Trilemma of Security, Poverty and Climate Change* (Palgrave Macmillan 2018) 3. The status quo could sometimes be underpinned by a perception of justice, such as the neoliberal intimation of justice that essentially informs the current global energy system. This does not make it just, however, when judged against competing ideas of justice. See variously Manfred B. Steger and Ravi K. Roy, *Neoliberalism: A Very Short Introduction* (Oxford University Press 2021); Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge University Press 2004) 33.

situations right.[71] The concept is ideally suited to respond to ethical issues that are associated with revolutionary trends in the energy sector, such as the energy transition.[72] As already noted, the energy transition is producing overt injustices, and latent ones which are not yet evident to policymakers or researchers, but which require attention.[73] Energy justice scholars have responded by positioning the concept not only as a normative framework, but also as an evaluative and decision-making frame to assist a range of decision-makers to uncover underlying causes of energy injustices and to make the right decisions in a wide-range of situations.[74] It is also mainly owing to these uses of energy justice that some scholars have regarded the concept as a new way of thinking about energy problems,[75] distinguishing it from related fields such as climate justice and environmental justice.[76]

While the usefulness of energy justice as stated here appears known and established, there is however considerable difficulty in interpreting the concept or saying what it should mean. A reason for this obvious difficulty is the presence of 'justice',[77] a notion that is open to considerable debate as to its meaning.[78] Owing to the presence of different conceptualisations of justice, it is hard to settle on a definition of the concept that would be acceptable to all, as what would be just to one may be unjust to another. A huge part of the difficulty in defining justice has inevitably seeped into energy justice scholarship where energy justice has been defined in several, oftentimes dissimilar, ways. This has invariably led to confusion and uncertainty in meaning, especially to observers encountering the concept for the first time. Formal definitions of energy justice have been offered, such as 'a global energy system that

[71] Elena V. Shabliy and Dmitry Kurochkin, 'Energy and Environmental Justice' in Elena V. Shabliy, Martha J. Crawford, and Dmitry Kurochkin, *Energy Justice: Climate Change Mitigation and Adaptation* (Palgrave Macmillan 2022) 17.

[72] Sovacool and others, 'Decarbonization and its Discontents' (n 66) 582. On the nature of scientific revolutions and paradigm shifts, see Thomas S. Kuhn, *The Structure of Scientific Revolutions* (4th edn, The University of Chicago Press 2012).

[73] McCauley, *Energy Justice: Re-Balancing the Trilemma of Security, Poverty and Climate Change* (n 70) 52. See also Kirsten Jenkins and others, 'Energy justice: A Conceptual Review' (2016) 11 Energy Research & Social Science 174, 178.

[74] See e.g., Sovacool and Dworkin, 'Energy Justice: Conceptual Insights and Practical Applications' (n 69) 435. See also Darren McCauley and others, 'Energy Justice in the Transition to Low Carbon Energy Systems: Exploring Key Themes in Interdisciplinary Research' (2019) 233-234 Applied Energy 916, 917.

[75] See e.g., Sovacool and Dworkin, 'Energy Justice: Conceptual Insights and Practical Applications' (n 69) 436.

[76] See Kirsten Jenkins, 'Setting Energy Justice Apart from the Crowd: Lessons from Environmental and Climate Justice' (2018) Energy Research and Social Science 117, 119-120. Environmental justice is concerned with issues of distribution of environmental hazards especially in poor communities while climate justice is chiefly concerned with responsibility for addressing the costs of climate change.

[77] At a basic level, energy justice is the conjugation of the words 'energy' and 'justice'.

[78] Robert C. Solomon and Mark C. Murphy, *What is Justice: Classic and Contemporary Readings* (Oxford University Press 1990) 3.

fairly disseminates both the benefits and costs of energy services, and one that has representative and impartial energy decision-making'[79] or the 'application of human rights across the energy life-cycle (from cradle to grave).'[80] Nevertheless, these formal definitions do not appear to say much about the substantive content or composition of the concept nor how it should operate in practice.

Accordingly, energy justice scholars have sought to flesh out the meaning of energy justice by first identifying the dimensions of justice realisable in the world and then proposing how those kinds of justice should be conceived or viewed in relation to energy issues.[81] When energy justice first emerged as a subject of academic enquiry a little over a decade ago, the most common dimension of justice among scholars at the time was distributive justice which relates to the dissemination of resources to all sections of the society.[82] Distributive justice continued to feature in later theorisations of the concept by latter day energy justice scholars,[83] but in addition to this dimension of justice, other kinds were included. These were most often recognition justice,[84] which is primarily concerned with investigating the causes of maldistribution, and which further engages with the questions about which sections of the society are ignored or misrepresented in the distribution of resources and things;[85] and procedural justice, which is mainly concerned with legal and administrative processes for addressing legal wrongs, but which equally involves the issues of inclusion and broad participation in decision-making.[86]

[79] Sovacool and Dworkin, 'Energy Justice: Conceptual Insights and Practical Applications' (n 69) 436. See also Benjamin Sovacool and others, 'New Frontiers and Conceptual Frameworks for Energy Justice' (2017) 105 Energy Policy 677, 677.

[80] Raphael J. Heffron and Darren McCauley, 'What is the 'Just Transition'? (2018) 88 Geoforum 74, 74; Raphael J Heffron, 'Applying Energy Justice into the Energy Transition' (2022) 156 Renewable and Sustainable Energy Reviews 1, 2. The energy lifecycle consists of extraction, production, distribution, consumption, and waste disposal.

[81] Aileen McHarg, 'Energy Justice: Understanding the ''Ethical Turn'' in Energy Law and Policy' in Íñigo del Guayo and others (eds)*, Energy Justice and Energy Law: Distributive, Procedural, Restorative and Social Justice in Energy Law* (Oxford University Press 2020) 20-25.

[82] See Lakshman Guruswamy, 'Energy Justice and Sustainable Development' (2010) 21 Colorado Journal of International Law and Policy 231, 258; Kandeh Yumkella, 'Energy Justice Conference, October 23, 2009' (2010) 21 Colorado Journal of International Law and Policy 277, 279-281; Beth Osnes, 'Engaging Women's Voices for Energy Justice' (2010) 21 Colorado Journal of International Law and Policy 341, 341-342.

[83] See Darren McCauley and others, 'Advancing Energy Justice: The Triumvirate of Tenets' (2013) 32(3) International Energy Law Review 107, 107-108.

[84] ibid 108-109.

[85] Jenkins and others, 'Energy Justice: A Conceptual Review' (n 73) 177-178.

[86] Sovacool and Dworkin, 'Energy Justice: Conceptual Insights and Practical Applications' (n 69) 437. For further discussion on the dimensions of justice deployed in energy justice scholarship, see McHarg (n 81) 20-22.

One dimension of justice that has featured in the energy justice literature is global justice.[87] It is also a dimension of justice upon which the present research is centrally focused. Global justice is essentially concerned with whether justice obligations can exist outside domestic borders.[88] Some of the questions considered within this dimension of justice include whether nationals of one state owe duties of justice to nationals of another state or whether there are institutions existing at the international level that could facilitate justice.[89] Questions of global justice are always important, but especially significant in present times when viewed against the background of global crises such as the Covid-19 pandemic, climate change, and economic inequality.[90] Phenomena such as globalisation, which has facilitated the greater integration of people and deepened existing fault lines, have equally heightened the interest in these questions of global justice.[91] When energy justice scholars apply the idea of global justice to energy problems, the outcome is global energy justice. Global energy justice therefore refers to situations where the concept of energy justice is viewed from a global or international perspective.[92] Occurrences such as the global energy transition have made global energy justice issues relevant in recent times.[93] Global energy justice issues interact with broader themes at the international level such as energy poverty, universal human rights, climate justice and equity.[94] It is largely owing to this that some pioneer energy justice scholars were mainly concerned with issues such as the lack of energy access and the prevalence of indoor air

[87] Benjamin K. Sovacool and Michael H. Dworkin, *Global Energy Justice: Problems, Principles, and Practices* (Cambridge University Press 2014).

[88] See Thomas Pogge and Darrel Moellendorf (eds), *Global Justice: Seminal Essays* (Paragon House Publishers 2008).

[89] See Jean-Christophe Merle (ed), *Spheres of Global Justice* (Springer 2013); James Christensen, *Global Justice* (Macmillan Education Ltd 2020).

[90] Martin Odei Ajei, 'Reporting on African Responses to COVID-19: African Philosophical Perspectives for Addressing Quandaries in the Global Justice Debate' (2022) 13(2) Global Justice: Theory Practice Rhetoric 1; Zhehan Li, Jiajun Lu and Jiamin Lv, 'The Inefficient and Unjust Global Distribution of COVID-19 Vaccines: From a Perspective of Critical Global Justice' (2021) 58 Inquiry. See also Gillian Brock and Darrel Moellendorf (eds), *Current Debates in Global Justice* (Springer 2005).

[91] Jon Mandle, *Global Justice* (Polity Press 2006) 2.

[92] In this thesis, when the term 'energy justice' is deployed, it refers to the concept in a generic sense. On the other hand, when the term 'global energy justice' is used, it is deployed in a restricted sense.

[93] Íñigo del Guayo and others, 'Introduction' in Íñigo del Guayo and others (eds), *Energy Justice and Energy Law* (Oxford University Press 2020) 4. Energy justice issues can equally arise in the domestic and regional contexts. But even when this happens, there is still the question of their international dimension which makes it imperative to consider them from a global perspective. See Catherine Redgwell and Lavanya Rajamani, 'And Justice for All? Energy Justice in International Law' in Íñigo del Guayo and others (eds), *Energy Justice and Energy Law* (Oxford University Press 2020) 48.

[94] Raya Salter, Carmen G. Gonzalez, and Elizabeth A. Kronk Warner, 'Energy Justice: Frameworks for Energy Law and Policy' in Raya Salter, Carmen G. Gonzalez, and Elizabeth A. Kronk Warner (eds), *Energy Justice: US and International Perspectives* (Edward Elgar 2018) 4.

pollution in developing countries, and the struggles which mostly poor people faced with these issues.[95]

When it concerns the substantive contents of the dimensions of justice or what they mean in different situations, energy justice scholars have drawn inspiration from an array of ethical principles existing within moral philosophy.[96] These have been predominantly informed by Western philosophy. To this end, there have been references to Rawlsian ideas of distributive justice, Kantian ethics, cosmopolitanism, libertarianism, utilitarianism, and Christian notions of right and wrong.[97]

A further point that arises in the above discourse relates to the operationalisation of energy justice. Even where the concept has been formulated, there is a question as to how it should operate in practice. As already noted, energy justice is not just a normative framework, but also a pragmatic tool for addressing injustices. The concept is likely to remain within the realms of theory, and therefore undeveloped, unless it is acted upon by certain instrumental devices, prominent amongst which is the law. As a concept that influences human behaviour and other processes, the law has an important bearing on justice.[98] The law can thus 'provide the flesh which clothes the dry bones'[99] of energy justice. As this thesis will mainly consider energy justice from a global perspective, public international law has a key role to play.[100]

1.2. The Role of Public International Law

Public international law refers to the set of rules, norms, standards, and practices that regulate the interaction between states, outlining the rights and responsibilities that should apply to them in different circumstances.[101] As one international law scholar defined the concept, international law is the 'name for the body of customary and conventional rules which are considered legally binding by … States in their intercourse with each other.'[102] The reach of

[95] As an example, see Guruswamy, 'Energy Justice and Sustainable Development' (n 82) 231.
[96] Chapter 3 of this thesis considers some of these philosophical principles in greater depth.
[97] See variously Guruswamy, 'Energy Justice and Sustainable Development' (n 82) 231; Jose Ambrozic, 'Beyond Public Reason on Energy Justice: Solidarity and Catholic Social Teaching' (2010) 21 Colorado Journal of International Environmental Law and Policy 381; Sovacool and Dworkin, *Global Energy Justice: Problems, Principles, and Practices* (n 87).
[98] Íñigo del Guayo and others (n 93) 5.
[99] This quote is adapted from Ivor Jennings's description of constitutional conventions. See Ivor Jennings, *The Law and the Constitution* (University of London Press 1959) 81.
[100] See Redgwell and Rajamani (n 93) 48.
[101] See Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (8th edn, Routledge 2018) 1. References to international law in this thesis are to public international law.
[102] Lassa Oppenheim, *International Law: A Treatise. Volume 1* (first published in 1905, The Project Gutenberg 2012) 3. The other body of transnational law is called private international law or conflict of laws. See Franco

international law is far and broad, covering matters that may appear mundane (such as those relating to day-to-day human activities) and matters that may be regarded as more complex (like issues of liberty, peace, security and the protection of the environment), thereby exhibiting a potential to be used for an array of purposes.[103] This potential of international law has invariably meant that it is no longer applicable to only states at the inter-state level, but also to non-state actors such as international governmental- and non-governmental organisations,[104] as well as individuals who have now been vested with international legal personality and therefore regarded as subjects, rather than mere objects, of international law.[105] For example, the Committee on Economic, Social and Cultural Rights (CESCR) can receive communications from individuals who are claiming that their economic, social and cultural rights have been violated by states.[106] A corollary to these examples is that non-state actors can also be held to account under international law. For example, under international criminal law, both states and individuals can be tried for committing offences which go contrary to a specie of norms known as *jus cogens* which are peremptory norms that do not permit any derogation.[107] Some of these norms include prohibitions against crimes against humanity and genocide.[108] Specialised tribunals and courts have risen to cater for these as well. Examples include the International Military Tribunal at Nuremberg; the International Military Tribunal for the Far East; the International Criminal Tribunal for Yugoslavia; the International Criminal Tribunal for Rwanda; and the International Criminal Court.[109] While the expansion in the meaning of international law has generated several issues for debate,[110]

Ferrari and Diego P. Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Edward Elgar 2019); and David Hill, *Private International Law* (Edinburgh University Press 2014).

[103] See American Society of International Law, 'International Law: 100 Ways it Shapes Our Lives' (2018 Edition) <100 Ways V. 2.0 (asil.org)> accessed 09 September 2023.

[104] See José E. Alvarez, *The Impact of International Organizations on International Law* (Brill Nijhoff 2017).

[105] Rebecca MM Wallace and Olga Martin-Ortega, *International Law* (8th edn, Sweet and Maxwell 2016) 121-122.

[106] See the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR, adopted 10 December 2008, 5 May 2013) 2922 UNTS, art 2. Note that the states in question must be parties to the OP-ICESCR. See the OP-ICESCR, art 1.

[107] See *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment),* IT-96-23-T and IT-96-23/1-T, International Criminal Tribunal for the Former Yugoslavia, 22 February 2001.

[108] See *Prosecutor of the Tribunal v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Vlajko Stojiljkovic (Second Amended Indictment),* Case no. IT-99—37-PT.

[109] See M. Cherif Bassiouni, 'Historical Survey: 1919-1998' in M. Cherif Bassiouni (ed), *The Statute of the International Criminal Court: A Documentary History* (Transnational Publishers 1998).

[110] For example, the International Criminal Court has been accused of championing 'Black guilt' while minimising 'White guilt'. See Rachel López, 'Black Guilt, White Guilt at the International Criminal Court' in Matiangai Sirleaf (ed), *Race and National Security* (Oxford University Press 2023 F*orthcoming*).

and while there is a question of its overall effectiveness,[111] the point remains that international law now has a more liberalised application.

Concerning the potential of international law to promote justice, Neil Walker and Steven Ratner have both suggested that the relationship between international law and global justice appears to be almost overlooked by theorists and practitioners working in both disciplines.[112] This can be expressed as a divide between international law on the one hand, and political and moral philosophy on the other. One of the reasons for this apparent chasm is said to be that international law expresses a descriptive, real-world outlook, whereas global justice embodies an evaluative and normative dimension which is seriously disputed between scholars.[113] Nevertheless, both disciplines could benefit from a mutual working relationship. International law is crucial to global justice because without the force of legally binding rules, the values and standards of global justice would at best remain hortatory and therefore inchoate and unrealised.[114] International law-making instruments and decisions of international courts, as well as the rules governing international institutions, all help to ensure that prescriptions of global justice are not just academic or utopian, but also realisable goals.[115] Global justice is significant to international law because it infuses international law with a normative value which is necessary to resolve the cocktail of ethical dilemmas facing modern international law actors. As Ratner opines, 'Without ethics, the law of global justice is ad hoc or at best a matrix of bargains.'[116] Public international law can therefore facilitate regulatory support for the promotion of global energy justice to address the injustices connected to the development of energy justice. There is however no bespoke international legal framework on energy justice, though there are concepts, processes, and institutions existing within international law that could enable the operationalisation of energy justice.

Although international law is righty recognised as a tool for facilitating global justice,[117] it is quixotic to see it as an unproblematic form of law. International law can sometimes be wielded

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[111] See Ashfaq Khalfan, 'Accountability Mechanisms' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International law* (Cambridge University Press 2013) 396-398 on the effect of the OP-ICESCR in relation to individuals filing human rights complaints.

[112] See Neil Walker, 'The Gap Between Global Law and Global Justice' in Nicole Roughan (ed), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017) 216-219; Steven R. Ratner, *The Thin Justice of International Law* (Oxford University Press 2015) 1.

[113] Walker (n 112) 216-217.

[114] Ratner (n 112) 1.

[115] ibid.

[116] ibid 2.

[117] See Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press 1995).

for parochial purposes, mainly serving the interests of rich and powerful states whilst overlooking the interests of poor and weak states.[118] It can also be wielded for immoral purposes, as evidenced by its use in facilitating colonialism.[119] In addition, international law has been regarded as a form of law that rides on the coattails of crises.[120] As Hilary Charlesworth puts it, 'International lawyers revel in a good crisis. A crisis provides a focus for the development of the discipline and it also allows international lawyers the sense that their work is of immediate, intense relevance.'[121] Attempts to upend this status quo have however been made by a recalibration of the pursuits of international law. For example, the concept of 'ambition' has been proposed as an alternative framework for the development of international law.[122] This is important because the crisis paradigm severely curtails the development of transnational law.[123]

In summary, therefore, the purpose of the above analyses on the limitations of international law is not to pass a damning or fatal verdict on international law. Rather, it is to present a sober picture of this important form of law when it is presented as a tool for facilitating justice. It will help to keep expectations in check while also realising what can be achieved when discussing the operationalisation of global energy justice.

2. Literature Review

Having introduced the concept of energy justice and highlighted its potential operationalisation through international law, I turn next to a systematic review of the scholarly literature on energy justice. A review helps to situate the present research within the broader field of energy justice. It also helps to uncover any gaps in the literature. The focus here is on the ideas and works of scholars that have theorised and written on 'global energy justice'. To this effect, there are two noticeable gaps in the field that warrant attention. The first relates to the conceptualisation of global energy justice and how Western philosophical ideas and

[118] Eyal Benvenisti and George W. Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (Cambridge University Press 2017) 1-2.
[119] See Robert J. Miller and Olivia Stitz, 'The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery' (2021) 32(1) Duke Journal of Comparative and International Law 1. See also Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012) 45.
[120] See Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65(3) Modern Law Review 377.
[121] ibid 377.
[122] See Leslie-Anne Duvic-Paoli, 'International Law: A Discipline of Ambition' (2023) 36 Leiden Journal of International Law 233.
[123] Charlesworth (n 120) 382-391.

scholars have dominated the scholarship. The second relates to the method by which energy justice scholars have sought to operationalise the concept and the lacunae this contains.

2.1. Gaps Pertaining to the Conceptualisation of Global Energy Justice

There is an observable emphasis on Western ideas of justice and ethics promoted by many scholars postulating and writing on the subject of global energy justice.[124] This has led to the dominance of Western conceptions of global energy justice to the exclusion of other worldviews that could offer fresh and more suitable points of view on important energy justice issues.[125] There is also the recognition that these philosophical approaches are championed by mainly 'Western, or European and American, thinkers, not those from the Global South.'[126] The fixation on Western philosophical traditions is noticeable among the pioneer set of global energy justice scholars as well as the modern class, who also mostly hail from the Western hemisphere. The pioneer set is represented by the body of work and theories written, developed, and proposed by Lakshman Guruswamy,[127] who is regarded as the first scholar to conceive of energy justice from an academic perspective,[128] though there were other scholars who equally deployed the concept in a scholarly fashion, publishing in the same academic journal issue in which Guruswamy's seminal essay on energy justice first appeared.[129] The modern set of scholars is represented by authors publishing after Guruswamy.

Guruswamy's global energy justice model is underpinned by the philosophy of John Rawls, whose seminal treatise on justice has influenced many writers since its publication.[130] According to Rawls, justice should be structured in a manner that benefits the less well-off in the society. Rawls called this the 'difference principle' and arrived at this determination through a thought experiment. He was however reluctant to extend the principle to the global level, only permitting a restrictive form of it to apply at that level in favour of societies that he considered as 'burdened'.[131] From this idea of justice, Guruswamy distilled principles of

[124] Sovacool and others, 'New Frontiers and Conceptual Frameworks for Energy Justice' (n 79) 678.
[125] Gunter Bombaerts and others (n 69) 6.
[126] McCauley and others, 'Energy Justice in the Transition to Low Carbon Energy Systems: Exploring Key Themes in Interdisciplinary Research' (n 74) 918.
[127] Although Guruswamy was born in Sri Lanka, he spent his academic career in the UK and US.
[128] Raphael J. Heffron and Darren McCauley, 'The Concept of Energy Justice Across the Disciplines' (2017) 105 Energy Policy 658, 659.
[129] As examples, see Osnes (n 82); Ambrozic (n 97).
[130] John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press 1971). See Thomas Pogge, *Realizing Rawls* (Cornell University Press 1989).
[131] See John Rawls, *The Law of Peoples* (Harvard University Press 1999); see also John Rawls, 'The Law of Peoples' (1993) 20 (1) Critical Inquiry 36, 39. Rawls' restrictive idea of global distributive is the subject of intense debate, one which I explore in Chapter 3 of this thesis.

global energy justice, the core of which was that developed and rich countries had a duty to address and remediate the energy problems of a class of people, whom he referred to as the 'energy oppressed poor' of the world.[132] These were people who were primarily domiciled in developing and low-income countries and who faced daily struggles with issues of energy access, and indoor air pollution caused by a reliance on heavily-polluting biomass like firewood.[133]

Guruswamy also linked his principle of global energy justice with the concept of sustainable development and argued that Rawls' conception of justice could underpin both.[134] Sustainable development represents a balanced and consolidated solution to the conflict between economic development, environmental protection, and social development.[135] The most popular definition of the concept is that offered by the World Commission on Environment and Development to the effect that sustainable development is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[136] Implicit in this definition is the presence of ethical and justice considerations manifesting in the balancing of equities between and across generations in areas such as natural resource usage and distribution.[137]

While Guruswamy's work is important in highlighting the peculiar circumstances of people facing energy access challenges, there is an apparent limitation with his approach to global energy justice. The use of Rawlsian principles of global distributive justice, while not improper *per se*, may yet raise pertinent questions. For example, energy issues such as the kinds treated by Guruswamy have been a motif at the international level, perpetuated by the current global energy system, which is itself principally underpinned by Western philosophical ideas.[138] It would therefore be more persuasive to adopt ethical worldviews that present alternative

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[132] See Guruswamy, 'Energy Justice and Sustainable Development' (n 82) 262-265; see also Lakshman Guruswamy, *Global Energy Justice: Law and Policy* (West Academic Publishing 2016).

[133] Lakshman Guruswamy, 'Global Energy Justice' in Lakshman Guruswamy (ed), *International Energy and Poverty: The Emerging Contours* (Routledge 2016) 55.

[134] Guruswamy, 'Energy Justice and Sustainable Development' (n 82) 258.

[135] Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, & Prospects* (Oxford University Press 2004) 1.

[136] World Commission on Environment and Development, *Our Common Future* (1987) 43.

[137] Redgwell and Rajamani (n 93) 50. Sustainable development as a principle has been recognised within international legal jurisprudence. See the Case *concerning Gabčikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, [140]. Nevertheless, its legal status remains uncertain. See Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 125.

[138] With an example being neoliberalism. See McCauley, *Energy Justice: Re-balancing the Trilemma of Security, Poverty and Climate Change* (n 70) 3.

ways of viewing justice. Indeed, Guruswamy appeared to have recognised the contributions of alternative philosophies by discussing the ethical contributions of Islamic, Buddhist and Confucian worldviews.[139] But these did not feature prominently in his conception of global energy justice.

Modern global energy justice scholars, in the main, largely follow the path created by Guruswamy when proposing an ethical idea that should underpin their conception of global energy justice. For example, Benjamin Sovacool and Michael Dworkin, in their joint interventions in the field, conceived energy justice as containing three kinds of justice, namely distributive justice, recognition justice, and procedural justice. They then relied on several Western conceptions of justice to underpin these dimensions of justice. From this methodology, they were able to construct different principles of energy justice, with the most common being availability, affordability, due process, good governance, sustainability, intergenerational equity, intragenerational equity and responsibility, presenting these as solutions to pressing energy problems such as energy externalities, energy poverty and access, and energy subsidies.[140] They intended these to be considered as part of global energy justice. On his part, Darren McCauley formulated an understanding of global energy justice based on Rawlsian liberalism, Immanuel Kant's cosmopolitanism and Nancy Fraser's recognition justice as applying to distributive justice, recognition justice, procedural justice, and global justice in order to address the problems posed by energy security, energy poverty, and climate change.[141] Once again, the dominance of Western-based theories is evident in these attempts to interpret global energy justice.

In a later work, though not on 'global energy justice', Sovacool and others recognised the value of non-Western conceptions of justice to energy justice.[142] They specifically proposed that philosophies such as Ubuntu; Confucianism and Taoism; Hinduism, Buddhism and Dharma; and Indigenous perspectives of the Americas should be taken more seriously when interpreting energy justice.[143] Some questions which these theories could help to answer, according to the scholars, are whether the theories could complement or contradict the

[139] Guruswamy, *Global Energy Justice: Law and Policy* (n 132) 36-41.
[140] Sovacool and Dworkin, *Global Energy Justice: Problems, Principles, and Practices* (n 87) 366-374; Sovacool and Dworkin, 'Energy Justice: Conceptual Insights and Practical Applications' (n 69) 439-440.
[141] McCauley, *Energy Justice: Re-balancing the Trilemma of Security, Poverty and Climate Change* (n 70) 11-17.
[142] Sovacool and others, 'New Frontiers and Conceptual Frameworks for Energy Justice' (n 79) 678.
[143] ibid 678-680. The scholars also noted that the non-human world should form an important part of energy justice conceptualisations.

commonly used Western ideas of justice and whether these non-Western theories could offer more appropriate perspectives on addressing justice issues in the energy sector.[144] However, the scholars do not go into great detail on how these non-Western theories could be useful nor do they answer some of the above questions which they had outlined concerning the use of the theories. This is even as the authors argue that a new way was needed for tackling some of the energy problems facing the world.[145] That new way should ostensibly prioritise the use of alternative conceptions of global energy justice, as I am seeking to do in this thesis.

In recent times, some energy justice scholars have made the effort to include references to non-Western ideas of justice. For example, Yekeen Sanusi and Andreas Spahn investigate the problem of renewable energy distribution as it affects the African continent from the perspectives of both Western Individualism and African Ubuntu philosophy.[146] Both authors frame their main conclusions as a dialogue between both conceptions of justice.[147] Guiseppe Pellegrini-Masini, Fausto Corvino and Lars Löfquist on their part canvass for the consideration of future generations in energy development, using a conception of justice based on Ubuntu.[148] Other efforts include the adoption of Kazakh traditional ethics to understand the dangers and safety issues posed by the use of nuclear energy[149] and a Hindu philosophical view on the effects of the energy transition in India.[150] These efforts at introducing non-Western conceptualisations of energy justice are noteworthy, but they require comprehensive and updated studies that complement them, especially from a global energy justice perspective, in order to elevate them to the mainstream of energy justice scholarship. The present research aims to play that role.

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[144] ibid 680.

[145] ibid 677.

[146] Yekeen A. Sanusi and Andreas Spahn, 'Exploring Marginalization and Exclusion in Renewable Energy Development in Africa: A Perspective from Western Individualism and African Ubuntu Philosophy' in Gunter Bombaerts and others (eds), *Energy Justice Across Borders* (Springer 2020) 273.

[147] ibid 292-293.

[148] Guiseppe Pellegrini-Masini, Fausto Corvino and Lars Löfquist, 'Energy Justice and Intergenerational Ethics: Theoretical Perspectives and Institutional Design' in Gunter Bombaerts and others (eds), *Energy Justice Across Borders* (Springer 2020) 253.

[149] Gulzhikhan Nurysheva, Zhyldyz Amrebayeva, and Aydar Amrebayev, 'The Kazakh Ethical Tradition and Anti-Nuclear Ethics' in Gunter Bombaerts and others (eds), *Energy Justice Across Borders* (Springer 2020) 69.

[150] Matthew Herington, Yuwan Malakar, and Vigya Sharma, 'A Hindu Philosophy Perspective on the Temporal Nature of Energy Justice in Odisha, India' in Gunter Bombaerts and others (eds), *Energy Justice Across Borders* (Springer 2020) 177.

In summary, the dominance of Western philosophies obscures the potential contributions of non-Western theories.[151] Some of these potential contributions of non-Western philosophical ideas could be viewed within the context of the issues associated with renewable energy as examined above, requiring an alternative ethical lens for conceptualising them. Non-Western philosophies have an important role to play in this respect because of their substance.[152] There is in fact a realisation that philosophical themes and precepts found among non-Western societies could offer a solid contribution to global justice and the issues that are associated with it. In view of this, there have been campaigns for theorists to deeply consider ethics from Southern and Eastern worldviews when theorising about justice and ethics beyond territorially-defined borders.[153] Some scholars have based this campaign on a need to offer a more balanced picture, where Western and non-Western thoughts are weighed on a similar scale and offered same consideration without discrimination.[154] Beyond a bare case of under-representation however is the realisation that non-Western philosophical themes have 'something substantial to contribute to contemporary controversies'.[155] In this instance, non-Western philosophical themes which are characteristically relational in nature could help to serve as an alternative to Western thoughts which have been said to be mainly individualistic.[156]

2.2. Gaps Concerning the Operationalisation of Global Energy Justice

Energy justice scholars theorising and writing on global energy justice have set out ways to operationalise the concept, but there are gaps with their approaches. The works of scholars like Sovacool and Dworkin[157] and McCauley,[158] for example, contain varying degrees of emphases on global energy justice and how the concept could be operationalised. Nevertheless, a noticeable shortcoming of this stream of scholarship is that it does not

[151] Chitzi C. Ogbumgbada, 'Book Review: I. del Guayo, L. Golden, D. N. Zillman, M.F. Montoya, J.J. González (eds), *Energy Justice and Energy Law* (Oxford University Press 2020)' (2022) 20(3) Oil, Gas and Energy Law 1, 3.
[152] Thaddeus Metz, 'Harmonizing Global Ethics in the Future: A Proposal to Add South and East to West' (2014) 10(2) Journal of Global Ethics 146; Dorine Eva Van Norren, 'The Nexus Between Ubuntu and Global Public Goods: Its Relevance for the Post 2015 Development Agenda' (2014) 1(1) Development Studies Research 255.
[153] See e.g., Metz, 'Harmonizing Global Ethics in the Future: A Proposal to Add South and East to West' (n 152).
[154] See e.g., Anke Graness, 'Is the Debate on 'Global Justice' a Global One? Some Considerations in view of Modern Philosophy in Africa' (2015) 11(1) Journal of Global Ethics 126, 127 ('Astonishingly, even though the goal of the debate is to find and justify universally valid principles of global justice, the concepts, norms, and values of regions of the world other than Europe and North America are rarely taken into account.'); Ifeanyi A. Menkiti, 'Africa and Global Justice' (2017) 46(1) Philosophical Papers 13.
[155] Metz (n 152) 'Harmonizing Global Ethics in the Future: A Proposal to Add South and East to West' 146.
[156] ibid 147-51.
[157] See Sovacool and Dworkin, *Global Energy Justice: Problems, Principles, and Practices* (n 87).
[158] See McCauley, *Energy Justice: Re-balancing the Trilemma of Security, Poverty and Climate Change* (n 70) 1.

explicitly consider how international law could be utilised to promote global energy justice, even though the scholars are strident in their prescription for relevant justice principles to be applied for the benefit of all humans in every part of the world. The works of these scholars may have merits in other respects. The scholarly outputs contain approaches to the operationalisation of energy justice, particularly at the domestic level, which may be considered novel. For example, Sovacool and Dworkin advance what appear to be creative solutions to the persistent problems associated with inefficiencies with respect to energy supply, conversion, distribution, and end use; social and environmental costs from extractive industries affiliated with energy production; violations of civil liberties in the pursuit of energy fuels; energy access; and the exhaustion of depletable energy reserves and fuels detrimental to future generations.[159] Nevertheless, a failure to consider international law in their theorisations is a significant shortcoming that requires attention. This is because there is a direct relationship between global energy justice and the law regulating the relationship between states and non-state entities.[160] Such consideration is specifically significant when the goal is to translate the concept of global energy justice into practice.[161]

Guruswamy's works emphasise the direct relationship between global energy justice and international law, thereby elevating global energy justice issues to the level of inter-state governance, an approach that appears largely missing in the theorisations of modern scholars writing on 'global energy justice'. Guruswamy's approach to operationalising his conception of global energy justice is largely centred on a critique of existing international climate law for failing to recognise the condition of the energy oppressed in low-income societies across the world.[162] Guruswamy also relied on international law to facilitate his call for direct financial assistance to the countries where the energy oppressed poor are domiciled as a means of alleviating their condition. Guruswamy's adoption of international law as an operationalisation tool achieves purposes such as the striking of a meaningful conversation between political philosophy and international law, as canvassed by Neil Walker.[163] Nevertheless, there are gaps with his approach as well.

[159] Sovacool and Dworkin, *Global Energy Justice: Problems, Principles, and Practices* (n 87).
[160] See Walker (n 112) 216-220.
[161] See Ratner (n 112) 1.
[162] See Guruswamy, 'Energy Justice and Sustainable Development' (n 82) 255-258.
[163] See Walker (n 112) 216-220.

First, in calling for direct financial assistance to the energy oppressed peoples of the international community, Guruswamy missed the opportunity of utilising existing institutional and regulatory mechanisms within international climate law to make his case. In this thesis, I will demonstrate how this could be achieved. Second, Guruswamy's offerings do not consider the negative effect which energy poverty bears on human rights and the role of international human rights law in alleviating the condition of the energy oppressed.[164] While this has been acknowledged as not being a fatal weakness of his scholarship,[165] basing 'demands for energy justice in the language of human rights creates legal rather than simply moral obligations to address energy poverty.'[166] Apart from re-interpreting existing human rights obligations to encompass global energy justice, I will also adopt relevant institutional frameworks within international human rights law to promote my conception of global energy justice.[167]

Aside from Guruswamy, other scholars have also considered and proposed ways to operationalise global energy justice. For example, explicitly adopting the principled approach to global energy justice proposed by Sovacool and Dworkin,[168] Catherine Redgwell and Lavanya Rajamani argue that the principles in question all have an international law dimension.[169] They then suggest the interpretation of existing international law concepts such as sustainable development, intra- and inter-generational justice, common but differentiated responsibilities, and human rights in order to reflect energy justice. They however conclude, amongst other points, that energy justice is not a novel concept. This is in contrast with arguments made by some energy justice scholars that the concept is a new way of thinking about energy issues.[170] Redgwell and Rajamani further argue that the concept does not serve much purpose other than to emphasise aspects of international law that reflect distributive justice concerns within an energy setting.[171]

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[164] Carmen G. Gonzalez, 'Book Review: Lakshman Guruswamy, *Global Energy Justice: Law and Policy* (West Academic Publishing 2016)' (2018) 9(2) Journal of Human Rights and the Environment 222, 223-225.
[165] ibid 225.
[166] ibid 224.
[167] See ibid 224 ('[A human rights-based approach to global energy justice] also provides an opportunity to exert pressure on states through human rights institutions, including special rapporteurs, universal periodic review, and domestic and regional human rights tribunals.')
[168] See e.g., Sovacool and Dworkin, 'Energy Justice: Conceptual Insights and Practical Applications' (n 69) 435-444.
[169] Redgwell and Rajamani (n 93) 48-49.
[170] See e.g., Jenkins, 'Setting Energy Justice Apart from the Crowd' (n 76) 119-120.
[171] Redgwell and Rajamani (n 93) 63.

Redgwell and Rajamani's contribution is significant for its use of interpretation in aligning existing international legal concepts with energy justice. This is an approach pursued by the present thesis as the first step towards operationalising energy justice in relation to the identified global energy justice issues in this work. One thing that appears to be missing in the authors' contribution, however, is that they do not definitively consider how to move from interpretation to implementation through the use of existing international law institutions and associated processes. A possible reason for this omission appears to be the apparent non-committal approach adopted by both scholars towards the concept of global energy justice. The present thesis differs with theirs in this respect. It adopts a more committed stance. It will also demonstrate that the re-interpretation of existing international concepts is the first step towards operationalisation. It will consider the implementation of the proposed re-interpretation as the second step.

Finally, Margaretha Wewerinke-Singh's contribution to the global energy justice discourse not only adopts the principle of interpretation as a first step towards global energy justice, but also demonstrates how to move towards implementation through international climate law and international human rights law.[172] Wewerinke-Singh's intervention focuses on the resolution of energy poverty within a climate compliant frame. Drawing upon existing international law principles and institutions, Wewerinke-Singh demonstrates how this can be achieved. One noteworthy contribution is the further use of energy justice litigation as a reinforcement mechanism to ensure that, even when implementation through existing institutions fails, there could be a further check.[173] This could be interpreted as a response to the call for energy justice scholars to consider whether litigation and the courts could be utilised to achieve the objectives of energy justice, much in the same way that both have been used to facilitate responses to climate change.[174] In this thesis, I highlight the use of litigation as a gap-filling or reinforcement mechanism for achieving global energy justice.[175] Nevertheless, there are distinctions between Wewerinke-Singh's contribution and the present research. For example, there are important points about her proposal of moving from interpretation to implementation which could have been strengthened. The reliance on both international climate law and international human rights law could have included references

[172] Margaretha Wewerinke-Singh, 'A Human Rights Approach to Energy: Realizing the Rights of Billions within Ecological Limits' (2021) Review of European, Comparative and International Environmental Law 16.
[173] ibid 24-25.
[174] See McHarg (n 81) 29.
[175] See Chapter 6.

to legal and regulatory techniques to ensure that the aims of energy justice are achieved with respect to energy poverty.[176] I will discuss some of these regulatory measures in a systematic way to facilitate the operationalisation of global energy justice.

3. Research Aims, Objectives, and Questions

Based on the foregoing premises, this research has two principal aims and objectives. First, it seeks to develop a conception of global energy justice that would conceptualise and address the injustices associated with renewable energy development within the energy transition. This conception of global energy justice will be primarily informed by global justice and a non-Western philosophical concept known as African communitarianism. As a philosophical concept, African communitarianism considers the value of relationality as the thing that should be prized for its own sake.[177] Relationality is expressed through the values of identity and solidarity and emphasises harmonious or communal relationships among members of a political and social community such as the international community.[178] This feature of relationality distinguishes African communitarianism from the dominant Western philosophical ideas that are primarily based on individualism.[179] It positions African communitarianism as a more appropriate philosophical idea for addressing renewable energy justices. The African communitarian approach to global energy justice considers the redress of renewable energy injustices as the right thing to do.[180] Second, the thesis seeks to present a formula for operationalising this African communitarian approach to global energy justice. Building on the understanding that international law can help to facilitate just outcomes, the thesis will demonstrate how norms, standards, practices, and institutions existing in international law can be adapted to move global energy justice from theory to practice.

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[176] For a discussion of some of these instruments, see Aileen McHarg, 'Regulating for Sustainable Electricity Market Outcomes in Britain: Asking the Law Question' (2013) 30 Environmental and Planning Law Journal 289, 293.

[177] Kwame Gyekye, 'Person and Community in Akan Thought' in Kwasi Wiredu and Kwame Gyekye (eds), *Person and Community: Ghanaian Philosophical Studies 1* (The Council for Research in Values and Philosophy 1992) 115; Thaddeus Metz, 'An African Theory of Moral Status: A Relational Alternative to Individualism and Holism' (2012) 15(3) Ethical Theory and Moral Practice 387; Ajume Wingo, 'Akan Philosophy of the Person' in Edward N Zalta (ed), *Stanford Encyclopaedia of Philosophy* (Summer 2017 Edition) <https://plato.stanford.edu/archives/sum2017/entries/akan-person/> accessed 09 September 2023.

[178] Thaddeus Metz, 'An African Theory of Social Justice: Relationship as the Ground of Rights, Resources and Recognition' in Camilla Boisen and Matthew C Murray (eds), *Distributive Justice Debates in Political and Social Thought* (Routledge 2016) 171.

[179] Thaddeus Metz, 'How the West was one: The Western as Individualist, the African as Communitarian' (2015) 47(11) Educational Philosophy and Theory 1175.

[180] Michael J. Sandel, *Justice: What's the Right Thing to do?* (Penguin Books 2009).

In pursuing the above aims and objectives, this research will be guided by an overarching question which asks how best global energy justice could be conceptualised and operationalised in a way that addresses the injustices generated by renewable energy development following the global transition to a low-carbon energy future. The following sub-questions will help to answer the overarching question:

i. What are the global energy issues connected with the development of renewable energy?
ii. What is global energy justice and why is it an important framework for this research?
iii. How best can international law facilitate the operationalisation of global energy justice concerning the renewable energy injustices identified by this thesis?

4. Methodology

To realise the above aims and to resolve the overarching research question, I will adopt a mixed methodology. To this end, I will utilise a philosophical approach to propose a conception of global energy justice that aims to address the renewable energy injustices briefly discussed in this chapter. Philosophical approaches to legal research are used in resolving ethical questions that have legal implications.[181] This approach typically involves a legal researcher following a 'logical progression, from inquiry into the values underlying the themes discussed and their practical application, to a delineation of broad overarching conclusions.'[182] I will interrogate some of the philosophical ideas of right and wrong that underpin existing understandings of energy justice to demonstrate why an alternative perspective is required. The outcome of this interrogation is the proposal for non-Western philosophical worldviews to have a role to play in energy justice scholarship, especially research on global energy justice. Such an outcome could offer a fresh perspective on the ethical issues involving energy and help to ensure that energy justice scholarship is more inclusive and representative. The use of philosophy in this research also highlights the interdisciplinary nature of energy justice research.[183]

[181] Mary Ford, 'A Property Model of Pregnancy' (2005) 1(3) International Journal of Law in Context 261.
[182] P. Ishwara Bhat, 'Philosophical Research in Law: The Possibilities' (2017) 10 NUJS Law Review 1, 2.
[183] See McCauley and others, 'Energy Justice in the Transition to Low Carbon Energy Systems: Exploring Key Themes in Interdisciplinary Research' (n 74) 917.

I will also adopt the Third World Approach to International Law (TWAIL) which is a broad approach that has been described as both a doctrine and a method for critiquing international law – its norms, standards, practices, and institutions.[184] As a theory, TWAIL offers perspectives on how international law will act towards the people of the Third World or Global South, relying on the history of international law's engagement with these people.[185] As a methodology, TWAIL presents a suite of methods that, among other things, shines the spotlight on 'the Rest and not merely the West' when studying international law and understanding its place in a global world.[186] The logic underpinning TWAIL is that international law and its range of processes and institutions are ranged against the interests of the Third World.[187] An instance of this is international law's association with colonialism,[188] as well as its ongoing connection with capitalism, modernity and statehood, all of which have served the interests of the West and powerful nations from the past till the present.[189] Ultimately, TWAIL's core objectives are the unravelling of international law, making it a neutral form of law that could apply to all peoples without discrimination; the presentation of alternative ways of being and understanding that could inform the international legal order; and the eradication of 'conditions of underdevelopment in the Third World'.[190] The use of TWAIL in this research enables the appreciation of the philosophical ideas underpinning some of the international law concepts used in the thesis. Doing so underscores the fact that, while international law may be a useful instrument for facilitating just outcomes, it may also be a tool of subjugation and hegemony.[191] The approach also helps to explain the underlying causes of some of the global energy injustices associated with renewable energy, many of which affect the peoples of the Global South.

In addition, I will utilise the doctrinal approach to legal research which 'aims to systematise, rectify and clarify the law on any particular topic by a distinctive mode of analysis of

[184] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 International Community Law Review 371, 377.
[185] ibid 373.
[186] ibid 377.
[187] Makau Mutua, 'What is TWAIL?' (2000) 94 American Society of International Law Proceedings 31, 31.
[188] See Miller and Stitz (n 119).
[189] Usha Natarajan and others, 'Third World Approaches to International Law Review: A Journal for a Community' (2000) 1 TWAIL Review 7, 8. See also Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020).
[190] Mutua (n 187) 31.
[191] See Benvenisti and Downs (n 118).

authoritative texts that consist of primary and secondary sources.'[192] The method enquires what the law is in a specific area.[193] Its roots may be traced to positivist legal doctrine that conceives law as self-contained once law has been validly enacted by a sovereign body. According to John Austin, a famous proponent of legal positivism, the 'existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.'[194] I will therefore systematically analyse relevant treaties existing at international law. Treaties are the primary means of international law making and are usually entered into between states to govern and regulate certain issues of mutual or global importance. These treaties are interpreted according to the Vienna Convention on the Law of Treaties.[195] Some of the treaties to be investigated in this thesis include the United Nations Framework Convention on Climate Change,[196] the Kyoto Protocol,[197] the Paris Agreement on Climate Change,[198] the International Covenant on Economic, Social and Cultural Rights,[199] and the Charter of the United Nations.[200] I will also dissect relevant caselaw and the proceedings and outcome documents of international governmental institutions. In addition, I will consider secondary authorities, such as scholarly articles and books from legal databases such as Westlaw, LexisNexis, and HeinOnline, and reports from institutional websites. The main use of the doctrinal approach in this thesis is to describe the state of the law with an aim of proposing reform where necessary or desirable in facilitating the promotion of energy justice at the international level.

[192] Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 4.
[193] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 20-21.
[194] John Austin, *Austin: The Province of Jurisprudence Determined* (originally published in 1832, Wilfrid E. Rumble ed, Cambridge University Press 1995) 157. This postulation of legal positivists that denies a role for morality in the sphere of law has been disputed by other philosophers. See e.g., Lon Fuller, *The Morality of Law* (revised edition, Yale University Press 1977); Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).
[195] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[196] United Nations Framework Convention on Climate Change (adopted 09 May 1992, entered into force 21 March 1994) 1771 UNTS 107.
[197] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.
[198] The Paris Agreement Under the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS.
[199] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[200] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

5. Significance of Research

A major significance of this research is that it has the potential to facilitate the resolution of injustices associated with the development of renewable energy worldwide as they occur with respect to the energy transition. The transition to a low carbon future is generating both positive and negative outcomes. Renewable energy, as part of the energy transition, is generally perceived as a benign source of energy, but it may be associated with both latent and overt injustices that require redress. Proposing an alternative conception of global energy justice and demonstrating how this could be achieved in practice could prove a useful resource for relevant actors. Energy justice engages a wide range of actors[201] who could glean insights from this research when confronted not only with renewable energy injustices, but with other injustices that may be generated by the energy transition. Lawmakers, regulators, and policymakers at the global, regional, and domestic levels may rely on this work as a justification for dealing with injustices in relation to renewable energy. The African communitarian approach to global energy justice could provide the basis for this action. These actors may also rely on the recommendations made in this thesis to enact and institute bespoke laws and policies tailored at addressing the injustices. The legal, regulatory, and institutional tools proposed in this thesis could aid such outcome. Peoples and communities directly affected by energy injustices could also benefit from this research. Either acting alone or through non-governmental organisations, these actors could push for laws and policies that would enable them to lead flourishing lives. This could be achieved through litigation or other forms of advocacy. Judicial and quasi-judicial bodies could also gain insights from this thesis as they become involved in cases concerning energy justice.[202]

In addition, the present study could help to further develop energy justice research. This is important given that the scholarly field of energy justice has generated massive interest in recent times. Scholars have sought to utilise the concept to understand and proffer solutions to some of the ethical issues surrounding the development, production, and consumption of energy. The present study not only serves to complement these efforts but also seeks to close existing gaps in the literature. An African communitarian approach to global energy justice could complement efforts to decolonise energy justice research, further serving as a useful

[201] Sovacool and Dworkin, *Global Energy Justice: Problems, Principles, and Practices* (n 87) 25-26.
[202] See McHarg (n 81) 29.

template for the inclusion of other philosophical perspectives.[203] Directly related to this is the hope that this research could be of particular benefit to legal researchers when they try to conduct research into the means of operationalising the concept of global energy justice. Energy justice research has drawn a diverse range of scholars from different fields, with the field essentially being dominated by social scientists[204] with an almost exclusive focus on the role of policy. There is however a need to emphasise the central importance of law to energy justice.[205] While the present study makes use of ideas from disciplines such as philosophy, it is primarily a research based on law. I therefore hope that legal researchers may draw insights from the research as they attempt to solve pertinent issues in relation to energy.

6. Structure of the Thesis

This thesis is structured into six chapters of varying lengths. It will advance from the present chapter which has situated the research within the broader field of energy justice and has identified the following two contributions which the research seeks to make: a conceptualisation of global energy justice informed by African communitarianism and a systematic demonstration of how this conceptualisation can be operationalised through international law to address the injustices associated with renewable energy.

Chapter Two further sets the scene for the adoption of energy justice. It identifies and discusses the injustices that have been generated by renewable energy development and use because of the movement to ensure that less or zero polluting fuels are used in the world's energy systems. In doing this, the chapter will highlight the interest generated by renewable energy globally and move on to establish the basis of that interest as being the benefits obtainable from renewable energy development and utilisation. The chapter will argue that while there is a justification for the development and utilisation of renewable energy to continue, there remains a competing necessity to address the ethical impacts of such development. It will select the unfair distribution of renewable energy benefits as the main injustice to be addressed by the thesis.

Chapter Three develops the African communitarian approach to global energy justice. It first discusses the rationales for adopting energy justice as a theoretical framework. It proposes

[203] See generally Foluke Adebisi, 'Should we Rethink the Purposes of the Law School? A Case for Decolonial Thought in Legal Pedagogy' (2021) 2(3) Amicus Curiae 428.
[204] McHarg (n 81) 17-19.
[205] See Íñigo del Guayo and others (n 93) 5-7.

and adopts a two-step methodology for developing the African communitarian approach to global energy justice. The first step entails the identification of three dimensions of justice namely distributive justice, recognition justice, and global justice, while the second step involves the adoption of African communitarianism as the conception of justice to underpin the dimensions of justice. The chapter will show that African communitarianism is a more appropriate framework for framing global energy justice because it is better able to address the problem of unfair distribution of renewable energy benefits compared to ideas drawn from Western philosophy.

Chapter Four discusses the role of international law in promoting global energy justice. It will begin by first considering why international law is being used as an operationalisation mechanism. It will discuss some of the issues that could potentially affect the operationalisation of the African communitarian approach to global energy justice. The chapter will thereafter introduce the tool of interpretation in international law as a strategic means for operationalising global energy justice. It will then canvass the re-interpretation of existing concepts in international law in a way that would encompass global energy justice. The concepts to be re-interpreted are Common but Differentiated Responsibilities (CBDR) and the duty to cooperate. These concepts share an affinity with African communitarianism and will be re-interpreted under international climate law and international human rights law respectively.

Chapter Five examines how institutions existing within international climate law and international human rights could help to implement the re-interpretations contained in Chapter Four. The discussion will also revolve round some legal and regulatory techniques that these institutions could adopt to implement the African communitarian approach to global energy justice. Some of these include the setting up of a regulatory body under the auspices of institutions existing within international climate law; the issuance of guidance to relevant institutions existing in international law; and the setting of binding targets. The chapter will also identify and discuss how the institutions could rely on existing mechanisms to monitor the implementation of global energy justice.

Chapter Six will serve as the overall conclusion. It will summarise the key arguments made in this thesis, highlight some areas for further research, and end with a reflection on the significance of the thesis.

Chapter 2
Renewable Energy Development: Benefits and Injustices

1. Introduction

In my introductory chapter, I noted that renewable energy has recently gained attention. As I revealed, data maintained by global inter-governmental agencies working in the field of renewable energy highlight the increasing interest placed on the energy source.[1] The range of benefits derivable from renewable energy development and deployment mainly drives this heightened interest. The introductory chapter also highlighted that renewable energy development, driven by the global transition to a low-carbon energy future, is associated with multiple injustices. While there are reasons for ensuring that renewable energy continues to remain relevant, especially in the context of the energy transition,[2] there is an equally compelling necessity to ensure that injustices connected with renewable energy are addressed to achieve energy justice. Flowing from these premises, I will commence by elaborating on the key benefits of renewable energy in this chapter. This discussion will provide context to the ensuing discussion on the justice and ethical issues that have arisen in relation to renewable energy. I intend to provide further justification for the intervention of energy justice in addressing the injustices linked to renewable energy development and use.

2. Benefits of Renewable Energy

Renewable energy has been associated with certain positive impacts, which provide the bases for the attention that has been placed on the energy source in recent years and which could also serve as a rationale for its continued expansion. The primary benefit of renewable energy is climate change mitigation, while its secondary benefits are energy access, energy security, and economic development. Renewable energy also has a positive linkage with developmental goals included in the SDGs and can contribute to realising a range of human rights. I discuss these benefits in the section that follows.

[1] See IRENA, *Off-grid Renewable Energy Systems: Status and Methodological Issues* (IRENA 2015) 3.
[2] ibid.

2.1. Climate Change Mitigation

It is widely acknowledged that renewable energy is an important energy source that could aid to minimise the incidence, and to lessen the catastrophic impacts, of climate change.[3] Energy contributes greatly to climate change and other environmental ills such as pollution and poor air and water quality. This has led to the realisation that both 'energy and environment are the two sides of the same coin called climate change.'[4] The dominant role which energy plays in causing climate change also puts it in the limelight when measures for mitigating climate change are being discussed. It has therefore been observed that energy production and consumption are 'centre stage in climate change, both as a source of the problem and as part of solutions for adaptation and mitigation'.[5] In this sense, energy from primary renewable sources have a front-seat role to play in combating climate change caused by anthropocentric activities such as the exploitation, production and consumption of fossil fuels for electricity, heating, transportation, and industrial uses.[6] This is mainly because renewable energy sources emit little or no greenhouse gases.

By contrast, conventional energy sources such as coal and crude oil emit larger amounts of greenhouse gases into the atmosphere.[7] Some of these greenhouse gases include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur

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[3] IRENA, 'REthinking Energy: Renewable Energy and Climate Change' (2015) 5 <IRENA _REthinking_Energy_2nd_report_2015.pdf> accessed 09 September 2023; IEA, 'Net Zero by 2050: A Roadmap for the Global Energy Sector'(2021) 14 <https://www.iea.org/reports/net-zero-by-2050> accessed 09 September 2023; IRENA, *IRENA's Energy Transition Support to Strengthen Climate Action* (IRENA 2021) 10. See also Adrian J. Bradbrook, 'The Development of Renewable Energy Technologies and Energy Efficiency Measures through Public International Law' in Donald N. Zillman and others (eds), *Beyond the Carbon Economy: Energy Law in Transition* (Oxford University Press 2008) 109; Douglas J. Arent, Alison Wise and Rachel Gelman, 'The Status and Prospects of Renewable Energy for Combating Global Warming' (2011) 33(4) Energy Economics 584; Stuart Bruce, 'International Law and Renewable Energy: Facilitating Sustainable Energy For All?' (2013) 14(1) Melbourne Journal of International Law 18.

[4] Walter Leal Filho and Dinesh Surroop, 'Introduction' in Walter Leal Filho and Dinesh Surroop (eds), *The Nexus: Energy, Environment and Climate Change* (Springer 2018) x. See also Antoine Bret, 'Energy and Climate: A Global Perspective' in G. Lefebvre and others, *Environment, Energy and Climate Change* (Springer 2016) 2.

[5] Catherine Redgwell, 'International Legal Responses to the Challenges of a Lower-Carbon Future: Climate Change, Carbon Capture and Storage, and Biofuels' in Donald N. Zillman and others, *Beyond the Carbon Economy: Energy Law in Transition* (Oxford University Press 2008) 85.

[6] See IRENA, 'REthinking Energy: Renewable Energy and Climate Change' (n 3) 5. See also Cristobal Rodriguez-Delgado and others, 'Dual Wave Farms for Energy Production and Coastal Protection Under Sea Level Rise' (2019) 222 Journal of Cleaner Production 364; Moonmoon Hiloidhari and others, 'Prospect and Potential of Biomass Power to Mitigate Climate Change: A Case Study of India' (2019) 220 Journal of Cleaner Production 931.

[7] Note however that natural gas is less polluting than both coal and crude oil and have oftentimes been positioned as a 'transition fuel'. See C. Gürsan and V. de Gooyert, 'The Systematic Impact of a Transition Fuel: Does natural Gas Help or Hinder the Energy Transition?' (2021) 138 Renewable and Sustainable Energy Reviews 110552.

hexafluoride.[8] When emitted into the atmosphere, they trap heat and produce the greenhouse effect, which leads to global warming. It is in this light that the use of renewable energy as a larger part of measures to hold down climate change may be appreciated. Renewable energy can indeed offer an immediate and effective pathway to decarbonising the global energy system.[9]

The importance of renewable energy to climate change mitigation has been highlighted by a significant report presented by the IPCC. The report focused on the aspirational climate goal of 1.5°C contained in the Paris Agreement.[10] The report arose from the 21st climate change conference in Paris where the Conference of the Parties (COP) as the institutional body overseeing, governing, and regulating the international climate regime[11] invited the IPCC to undertake research into the impacts of global warming of 1.5°C as well as efforts that would be needed to keep warming below 1.5°C.[12] On the strength of that invitation, the IPCC produced its report. While reiterating that human-based activities have been the principal vectors of global warming of approximately 1.0°C above pre-industrial levels,[13] the IPCC predicted that global warming was likely to reach 1.5°C between 2030 and 2052 under business-as-usual conditions.[14] This would have profound implications for health, livelihoods, food security, water supply, human security, and economic growth.[15] Limiting global warming to 1.5°C, according to the IPCC, would entail efforts akin to a revolution in the realms of '*energy*, land, urban and infrastructure (including transport and buildings), and industrial systems.'[16] The report acknowledged the role of deep emissions reductions in these sectors,

[8] See Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162, annex a.
[9] IRENA, 'REthinking Energy: Renewable Energy and Climate Change' (n 3) 5.
[10] Valérie Masson-Delmotte and others (eds), *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Cambridge University Press 2018).
[11] In Chapter 5, I discuss the role of the COP in facilitating global energy justice.
[12] Decision 1/CP.21, 'Adoption of the Paris Agreement', 29 January 2016, FCCC/CP/2015/10/Add.1, para 21.
[13] Valérie Masson-Delmotte and others, 'Summary for Policymakers' in Valérie Masson-Delmotte and others (eds), *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Cambridge University Press 2018) para.a.1.
[14] ibid.
[15] ibid para b.5. The IPCC reiterated this message in its most recent report. See Valérie Masson-Delmotte and others (eds), *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2021).
[16] Emphasis added. Ibid c.2.

as well as a mix of mitigation options and an upscaling of investments in those options.[17] Renewable energy is one of those mitigation options.[18] The IPCC report thus signposts the need for renewable energy development to double, along with other mitigation measures, to keep global warming below the desired threshold. Doing so would likely forestall some of the dangerous consequences of climate change that threaten humanity. As has been noted in the context of climate change and security, 'Reduced greenhouse gas emissions as a result of expanded use of renewable energy should logically reduce the risk of conflict and instability that climate change would otherwise generate.'[19]

In conclusion, energy will continue to play a dominant role in society in the foreseeable future. The exponential growth of human populations will likely lead to more energy demand. As one report of the International Energy Agency (IEA) has predicted, there is likely to be an increase in the global demand for energy by 2040, with about 1.7 billion people in mostly developing economies driving up that demand.[20] It is acknowledged that if conventional energy sources continue to dominate the world's energy mix, global warming will become even worse. Energy mix refers to the combination of energy sources that a country utilises to meet its energy needs. The energy mix of countries typically contain sources of energy that are utilised to produce electricity, fuel for transportation, industrial processes, and residential purposes such as cooking, heating, and cooling. The understanding of the harmful effects of continued reliance on conventional energy entails the need for less dependence on these sources of energy. This has in fact led to radical calls for all conventional energy reserves to remain unextracted or 'in the ground'.[21] This is a recommendation that is laced with potential justice implications,[22] as I will demonstrate subsequently in this chapter.

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[17] ibid c.2.

[18] ibid c.2.2. The report also recommends the adoption of carbon dioxide removal tools such as afforestation and reforestation, land restoration and soil carbon sequestration, bioenergy with carbon capture and storage (BECC), direct air carbon capture and storage (DACCS), enhanced weathering and ocean alkanisation: See ibid c.3 and c.3.1.

[19] Meghan O'Sullivan, Indra Overland, and David Sandalow, 'The Geopolitics of Renewable Energy' (*Harvard Faculty Research Working Paper Series*, June 2017) vii <The Geopolitics of Renewable Energy | Harvard Kennedy School> accessed 09 September 2023.

[20] The New Policies Scenario is a measuring index designed by the IEA that forecasts future energy trends using energy policies that have been announced by governments, but not implemented. See IEA, 'World Energy Outlook' (IEA 2018) 23.

[21] See Dan Calverley and Kevin Anderson, 'Phaseout Pathways for Fossil Fuel Production within Paris-compliant Carbon Budgets' (*Research Report,* 2022) <Tyndall_Production_Phaseout_Report_final_text_3_.pdf (manchester.ac.uk)> accessed 09 September 2023.

[22] See Chukwumerije Okereke and Youba Sokona, 'Africa has Vast Gas Reserves – Here's how to Stop Them Adding to Climate Change' (*The Conversation, 15 November 2022)* <Africa has vast gas reserves – here's how to stop them adding to climate change (theconversation.com)> accessed 09 September 2023.

2.2. Energy Access

Renewable energy has the potential to improve access to energy for those parts of the international community without access to clean and sustainable energy.[23] This potential accounts for why the use of renewable energy for universal access to energy is the seventh goal of the SDGs, in the light of its potential to contribute to access to basic energy services such as electricity, cooking, and heating[24] for hundreds of millions around the world, essentially helping to achieve sustainable development.[25] Access to these basic energy services is a problem for a vast number of people around the globe, notwithstanding the progress made over the years to address the problem. In 2021, an estimated 770 million people lacked access to electricity.[26] Also, the number of people without access to facilities for clean and sustainable cooking was estimated at 2.5 billion, with most of these people living in the developing parts of Asia and sub-Saharan Africa.[27] People in these regions mainly rely on the use of traditional biomass for cooking, which has adverse consequences for health, particularly for women and children, most especially in rural areas of developing and low-income countries.[28] Traditional biomass also has a damaging effect on the physical environment, contributing to global warming, and poor air quality.

Decentralised renewable energy technologies, both mini-grid and stand-alone systems, could provide potential cost-effective solutions to the problem of lack of access to electricity and clean cooking facilities.[29] In countries that operate a centrally controlled electricity grid, decentralised renewables are particularly attractive. In these countries, the central electric grid is usually unable to serve users in remote areas owing to issues of cost and the sheer difficulty of connecting those areas to the national grid.[30] Decentralised options are therefore useful in powering rural areas otherwise cut-off from the central grid, as well as urban areas

[23] Benjamin K. Sovacool and Ira Martina Drupady, *Energy Access, Poverty, and Development: The Governance of Small-Scale Renewable Energy in Developing Asia* (Routledge 2016).
[24] Energy access also includes access to transport and industrial fuels.
[25] IRENA, *Off-Grid Renewable Energy Solutions: Global and Regional Status and Trends* (IRENA 2018) 1.
[26] IEA, 'SDG7: Data and Projections: Access to electricity' (2022) <https://www.iea.org/reports/sdg7-data-and-projections> accessed 09 September 2023.
[27] IEA, 'SDG7: Data and Projections: Access to clean cooking' (2022) <https://www.iea.org/reports/sdg7-data-and-projections> accessed 09 September 2023.
[28] See Yinka O. Omorogbe, 'Promoting Sustainable Development Through the Use of Renewable Energy: The Role of the Law' in Donald N. Zillman and others, *Beyond the Carbon Economy: Energy Law in Transition* (Oxford University Press 2008) 39.
[29] IRENA, *Off-grid Renewable Energy Solutions to Expand Electricity Access: An Opportunity not to be Missed* (IRENA 2019) 5.
[30] See Ngozi Chinwa Ole, 'The Paris Agreement 2015 as a Primer for Developing Nigerian Off-grid Solar Electricity' (2018) 26(3) African Journal of International and Comparative Law 426, 427.

where users may be either underserved or experience power cuts from the national grid. The use of decentralised renewable energy could enable women and children to utilise electricity for cooking and lighting thereby preventing them from relying on traditional biomass that is harmful to their health. Decentralised renewables could also obviate the need of relying on diesel or petrol generators which are harmful to human health and the physical environment. Decentralised renewable energy 'requires less land than a utility-scale renewable project, experiences less distance-related transmission losses (as it serves only a local customer or area) and provides electricity like a traditional grid connection.'[31] It is therefore reliable and stable and has fewer instances of outages as experienced with a central grid.[32]

There is evidence to suggest the growing popularity of decentralised renewables globally, propelled by creative technological and financial models such as the utilisation of mobile payment platforms to purchase electricity from decentralised grids.[33] Some national governments are already building off-grid renewables while others have made commitments to do so.[34] Despite this development, there are still barriers associated with capital and investments needed to build decentralised renewables, especially in developing countries. There are also barriers related to a lack of technology for decentralised renewables in these countries which would necessitate international support and assistance.[35]

2.3. Energy Security

Renewable energy could enable countries to achieve or maintain their energy security. Energy security is in fact at the heart of countries' development agendas. Countries intent on achieving or maintaining prosperity would usually adopt an effective, long-term energy security strategy.[36] Energy security is therefore an important component of development, although it is conceived in diverse ways by different countries.[37] The ubiquity of renewable energy sources

[31] IRENA, *Off-grid Renewable Energy Systems: Status and Methodological Issues* (IRENA 2015) 3.
[32] ibid.
[33] IRENA, *Off-Grid Renewable Energy Solutions: Global and Regional Status and Trends* (n 25) 3.
[34] See e.g., UNFCCC, 'NDC Registry' <https://www4.unfccc.int/sites/NDCStaging/pages/Party.aspx?party=NGA> accessed 09 September 2023.
[35] IEA, 'Financing Clean Energy Transitions in Emerging and Developing Economies' (2021) 17 <https://www.iea.org/reports/financing-clean-energy-transitions-in-emerging-and-developing-economies> accessed 09 September 2023. See also Chitzi C. Ogbumgbada, Rasaki Stephen Dauda, and Eduardo G. Pereira, 'Sustainable Development and Off-grid Renewable Electricity: Current Status and Challenges' in Ngozi Chinwa Ole and others (eds), *Regulatory Support for Off-Grid Renewable Electricity* (Routledge 2023) 41-42.
[36] See generally Espen Moe and Paul Midford (eds), *The Political Economy of Renewable Energy and Energy Security: Common Challenges and National Responses in Japan, China and Northern Europe* (Palgrave Macmillan 2014).
[37] Daniel Yergin, 'Ensuring Energy Security' (2006) 85(2) Foreign Affairs 69, 70.

around the globe means that renewable energy could be used as a national energy security strategy. It is difficult to conceive of areas where the sun does not shine or where the wind does not blow, even though there remains an issue of intermittency where there is a lull in the sun shining or the wind blowing, and which has led to discussions on innovative energy storage solutions.[38] Although there are several landlocked countries in the world, it is inconceivable to imagine an instance of coastal countries where the ocean does not flow. Through the diversification of energy supplies, renewable energy could play a role in energy security, especially in countries where conventional energy sources continue to dominate the energy mix. Diversification essentially involves the liberalisation of a country's energy mix to the effect that the country relies on a range of sources for its energy security needs, thus becoming less dependent upon any particular energy source and thereby less vulnerable to disruptions in supply. Diversification could introduce greater reliance on renewable energy and less on conventional energy sources. There is an instrumental reason why this is important. Conventional energy sources, constituted mainly by fossil fuels, are not only highly polluting, but also finite and depletable resources.[39] This feature is directly responsible for the peak oil theory which holds that crude oil reserves have either reached their maximum capacity or would do so in the twenty-first century and begin to decline rapidly.[40] 'Peak oil' mainly relates to onshore extraction of crude oil and therefore typically excludes offshore or deepwater drilling and the unconventional extraction of gas called shale gas which is nonetheless associated with significant safety, environmental, and regulatory concerns.[41]

In addition to being finite, conventional energy sources are also susceptible to shocks and hazards caused by factors such as geopolitics. For example, the bulk of these reserves (especially crude oil and natural gas) are found in few countries that are mostly located in politically volatile parts of the world.[42] This reason played a contributory role in the 1973 oil crisis which affected mainly import-dependent countries. The 1973 oil crisis eventually led to

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[38] See e.g., Michael Child, Teresa Haukkala, and Christian Breyer, 'The Role of Solar Photovoltaics and Energy Storage Solutions in a 100% Renewable Energy System for Finland in 2050' (2017) 9 Sustainability 1358.
[39] Cutler J. Cleveland and Christopher Morris, *Dictionary of Energy* (Elsevier 2006) 171.
[40] Christopher O'Leary, 'Peak Oil Theory' (*Encyclopedia Britannica,* 16 December 2022) <https://www.britannica.com/topic/peak-oil-theory> accessed 09 September 2023. Expectedly, this theory has been challenged on the basis that peak oil is like a chimera, or like waiting for Godot. See Charles B. Blankart, 'Peak Oil Theory' in Bruno S. Frey and David Iselin (eds), *Economic Ideas You Should Forget* (Springer 2017) 27-28.
[41] See John Paterson and Tina Hunter, 'Shale Gas Law and Regulation in the United Kingdom' in Tina Hunter (ed), *Handbook of Shale Gas Law and Policy: Economics, Access, Law, and Regulations* (Intersentia 2016) 281.
[42] Donald N. Zillman and others, 'Introduction' in Don N. Zillman and others (eds), *Beyond the Carbon Economy: Energy Law in Transition* (Oxford University Press 2008) 7.

the formation of the IEA,[43] which has the central objective of committing its member countries to hold emergency oil stocks equivalent to at least 90 days of net imports to avoid supply disruptions.[44] The interdependence shared among certain countries and the location of conventional energy resources in some of those countries could sometimes produce risks. This is the case with Eastern Europe where countries such as Russia have had gas disputes with neighbouring countries such as Ukraine. The 2009 Russia-Ukraine gas crisis, for example, revolved round transit routes for Russia's gas exports to other parts of Europe, among other issues.[45] Western Europe's dependence on gas supplies from Russia complicated that crisis. The 2022 Russia-Ukraine conflict has also highlighted the volatility of conventional energy sources. The conflict has severely impacted energy markets and energy security in profound ways.[46] Its ripple effects can be felt around the globe, mainly in the form of rising energy costs and cost of living in many import-dependent countries where there is a huge reliance on imported natural gas for electricity and other end uses.[47] All these highlight the peculiar uncertainties surrounding conventional energy sources. When conflicts arise, they immediately imperil energy security and raise questions of alternatives such as renewable energy.[48]

Renewable energy has the potential to alter geopolitical relations in many ways. With the heightened interest in renewable energy in recent times, for instance, it has been predicted that cartels or closed-membership organisations could form around natural resources used to manufacture renewable energy technologies.[49] Some of these natural resources include copper, lithium, nickel, manganese, cobalt, graphite, zinc, and rare earths. Electric vehicles, solar plants and wind turbines depend on these for functionality.[50] Under the IEA's Sustainable Development Scenario, which aligns with the temperature goals of the Paris Agreement, demand for these minerals would rise 'significantly over the next two decades to over 40%

[43] Jill Tennant, '40 years later: Legacies of the 1973 Oil Crisis Persist' (2013) 234(10) World Oil.
[44] IEA, 'Oil Security' <https://www.iea.org/topics/energysecurity/oilsecurity/> accessed 09 September 2023. In addition, the IEA also publishes authoritative data on future trends of energy resources.
[45] Yusin Lee, 'Interdependence, Issue Importance, and the 2009 Russia-Ukraine Gas Conflict' (2017) 102 Energy Policy 199, 201.
[46] UN, 'Global Impact of War in Ukraine: Energy Crisis' (2022) <GCRG_3rd-Brief_Aug3_2022_FINAL.pdf (un.org)> accessed 09 September 2023.
[47] Julia Korosteleva, 'The Implications of Russia's Invasion of Ukraine for the EU Energy Market and Businesses' (2022) 33 British Journal of Management 1678, 1679.
[48] Bradbrook (n 3) 111.
[49] See O'Sullivan, Overland, and Sandalow (n 19) 11.
[50] IEA, 'The Role of Critical Minerals in Clean Energy Transitions' (2021) <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions> accessed 09 September 2023.

for copper and rare earth elements, 60-70% for nickel and cobalt, and almost 90% for lithium.'[51] Increased demand could create the type of cartelisation witnessed with the formation of groups such as the Organization of the Petroleum Exporting Countries (OPEC),[52] which heavily influenced international policies on oil and gas in the 1970s.[53]

Depending on the perspectives adopted to consider the outcome, cartelisation of resources may be a positive or negative end result. For cartel members, there appears to be a sense of global power in influencing world events. This is likely the case with the Arab members of the OPEC that had placed an oil embargo on mostly Western nations in response to the conflict involving Israel and some Arab countries. That measure had had a profound impact on the global oil market with the price of crude oil astronomically increasing from US$2.59 to 11.65 per barrel.[54] For non-cartel members, however, there is likely to be a sense of disillusionment with the existence of a cartel that influences global energy security. Such dissatisfaction could sometimes lead to a paradigm shift as witnessed with the formation of the IEA. In the context of the possible cartelisation of renewable energy resources, and notwithstanding the different points of views just examined, the constant factor is that the potential of renewable energy to affect global energy security can hardly be denied.[55]

2.4. Economic Development

Renewable energy could enhance the socio-economic prospects of countries by delivering on a range of socio-economic benefits such as the provision of jobs, industrialisation, infrastructure, and generally enhanced economic development. Renewable energy technologies are generally more attractive than conventional energy technologies when viewed from an employment perspective. The reason is that renewable energy technologies are labour-intensive, thereby able to create more jobs per unit of money invested. Labour-intensity denotes 'a production process, project, or investment that relies heavily on the use of labour'.[56] Renewable energy technologies could be categorised as either fuel-free

[51] ibid.
[52] See O'Sullivan, Overland, and Sandalow (n 19) 11.
[53] OPEC was founded at a conference in Baghdad, Iraq. Its founding members were Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela. See OPEC, 'Brief History' <OPEC : Brief History> accessed 09 September 2023.
[54] Fabian Kesicki, 'The Third Oil Price Surge – What's Different This Time?' (2010) 38 Energy Policy 1596, 1597.
[55] Daniel Scholten and Rick Bosman, 'The Geopolitics of Renewables: Exploring the Political Implications of Renewable Energy Systems' (2016) 103 Technological Forecasting and Social Change 273, 277-280.
[56] Jonathan Law, 'labour-intensive' in *A Dictionary of Finance and Banking* (Oxford University Press 2018) <https://www.oxfordreference.com/view/10.1093/acref/9780198789741.001.0001/acref-9780198789741-e-2019> accessed 09 September 2023.

technologies or fuel-based technologies. For the former, the highest number of jobs is usually concentrated at the installation, manufacturing, and administration stages, while for the latter, the production of feedstock and distribution of biofuels make up the highest share of jobs.[57] Renewable energy technologies such as those involving solar energy, bioenergy, hydro, and wind employ more workers across the entire value chain than conventional energy technologies thereby providing decent jobs and means of livelihoods.[58]

To appreciate the importance of renewable energy to employment generation, we have to examine relevant statistics. Thus, in 2017, renewable energy generated 10.3 million jobs worldwide in both the upstream and downstream sections of the sector.[59] The upstream is mainly characterised by the extraction of critical minerals for renewables while the downstream sector involves the conversion of renewable energy to productive end uses, with both sectors employing many people. The 2017 figure represented an increase of 5.3% over the previous year,[60] and out of that figure, more than 500,000 were new jobs.[61] The solar sector provided 3.37 million jobs, up from 9% in 2016, representing the largest employer in the year under review.[62] In 2021, the total number of jobs climbed to 12.7 million, with 700,000 representing new jobs.[63] Solar once again employed the highest number of workers at 4.3 million jobs.[64] This was followed by wind energy which produced 1.3 million jobs. Both hydro and biofuels respectively created 2.4 million jobs.[65] These figures demonstrate the growth of renewable energy and could be reflective of the efforts made in overcoming the barriers to investments in clean energy around the world. It is also remarkable that the sector has continued to grow exponentially and remain a 'reliable job creation engine' despite the intervention of global challenges such as Covid-19 and the global economic crises ensuing from the pandemic.[66] Both the International Renewable Energy Agency (IRENA) and the International Labour Organisation (ILO) have in fact predicted that by 2030 renewable energy

[57] IRENA, 'Renewable Energy Jobs: Status, Prospects and Policies' 4 (*IRENA Working Paper,* 2011) <Renewable Energy Jobs: Status, Prospects & Policies (irena.org)> accessed 09 September 2023.
[58] IRENA and ILO, *Renewable Energy and Jobs: Annual Review 2022* (IRENA and ILO 2022) 10.
[59] IRENA, *Renewable Energy and Jobs: Annual Review* (IRENA 2018) 3.
[60] ibid.
[61] ibid 3-5.
[62] Ibid 7.
[63] IRENA and ILO, *Renewable Energy and Jobs: Annual Review* (n 58) 8.
[64] ibid.
[65] ibid.
[66] UN, 'Renewable Energy Jobs Rise by 700,000 in a Year, to Nearly 13 Million' (*UN News,* 22 September 2022) <Renewable energy jobs rise by 700,000 in a year, to nearly 13 million | UN News> accessed 09 September 2023.

industries could employ 38.2 million people globally.[67] This prediction is nevertheless dependent upon an aggressive energy transition scenario where investments in renewable energy are readily achievable.

Taking a close look at the employment data, however, we can observe a trend. The employment generated by renewable energy remains significantly concentrated in a cluster of countries, with China, Brazil, India, the US, and the EU topping the employment charts. The employment bazaar is noticeably limited on the African continent.[68] In fact, the number of jobs created by renewable energy in Germany is greater than the combined number of green jobs created on the African continent in 2021.[69] This disparity in employment generation is symptomatic of the inequality inherent in renewable energy development, where renewable energy benefits such as green employment are not fairly and equitably distributed.

2.5. Connection with the Sustainable Development Goals

Renewable energy has a major role to play in achieving the SDGs.[70] The SDGs are at the heart of the 2030 Agenda for Sustainable Development adopted by the United Nations General Assembly (UNGA) during the 2015 United Nations Sustainable Development Summit.[71] They supplanted the Millennium Development Goals (MDGs) which were a set of eight goals aimed at eradicating poverty and other global ills.[72] At the heart of the SDGs is the realisation that 'eradicating poverty in all its dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.'[73] The goals also seek to protect the planet by conserving and sustainably using the natural resources of the earth while addressing the negative consequences of climate change and ensuring prosperity through an inclusive and equitable economic growth, productive employment and decent work for all. These objectives are included in seventeen goals and one-hundred-sixty-nine associated targets designed to be achieved by 2030.[74] Renewable energy can play a critical role in achieving many of the goals through its range of benefits. This explains the presence of

[67] IRENA and ILO, *Renewable Energy and Jobs: Annual Review 2022* (n 58) 8.
[68] IRENA and ILO, *Renewable Energy and Jobs: Annual Review 2022* (n 58) 32-51.
[69] IRENA and ILO, *Renewable Energy and Jobs: Annual Review 2022* (n 58) 30.
[70] Ogbumgbada, Dauda, and Pereira (n 35) 36.
[71] UNGA, Resolution 70/1, 'Transforming our world: the 2030 Agenda for Sustainable Development', 25 September 2015, A/RES/70/1.
[72] ibid preambular ref 3.
[73] ibid preambular ref 1.
[74] See Duncan French and Louis J. Kotzé, *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar 2018).

energy as a vital component of the SDGs manifesting as Goal 7 which seeks to create conditions for universal access to 'affordable, reliable, sustainable and modern energy for all' to flourish. Crucially, Goal 7 has the expansion of renewable energy in the global energy mix as a core target. This is a key feature that was missing in the erstwhile MDGs which had omitted the inclusion of energy as one of the achievable goals.[75]

As I discussed above, the use of renewable energy technologies can facilitate the achievement of Goal 13 by substituting for fossil fuels and other high polluting energy sources. Goal 13 is at the heart of climate action and enjoins countries to take urgent and integrated measures aimed at combating the threat of global warming. When renewable energy is adopted in this regard, it can further help to reduce or eliminate high polluting greenhouse gases in the atmosphere. A clean atmosphere is central to good health and well-being and people will be able to breathe clean air in places where renewable energy technologies are utilised.[76] The use of renewable energy in this instance has a positive effect on Goal 3 of the SDGs. Through the provision of clean electricity in educational settings, renewable energy also has a positive relationship with quality education, which is at the heart of Goal 4 of the SDGs. The utilisation of renewable energy sources can equally lead to the creation of green jobs which could in turn incentivise economic growth in places where renewable energy systems are adopted, thereby contributing to the realisation of Goal 8. Increased economic growth is also significant in vastly reducing poverty worldwide, which is directly central to Goal 1 of the SDGs on eradicating poverty.

2.6. Nexus with Human Rights

The major benefits of renewable energy can positively contribute to a range of human rights[77] contained in such instruments as the International Covenant on Economic, Social and Cultural Rights (ICESCR),[78] and the Charter of the United Nations.[79] Access to clean and sustainable electricity 'can have an immediate and transformative impact on quality of life, access to basic

[75] Abeeku Brew-Hammond, 'Energy: The Missing Millennium Development Goal' in Ferenc L. Toth (ed), *Energy for Development: Resources, Technologies, Environment* (Springer 2012) 35.
[76] Ciaran L. Gallagher and Tracey Holloway, 'Integrating Air Quality and Public Health Benefits in U.S. Decarbonization Strategies' (2020) 8 Frontiers in Public health 563358.
[77] Olasupo Owoeye, 'Access to Energy in Sub-Saharan Africa: A Human Rights Approach to the Climate Change Benefits of Energy Access' (2016) 18(4) Environmental Law Review 284, 293-297.
[78] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[79] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 55.

services (e.g., health, education) and livelihoods.'[80] Clean energy access is therefore a facilitator of both human and societal development such that without it 'people are destined to live in poverty'.[81] Furthermore, by helping in the mitigation of climate change, renewable energy can help to mitigate against threats to human rights. The harmful effects of climate change have an adverse impact on the enjoyment and the realisation of human rights.[82] According to the Human Rights Council (HRC), an intergovernmental organisation within the United Nations that is charged with the protection and monitoring of human rights around the world,[83] 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.'[84] Responding to the challenge that climate change poses to human rights through the design of effective climate change response laws and regulations that incorporate the use of renewable energy becomes necessary.[85]

The above is the case even though there is no express recognition of a right to energy or renewable energy, including within the ICESCR which is generally viewed as a comprehensive catalogue of socio-economic and cultural rights.[86] Nevertheless, there have been suggestions for a human right to energy to be recognised.[87] This is analogous to calls made for a recognition of the human right to a clean and healthy environment in view of the profound effect which a clean environment, just like energy, has on human wellbeing. The latter gained express recognition recently when the HRC passed a resolution to recognise a clean, healthy, and sustainable environment[88] and a further resolution appointing a Special Rapporteur on the

[80] IRENA, *Off-grid Renewable Energy Solutions: Global and Regional Status and Trends* (n 25) 1.
[81] Adrian J. Bradbrook and Judith G. Gardam, 'Placing Access to Energy Services Within a Human Rights Framework' (2006) 28 Human Rights Quarterly 389, 390.
[82] See Elena Cima, 'The Right to a Healthy Environment: Reconceptualising Human Rights in the Face of Climate Change' (2022) Review of European, Comparative and International Environmental Law 1, 2-3. See also Derek Bell, 'Climate Change and Human Rights' (2013) 4 WIREs Climate Change 159.
[83] OHCHR, 'About HRC' <OHCHR | HRC Welcome to the Human Rights Council> accessed 09 September 2023.
[84] HRC, Resolution 7/23, 'Human Rights and Climate Change', 28 March 2008, A/HRC/RES/7/23, preambular ref 1.
[85] Jan McDonald and Phillipa C. McCormack, 'Rethinking the Role of Law in Adapting to Climate Change' (2021) 12 WIREs Climate Change 1.
[86] See generally Matthew C.R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Oxford University Press 1995).
[87] Giovanni Frigo, Manuel Baumann, and Rafaela Hillerbrand, 'Energy and the Good Life: Capabilities as the Foundation of the Right to Access Energy Services' (2021) 22(2) Journal of Human Development and Capabilities 218. See also Chian-Woei Shyu, 'A Framework for 'Right to Energy' to Meet UN SDG7: Policy Implications to Meet Basic Human Energy Needs, Eradicate Energy Poverty, Enhance Energy Justice, and Uphold Energy Democracy' (2021) 79 Energy Research and Social Science 102199.
[88] HRC, Resolution 48/13, 'The Human Right to a Clean, Healthy and Sustainable Environment', 8 October 2021, A/HRC/RES/48/13.

impacts of climate change on the enjoyment of human rights.[89] The right has also been positioned as a potentially 'precious ammunition to bridge the accountability and enforcement gaps plaguing climate law.'[90] This may also be the case if a right to energy is recognised. The non-recognition of a human right to energy has however not deterred scholars from interpreting existing human rights to encompass energy.[91]

Notwithstanding the positive relationship between energy and human rights, as evidenced above, there are however occasions when energy production and exploitation could lead to the impairment of human rights. Examples of these include cases of pollution associated with energy production which harm the human and physical environment,[92] and further includes emissions from energy processes that contribute to climate change which, as highlighted above, has a negative impact on human rights. The development of renewable energy could sometimes lead to human rights violations when they are a part of climate change response measures, or when they form part of the industrial activities of energy corporations,[93] raising questions of justice and ethics. It is important to emphasise this dark aspect of renewable energy use when discussing its benefits to human rights.

3. Injustices Associated with Renewable Energy

Despite the benefits associated with its development, renewable energy has raised a host of moral and ethical issues. In this section, I will identify and discuss some of those injustices from a global perspective.

3.1. The Unfair Distribution of Renewable Energy Benefits

The benefits of renewable energy are not being fairly distributed across all sections of the international community. On the one hand, developed and high-income countries have mainly enjoyed these benefits because they traditionally have greater access to the financial, technological, and other capacity-based resources that are crucial to renewable energy

[89] HRC, Resolution 48/14, 'Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change', 13 October 2021, A/HRC/RES/48/14.
[90] Pau de Vilchez and Annalisa Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Game Changer?' (2023) Yearbook of International Environmental Law 1, 17.
[91] See e.g., Margaretha Wewerinke-Singh, 'A Human Rights Approach to Energy: Realizing the Rights of Billions within Ecological Limits' (2021) Review of European, Comparative and International Environmental Law 16, 18.
[92] UN, 'Cleaning Up Nigerian Oil Pollution Could Take 30 Years, Cost Billions' (*UN News,* 4 August 2011) <Cleaning up Nigerian oil pollution could take 30 years, cost billions – UN | | UN News> accessed 09 September 2023.
[93] Raphael J. Heffron, 'Energy Multinationals Challenged by the Growth of Human Rights' (2021) 6 Nature Energy 849.

development. In many cases, they also have robust legal and regulatory frameworks that have incentivised renewable energy development,[94] thereby ensuring that they reap most of the benefits associated with renewable energy development and utilisation. Developing and low-income countries, on the other hand, have largely been marginalised and thus excluded from the benefits of renewable energy.[95] Many of these countries encounter a number of barriers that have worked against the development of renewable energy.[96] The major barriers relate to the lack of access to finance and technology that are central to a robust renewable energy system.[97] Adding to these is the absence of adequate legal and regulatory frameworks that could create an enabling environment for renewable energy to thrive.[98]

Renewable electricity generation statistics can help to contextualise the above claims.[99] Electricity generation is a useful indicator of renewable energy deployment, at least in the electricity sector since it presupposes the existence of power infrastructure and therefore renewable energy utilisation. Low generation from renewable energy sources therefore indicates the non-existence of renewable energy technologies and energy systems. The absence of these presupposes the absence of benefits such as improved access to electricity, clean cooking facilities, and green employment. In 2019, therefore, a total of 6,955,866 GWh of electricity was generated globally from different sources of renewable energy such as wind, solar, marine, renewable hydropower, bioenergy and geothermal.[100] Of this figure, the Central

[94] Aileen McHarg and Anita Rønne, 'Reducing Carbon-Based Electricity Generation: Is the Answer Blowing in the Wind' in Don N. Zillman and others (eds), *Beyond the Carbon Economy: Energy Law in Transition* (Oxford University Press 2008) 295-305.

[95] This excludes countries like China, India, Morocco, and Brazil that identify as developing countries but that have comparatively witnessed greater use of renewable energy. See Demetrios Papathanasiou, 'These Developing Countries are Leading the Way on Renewable Energy' (*World Economic Forum*, 4 July 2022) <The developing countries leading the way on renewable energy | World Economic Forum (weforum.org)> accessed 09 September 2023.

[96] Renewable energy barriers have been the subject of several studies. See e.g., Peter K. Oniemola, 'Powering Nigeria through Renewable Electricity Investments: Legal Framework for Progressive Realization' (2015) 6(1) Journal of Sustainable Development Law and Policy 83, 88-102; Cle-Anne Gabriel, 'What is Challenging Renewable Energy Entrepreneurs in Developing Countries' (2016) 64 Renewable and Sustainable Energy Reviews 362, 365-368; Nadia S. Ouedraogo, 'Opportunities, Barriers and Issues with Renewable Energy Development in Africa: A Comprehensible Review' (2019) 6 Current Sustainable/Renewable Energy Reports 52, 54-55; Ogbumgbada, Dauda, and Pereira (n 35) 41-43.

[97] Hooman Peimani, 'Financial Barriers for Development of Renewable and Green Energy Projects in Asia' in Jeffrey D. Sachs and others (eds), *Handbook of Green Finance* (Springer 2019) 15; Godswill A. Agbaitoro, 'Is Having a Robust Energy Mix a Panacea for Resolving the Energy Crisis in Nigeria' (2017) 7(4) Renewable Energy Law and Policy Review 7, 12-13.

[98] Ogbumgbada, Dauda, and Pereira (n 35) 41-42.

[99] The distribution of renewable energy jobs, discussed in this chapter, also evidences the unfair distribution of renewable energy benefits. See IRENA and ILO, *Renewable Energy and Jobs: Annual Review 2022* (n 58) 32-51.

[100] IRENA, 'Renewable Energy Electricity Generation and Installed Capacity: Regional Trends' <Regional Trends (irena.org)> accessed 09 September 2023.

American and the Caribbean region generated a total of 45,936 GWh of electricity from several renewable energy sources. On its part, Oceania produced 91,495 GWh of renewable electricity. Eurasia generated a total of 343,352 GWh while the African continent produced a cumulative unit of 163,034 GWh of electricity from diverse renewable energy sources. By contrast, the North American continent generated a total of 1,249,905 GWh electricity from renewable energy. Europe generated 1,332,012 GWh in the same period. Asia produced a total of 2,882,873 GWh of renewable electricity, placing the continent at the top spot. This growth was primarily driven by renewable energy development in China.

The above renewable energy generation statistics are not just random occurrences but repeated incidences that appear constant across different timescales. The renewable energy generation statistics of 2020 evoke the same picture as those of 2019. Thus, in 2020, a total of 7,468,058 GWh of electricity was generated from different sources of renewable energy across the world.[101] Of this figure, Central America and the Caribbean generated 50,992 GWh, a marginal improvement from the previous year. The same can be observed with Oceania where a total unit of 98,224 GWh of renewable electricity was produced in the region. Eurasia generated 357,516 GWh while Africa produced 172,335 GWh of renewable electricity. Once more and in contrast, North America generated 1,331,788 GWh while the European continent generated 1,448,016 GWh of electricity from renewable energy. The Asian continent continued to take the lead by generating 3,118,544 GWh of renewable energy, driven once again by renewable energy development in China.

These generation data show that developed countries in regions such as Europe and North America have advanced greatly in their use of renewable energy while developing countries in regions such as Africa, the Caribbean, and the developing parts of Asia, have effectively been left behind. The latter exist 'outside the drive of the [global] renewable energy system', as one author has aptly described the phenomenon.[102] The problem of distribution is exacerbated by several underlying structural issues in these regions. Without an

[101] ibid.

[102] See Yekeen A. Sanusi, 'Exploring Marginalisation and Exclusion in Renewable Energy Development in Africa (International Conference on Equity and Energy Justice, Durham University, September 2017), cited in Yekeen A. Sanusi and Andreas Spahn, 'Exploring Marginalization and Exclusion in Renewable Energy Development in Africa: A Perspective from Western Individualism and African Ubuntu Philosophy' in Gunter Bombaerts and others (eds), *Energy Justice Across Borders* (Springer 2020) 275.

understanding of these issues, it might be difficult to appreciate the scale of maldistribution inherent in renewable energy development.[103]

A major structural issue therefore relates to extreme poverty that characterises many developing and low-income countries. Most of these countries perform poorly on the Human Development Index (HDI). The HDI was developed by the UN 'to emphasise that people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone.'[104] The capabilities include life expectancy at birth, expected years of schooling, mean years of schooling and gross national income per capita.[105] These also align with the SDGs and human rights, particularly socio-economic rights. The development of the HDI followed arguments by political philosophers such as Amartya Sen and Martha Nussbaum, who postulated that humans can only flourish if they have certain capabilities at their disposal.[106] The HDI indicators have shown that many developing and low-income countries have much work to do.

In the sub-Saharan African region, for example, life expectancy is comparatively low. For example, the life expectancy in Chad, Central African Republic, South Sudan, Guinea, and Mozambique are 52.5, 53.9, 55.0, 58.9 and 59.3 years respectively.[107] To understand how low these figures compare, the life expectancy in developed countries such as Germany, Denmark, France, Sweden, and Switzerland are 80.6, 81.4, 82.5, 83.0, and 84.0 years respectively.[108] The figures relating to literacy also present a similar conclusion. For example, sub-Saharan African countries like Mali, Eritrea, Burkina Faso, Guinea-Bissau, and Lesotho have expected years of schooling at 7.4, 8.1, 9.1, 10.6, and 12.0 years respectively.[109] This is in contrast to high-income economies like Canada, Norway, Republic of Ireland, Iceland, and Australia which have 16.4, 18.2, 18.9, 19.2, and 21.1 years respectively.[110] The same is equally true with respect to the

[103] As some justice scholars have opined, there is a need to investigate the reasons for the failure of a system to produce a fair and just distribution of benefits. See Nancy Fraser, *Justice Interruptus: Critical Reflections on the ''Postcolonialist'' Condition* (Routledge 1997). See also Iris Young, *Justice and the Politics of Difference* (Princeton University Press 1990).
[104] UNDP, 'Human Development Index' <Human Development Index | Human Development Reports (undp.org)> accessed 09 September 2023.
[105] ibid.
[106] See Amartya Sen, *Commodities and Capabilities* (North-Holland 1985); Amartya Sen, *Development as Freedom* (Oxford University Press 1999); Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011).
[107] UNDP, 'Human Development Index' (n 104).
[108] ibid.
[109] ibid.
[110] ibid.

Gross National Income (GNI) index. The GNI figures of countries in sub-Saharan Africa such as Madagascar, Sierra Leone, Gambia, Congo, and Benin are US$1,484, US$1,622, US$2,172, US$2,889, and US$3,409 respectively,[111] whereas developed countries such as New Zealand, Finland, Australia, the United States, and Singapore have US$44,057, US$49,452, US$53,619, US$64,765, and US$90,919 as their GNI per capita.[112]

In addition to extreme poverty, many developing countries also face acute challenges such as the lack of access to basic energy services like electricity and clean cooking which raises questions of justice and ethics.[113] In 2020, for example, an estimated 580 million people were without electricity in sub-Saharan Africa.[114] Blackouts are thus a regular feature in several countries that constitute the region. The situation is equally grim with respect to access to clean cooking facilities, once again remaining pervasive in the region where an estimated 940 million people lacked access to clean cooking facilities in the same year.[115] Even where progress was made in improving access to these energy services, there was still a relapse caused by global crises such as Covid-19. The pandemic in fact caused a 2% increase in the number of people without access to electricity in 2020.[116] This represents a setback to some of the work being done to reverse the trend of lack of energy access in the region.[117]

These systemic issues undermine the ability of people living in developing and low-income countries to lead flourishing lives. They also make a strong case for resources to be equitably distributed to the people in these countries to enable them to enjoy the benefits of renewable energy, which could help address some of these structural issues. In the next chapter, I argue that these countries should be recognised as needing assistance to develop their renewable energy systems and that resources such as finance, technology, and other capacity-based support should be distributed to them for renewable energy development. Distribution of resources in this way would help to address the unfair distribution of renewable energy benefits.

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[111] ibid.
[112] ibid.
[113] See Paola Villavicencio Calzadilla and Romain Mauger, 'The UN's new Sustainable Development Agenda and Renewable Energy: The Challenge to Reach SDG7 While Achieving Energy Justice' (2018) 36(2) Journal of Energy and Natural Resources Law 233.
[114] IEA, *World Energy Outlook 2020* (IEA 2020) 18.
[115] IEA, 'SDG7: Data and Projections: Access to clean cooking' (n 27).
[116] IEA, *World Energy Outlook 2020* (n 114) 18.
[117] IEA, 'The Covid-19 Crisis is Reversing Progress on Energy Access in Africa' <https://www.iea.org/articles/the-covid-19-crisis-is-reversing-progress-on-energy-access-in-africa> accessed 09 September 2023.

3.2. Renewable Energy and Petroleum-rich Developing Countries

Petroleum-rich developing countries could potentially lose viable revenue streams if they completely switched to clean energy sources such as renewable energy, in line with existing mitigation obligations canonised in international climate change instruments.[118] This is a direct consequence of the move to decarbonise the global energy system, or to achieve the Net Zero goal, where carbon emissions are expected to decline steadily to a negligible volume.[119] In several international climate negotiations, there has been a long, sometimes acrimonious, debate on the climate ambition of countries that possess considerable reserves of conventional energy sources, especially oil and gas, and coal.[120] It is a debate that could be situated within the larger contention on notions of equity and justice regarding the appropriate responses to climate change.[121]

One side of the debate is represented by advocates who argue that the bulk of conventional energy sources should be left in the ground if the world hopes to achieve the long-term climate ambition of the Paris Agreement.[122] A recent report warning that both rich and poor petroleum countries must not increase oil and gas production notes that wealthy petroleum countries must scale back their oil and gas production by 74% while poorer oil and gas nations must cut back theirs by 14% by 2030.[123] This report is complimented by some commentators who utilise a global energy system model to assess the amount of fossil fuels that must be left unextracted and unexploited in order to allow for a 50% chance of limiting warming to the aspirational goal of 1.5˚C provided within the Paris Agreement.[124] According to those commentators, 58% of oil, 56% of fossil methane gas, and 89% of coal must remain in the ground by 2050 to stay within the 1.5˚C limit.[125] A further element to this side of the debate is that the abundance of oil and gas resources have led to the resource curse phenomenon in

[118] See T.A. Hansen, 'Stranded Assets and Reduced Profits: Analyzing the Economic Underpinnings of the Fossil Fuel Industry's Resistance to Climate Stabilization' (2022) 158 Renewable and Sustainable Energy Reviews 112144.
[119] Simon Black and others, *Not Yet on Track to Net Zero: The Urgent Need for Greater Ambition and Policy Action to Achieve Paris Temperature Goals* (IMF Staff Climate Note, IMF 2021) 1.
[120] Harro van Asselt, 'Breaking a Taboo: Fossil Fuels at COP26' (*EJIL: Talk!* 26 November 2021) <Breaking a Taboo: Fossil Fuels at COP26 – EJIL: Talk! (ejiltalk.org)> accessed 09 September 2023.
[121] See Lavanya Rajamani, 'Differentiation in the Emerging Climate Regime' (2013) 14 Theoretical Inquiries in Law 151.
[122] See SEI, IISD, ODI, E3G, and UNEP, 'The Production Gap Report: 2020 Special Report' <https://productiongap.org/wp-content/uploads/2020/12/PGR2020_FullRprt_web.pdf> accessed 09 September 2023.
[123] See Calverley and Anderson (n 21).
[124] Dan Welsby and others, 'Unextractable Fossil Fuels in a 1.5˚C World' (2021) 597 Nature 230.
[125] ibid 231.

many petroleum-exporting countries. This means that these countries have not effectively utilised the resources to lift their populations out of poverty.[126] An absence of institutional accountability mechanisms, coupled with corruption and the lack of the rule of law, have negatively worked to turn these resources into a curse, rather than a blessing.[127] Worryingly, the resource curse has also been found to be prevalent in countries that possess natural resources such as cobalt for renewable energy technologies,[128] leading to the suggestion that countries rich in rare elements for renewable energy technologies could be the next battleground for the paradoxical disease.[129]

The other side of the debate is represented by voices that have expressed dissatisfaction with the argument that petroleum-rich countries should shun their hydrocarbon resources.[130] These countries, which are mostly developing and low-income countries, have argued for the continued exploitation of hydrocarbon resources to obtain much-needed revenues for national poverty alleviation programmes. For example, the Democratic Republic of Congo recently expressed interest in organising licensing rounds for oil and gas blocks, declaring rather cynically that, 'Our priority is not to save the planet'.[131] This category of petroleum-rich countries depends on petroleum-generated profits to function. A decline in petroleum profits could plunge these countries into severe crises, such as wars and political instability.[132]

Some commentators have also coined the term 'energy progression' as a substitute for 'energy transition', in recognition of the fact that many developing countries rely heavily on fossil fuels

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[126] The literature on the resource cure or the paradox of plenty is considerable. Illustrative sources include Jeffrey D. Sachs and Andrew M. Warner, 'The Curse of Natural Resources' (2001) 45(4-6) European Economic Review 827; James A Robinson, Ragner Torvik, and Thierry Verdier, 'Political Foundations of the Resource Curse' (2006) 79(2) Journal of Development Economics 447; Nasiru Inuwa and others, 'Testing the Resource Curse Hypothesis: Evidence from Top Ten Resource-Rich Countries in Africa' (2022) 17(2) African Journal of Business and Economic Research 205, 206-208; Eddy Lenusira Wifa and Mostafa Elshazly, 'The Role of Law in Petroleum Resource Governance and Predicting the Natural Resource Paradox in Africa' in Tina Soliman Hunter and Madeline Taylor (eds), *Research Handbook on Oil and Gas Law* (Edward Elgar 2023) 90.

[127] Frederick van der Ploeg, 'Natural Resources: Curse or Blessing?' (2011) 49(2) Journal of Economic Literature 366, 381-382.

[128] Veli Yilanci, N. Ceren Turkmen, and Muhammad Ibrahim Shah, 'An Empirical Investigation of Resource Curse Hypothesis for Cobalt' (2022) 78 Resources Policy 102843.

[129] O'Sullivan, Overland, and Sandalow (n 19) v.

[130] See e.g., N.J. Ayuk, 'African Governments Must Act to Protect Their Countries' Oil and Gas Industries after COP26' (*African Energy Chamber,* 2 November 2021) <African Governments Must Act to Protect Their Countries' Oil and Gas Industries after COP26 | African Energy Chamber> accessed 09 September 2023.

[131] See Ruth Maclean and Dionne Searcey, 'Congo to Auction Land to Oil Companies: 'Our Priority is Not to Save the Planet''(*The New York Times*, 24 July 2022) <Congo to Auction Off Oil and Gas Blocks In a Step Back for Climate Change - The New York Times (nytimes.com)> accessed 09 September 2023.

[132] Nevertheless, a decline in petroleum profits could also produce political reform and economic diversification. See O'Sullivan, Overland, and Sandalow (n 19) vi.

for their energy security and economic development, with the resulting argument that the global transition to a low-carbon energy future should be just.[133] Amidst these arguments, there is also the clear risk of stranded assets occasioned by the raising of climate ambition, such as the reliance on renewable energy, and its implication for equity.[134] Voices on this side of the debate also point at what they consider to be a volte face by some developed, resource-rich countries that have mooted plans to begin oil and gas extraction.[135] Norway for instance has expressed its intention to offer new licences for petroleum drilling in the Arctic to boost its energy security.[136] Germany, once considered a model for the rapid growth of renewable energy worldwide, has also seen itself falling back to the use of coal for electricity.[137]

Compromises have been proposed as a solution to the raging debate. For instance, it has been suggested that oil and gas producing countries should be compensated in one form or the other.[138] Attempts to compensate countries in exchange for foregoing oil and gas exploration have sometimes proven unsuccessful in practice. A notable example is the Yasuní-ITT Initiative in Ecuador.[139] This scheme involved a proposal by Ecuador where it elected to shun oil and gas exploration in rich biodiverse areas of the Amazon Basin located in the country. As the country is heavily dependent on its oil industry for revenue and other energy security objectives, it demanded for compensation from the international community to be paid for its ambition not to exploit those areas of the Amazon Basin.[140] Notwithstanding the failure of

[133] See e.g., Victoria R. Nalule, 'Transitioning to a Low Carbon Economy: Is Africa Ready to Bid Farewell to Fossil Fuels?' in Geoffrey Wood and Keith Baker, *The Palgrave Handbook of managing Fossil Fuels and Energy Transitions* (Palgrave Macmillan 2020) 265-268, and 283.

[134] Simon Caney, 'Climate Change, Equity, and Stranded Assets' (*Oxfam America Research Backgrounder Series*, 2016) <er-climate-change-equity-stranded-assets-090516-en.pdf (openrepository.com)> accessed 09 September 2023.

[135] In Chapter 6, I discuss how these decisions engage with litigation in the context of climate change.

[136] See Terje Solsvik, 'Norway Plans to Expand Arctic Oil and Gas Drilling in New Licensing Round' (*Reuters,* 17 March 2022) < Norway plans to expand Arctic oil and gas drilling in new licensing round | Reuters> accessed 09 September 2023.

[137] See Vera Eckert and Tom Sims, 'Energy Crisis Fuels Coal Comeback in Germany' (*Reuters*, 16 December 2022) <Energy crisis fuels coal comeback in Germany | Reuters> accessed 09 September 2023. A further example is the recent decision of the UK government to issue more than 100 oil and gas exploratory licences for drilling in the North Sea to boost the UK's energy security. See GOV.UK, 'Press Release – Hundreds of new North Sea oil and gas licences to boost British energy independence and grow the economy' <Hundreds of new North Sea oil and gas licences to boost British energy independence and grow the economy - GOV.UK (www.gov.uk)> accessed 09 September 2023.

[138] Kyla Tienhaara and Lorenzo Cotula, *Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (IIED 2020) 3.

[139] Benjamin K. Sovacool and Joseph Scarpaci, 'Energy Justice and the Contested Petroleum Politics of Stranded Assets: Policy Insights from the Yasuní-ITT Initiative in Ecuador' (2016) 95 Energy Policy 158.

[140] Matt Finer, Remi Moncel and Clinton N. Jenkins, 'Leaving the Oil Under the Amazon: Ecuador's Yasuní-ITT Initiative' (2010) 42(1) Biotropica 63, 63.

schemes such as the Yasuní-ITT Initiative,[141] I argue that compensation appears reasonable, just, and fair. In chapter five, I propose a similar compromise to bridge the divide between the two sides of the debate. Such a compromise includes distributing finance, technology, and capacity-based support for renewable energy development in petroleum-rich developing countries.[142] This compromise might help persuade these countries to leave their resources in the ground.[143] In addition, I propose a strategy to facilitate this compromise, with that strategy demonstrating the role of international law in ushering just outcomes.

A closely related injustice to the above is that the energy transition is leading to the loss of jobs and livelihoods of people working in the fossil fuels industry.[144] While the energy transition will likely lead to the creation of more employment opportunities in the clean energy sector,[145] it will also lead to unemployment in fossil fuels communities owing to the phasing out of industries that produce carbon-intensive energy resources.[146] It is estimated that as many as 5 million jobs will be lost in these communities by 2030.[147] A just transition is often proposed as a pathway for addressing this issue.[148] A just transition entails deliberate measures aimed at reducing the costs associated with the energy transition. The practical aspects of these measures involve 'retraining workers, locating new clean energy facilities in heavily affected areas wherever possible, and providing regional aid.'[149]

[141] On 20 August 2023, Ecuadorians voted in favour of a moratorium on oil operations in Yasuní. See Dan Collyns, 'Ecaudorians Vote to halt Oil Drilling in Biodiverse Amazonian National Park' (*The Guardian,* 21 August 2023) <Ecuadorians vote to halt oil drilling in biodiverse Amazonian national park | Ecuador | The Guardian> accessed 09 September 2023.

[142] A somewhat similar argument is made by Andreas Goldthau, Laima Eicke, and Silvia Weko, 'The Global Energy Transition and the Global South' in Manfred Hafner and Simone Tagliapietra (eds), *The Geopolitics of the Global Energy Transition* (Springer 2020) 319.

[143] See Harro van Asselt, 'Governing Fossil Fuel Production in the Age of Climate Disruption: Towards an International Law of 'leaving it in the ground' (2021) 9 Earth System Governance 1, 6.

[144] IEA, 'The Importance of Focusing on Jobs and Fairness in Clean Energy Transitions' (2021) <https://www.iea.org/commentaries/the-importance-of-focusing-on-jobs-and-fairness-in-clean-energy-transitions> accessed 09 September 2023.

[145] The IEA predicts that an estimated 14 million jobs would be created by 2030 due to investments in renewable energy and other clean energy sources. See IEA, 'Net Zero by 2050: A Roadmap for the Global Energy Sector' (n 3) 17.

[146] Sanya Carley and David M. Konisky, 'The Justice and Equity Implications of the Clean Energy Transition' (2020) 5 Nature Energy 569, 570.

[147] See IEA, 'Net Zero by 2050: A Roadmap for the Global Energy Sector' (n 3) 17.

[148] J. Mijin Cha, 'A Just Transition: Why Transitioning Workers into a new Clean Energy Economy Should be at the Center of Climate Change Policies' (2017) 29(2) Fordham Environmental Law Review 196, 205-207.

[149] See IEA, 'Net Zero by 2050: A Roadmap for the Global Energy Sector' (n 3) 17-18.

3.3. Adverse Impacts of Renewable Energy Projects

A final injustice concerns the adverse impacts associated with renewable energy-based projects. While renewable energy is regarded as an indispensable component of the energy transition, it is not a totally harmless source of energy,[150] as 'no form of electricity is environmentally benign.'[151] The building and siting of infrastructure for renewable electricity could produce costs associated with the extraction, development, transmission, and transportation of energy.[152] The technologies used for renewable energy projects have been known to be problematic. For example, wind energy is often harnessed to provide renewable electricity through the construction of wind turbines and wind farms. Negative impacts associated with this renewable energy source include the noise generated by the rotor blades of wind turbines; adverse visual impacts occasioned by the height of the turbines, which often leads to aesthetic intrusion; and the threat these turbines pose to wildlife, especially migratory birds.[153] During the construction of a wind farm, activities such as foundation excavation and road construction could have an impact on the bio-system of the area where the wind farm is being constructed, and if in the process surface plants are tampered with, this could lead to soil erosion, as the surface soil could be exposed to strong wind and rainfall.[154] In addition to these problems, carbon and other greenhouse gases are emitted during the construction process of renewable technologies, thereby endangering public health and contributing to global warming.

In recent times, the activities of corporations engaged in the extraction of elements and raw materials for renewable energy technologies have been gaining considerable attention.[155] Specifically, concerns are being raised against energy corporations that commit human rights violations during the extraction of rare minerals for use in renewable energy end products

[150] This evokes a literary analogy with Dr Jekyll and Mr Hyde, created by Robert Louis Stevenson, and a study in split personalities. See Robert Louis Stevenson, *Dr. Jekyll and Mr. Hyde* (Reader's Library Classics 2022).
[151] McHarg and Rønne (n 94) 292.
[152] Carl-Johan Karlsson and Katarina Zimmer, 'Green Energy's Dirty Side Effects' (*Foreign Policy*, 18 June 2020) <The Transition to Green Energy Has Dirty Side Effects for Human Rights (foreignpolicy.com)> accessed 09 September 2023.
[153] See R. Saidur and others, 'Environmental Impact of Wind Energy' (2011) 15 Renewable and Sustainable Energy Reviews 2423, 2426.
[154] Kaoshan Dai and others, 'Environmental Issues Associated with Wind Energy – A Review' (2015) 75 Renewable Energy 911, 913.
[155] See Business and Human Rights Resource Centre, 'Transition Minerals Tracker: 2021 Analysis', 4 <Transition_Minerals_Tracker_Global_analysis.pdf (business-humanrights.org)> accessed 09 September 2023.

such as electric vehicles.[156] This situation is prevalent in mainly developing countries that are resource-rich and where they arise in developed countries, mostly affect historically marginalised and underrepresented communities in those countries.[157] The problem has generated both policy and scholarly attention on the unintended consequences of climate change response measures on people and biodiversity and how these could be tackled. Renewable energy projects which fall under climate change mitigation measures have been associated with 'emerging patterns of human rights violations, massive land grabs, forced displacements, marginalisation, exclusions, and governmental repressions.'[158] A notable international policy response to this is the United Nation's Guiding Principles on Business and Human Rights which enshrines a range of guidelines for countries and companies to prevent, address and remedy human rights abuses committed during commercial activities. The scholarly response to the issue has sometimes taken the form of intense debates among scholars who have proposed ways of tackling the problem. Some scholars have called for the mainstreaming of human rights, especially those developed within the contours of the United Nations Human Rights-Based Approach (HRBA), into the design, approval, finance, and implementation of climate change projects in order to prevent human rights violations associated with climate change response projects.[159] Others have nevertheless expressed reservations about the idea of mainstreaming the HRBA, arguing instead that existing international legal frameworks are sufficient to handle rights violations of not only renewable energy projects, but also climate change response measures in general, which encompass both mitigation and adaptation.[160]

There is a need to ensure that renewable energy projects reflect ethical considerations. A necessity arises here to avoid the situation where developmental goals are aggressively pursued without due regard to possible side effects. In this respect, parallels could be drawn

[156] See Benjamin K. Sovacool and others, 'Dispossessed by Decarbonisation: Reducing Vulnerability, Injustice, and Inequality in the Lived Experience of Low-Carbon Pathways' (2021) 137 World Development 105116.
[157] See Sofie Van Canegem, 'Renewable Energy and Indigenous Peoples' Rights: A Comparative Study of New Zealand, Norway and Canada' (2021) 25 New Zealand Journal of Environmental Law 61.
[158] Damilola S. Olawuyi, 'Advancing Climate Justice in International Law: An Evaluation of the United Nations Human Rights-Based Approach' (2015) 11(1) Florida A & M University Law Review 103.
[159] See ibid. See also Thoko Kaime and Godswill Agbaitoro, 'An Energy Justice Approach to Resolving the Conflict Between the Development of Energy Access Projects and Human Rights Risks and Violations in Africa: Can a Balance be Struck?' (2023) 3(1) Global Energy Law and Sustainability 39.
[160] See e.g., Elisa Morgera, 'No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law' in E. Hollo and others (eds.), *Climate Change and the Law* (Springer 2012) 359; see also C. Gearty, 'Do Human Rights Help or Hinder Environmental Protection?'(2010) 1 Journal of Human Rights and the Environment 7, 7-22; M. Koskieniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power (2010) 1 Humanity 47.

with the UK's haste to harness hydrocarbons on the United Kingdom Continental Shelf (UKSC) without putting in place a robust legal and regulatory framework for offshore health and safety.[161] In the early days of gas exploration on the UKCS, the UK first adopted self-regulation to regulate occupational health and safety on the UKCS. After the Sea Gem rig disaster in 1965, the UK adopted the prescriptive regulatory strategy. However, the Piper Alpha disaster would occur in 1988, unfortunately claiming the lives of 167 persons. This prompted the UK to adopt the goal-setting regulatory system that is built on a safety case model. Since then, there have not been any major accidents on the scale of the Piper Alpha accident. This development could serve as a cautionary tale for renewable energy projects.

4. Final Words

The above issues are some of the injustices associated with renewable energy. Before concluding this chapter, I make three points. First, the above discussion on renewable energy injustices has mainly proceeded from a global perspective in line with the aim of this thesis; nevertheless, I reemphasise that injustices associated with renewable energy and the energy transition may also be considered from a domestic perspective.[162] In fact, there is a significant amount of scholarly literature dedicated to understanding and proffering solutions to clean energy injustices from a domestic perspective.[163] An example of one of these injustices is fuel poverty, sometimes referred to as energy poverty in the scholarly literature, which is prevalent in mostly developed countries.[164] Households are said to be experiencing fuel poverty if they 'spend an unreasonably high proportion of their income on energy'[165] or if they

[161] See John Paterson, 'Health and Safety at Work Offshore' in Greg Gordon, John Paterson, and Emre Üşenmez (eds), *UK Oil and Gas Law: Current Practice and Emerging Trends (Resource Management and Regulatory Law)* (3rd edn vol 1, Edinburgh University Press 2018).

[162] Catherine Redgwell and Lavanya Rajamani, 'And Justice for All? Energy Justice in International Law' in Íñigo del Guayo and others (eds), *Energy Justice and Energy Law* (Oxford University Press 2020) 48 ('While most of the existing literature on energy justice is situated in the domestic context, connections with the international or global dimension are frequently').

[163] See e.g., Benjamin K. Sovacool and others, 'Decarbonization and its Discontents: A Critical Energy Justice Perspective on Four Low-Carbon Transitions' (2019) 155 Climatic Change 581; Kirsten Jenkins, Darren McCauley, and Charles R. Warren, 'Attributing Responsibility for Energy Justice: A Case Study of the Hinkley Point Nuclear Complex' (2017) 108 Energy Policy 836; George Goddard and Megan A. Farrelly, 'Just Transition Management: Balancing Just Outcomes with Just Processes in Australian Renewable Energy Transitions' (2018) 225 Applied Energy 110.

[164] See e.g., Rosie Day and Gordon Walker, 'Household Energy Vulnerability as 'assemblage'' in Karen Bickerstaff, Gordon Walker, and Harriet Bulkeley (eds), *Energy Justice in a Changing Climate* (Zed Books 2013) 14; Stefan Bouzarovski and others, 'Precarious Domesticities: Energy Vulnerability Among Urban Young Adults' in Karen Bickerstaff, Gordon Walker, and Harriet Bulkeley (eds), *Energy Justice in a Changing Climate* (Zed Books 2013) 30.

[165] Council of Europe Development Bank, 'Energy Poverty in Europe' (2019) 1 <Energy Poverty in Europe: How Energy Efficiency and Renewables Can Help (coebank.org)> accessed 09 September 2023.

are simply unable to afford basic energy services to enable them lead meaningful and fulfilled lives.[166] The research on fuel poverty is built on the understanding that, 'everyone needs to purchase fuel to provide essential energy services, such as warmth, hot water and lighting. These are not discretionary purchases but absolute necessities.'[167] Fuel poverty is to be distinguished conceptually from energy access issues, with the latter referring to the absence of energy infrastructure for electricity and other forms of secondary energy in mainly developing and low-income countries.[168]

Fuel poverty is further connected to other injustices such as the failure to recognise that certain categories of persons (such as the elderly and the infirm) normally require more heating than others on account of their vulnerability.[169] Fuel poverty is worsened by events such as high energy prices and high cost of living, especially when these are the products of global crises like pandemics and wars. Other injustices distinct from fuel poverty relate to the inequitable distribution of renewable energy projects in countries. The decision to site renewable energy infrastructure in certain places can be a challenging component of domestic energy policy. It is also a potential problem that could engage the further injustice of failure to consult relevant stakeholders in constructing facilities for generating renewable energy services like electricity.

All these issues are important and have also attracted policy and scholarly responses. For example, the issue of fuel poverty and the rising cost of energy services in some developed countries have been targeted with a variety of measures such as subsidies and grants awarded to households to cushion the crushing effects of both problems.[170] This is in addition to the range of benefits which citizens of these developed countries usually enjoy.[171] Matters of public participation have also led to the rise of a concept called the social licence to operate, which

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[166] Gordon Walker and Rosie Day, 'Fuel poverty as Injustice: Integrating Distribution, Recognition and Procedure in the Struggle for Affordable Warmth' (2012) 49 Energy Policy 69, 69. See also Manuel Frondel, Stephan Sommer, and Colin Vance, 'The Burden of Germany's Energy Transition: An Empirical Analysis of Distributional Effects' (2015) 45 Economic Analysis and Policy 89.

[167] Brenda Boardman, *Fixing Fuel Poverty: Challenges and Solutions* (Earthscan 2010) 48.

[168] Íñigo del Guayo, 'Energy Poverty and Energy Access: A Legal Analysis' in Íñigo del Guayo and others *(*eds*), Energy Justice and Energy Law: Distributive, Procedural, Restorative and Social Justice in Energy Law* (Oxford University Press 2020) 32-34.

[169] Kirsten Jenkins and others, 'Energy Justice: A Conceptual Review' (2016) Energy Research and Social Science 174, 177.

[170] For example, see the UK government response to both crises in form of the Energy Bills Support Scheme: GOV.UK, '£400 Energy Bills Discount to Support Households this Winter' (2022) <£400 energy bills discount to support households this winter - GOV.UK (www.gov.uk)> accessed 09 September 2023.

[171] See e.g., GOV.UK, 'Overall Government Support for the Cost of Living: Factsheet' (2022) <Overall government support for the cost of living: factsheet - GOV.UK (www.gov.uk)> accessed 09 September 2023.

is underpinned by the thinking that extractive companies must continually secure the confidence of host communities to ensure a seamless operation.[172] There is however the broader question as to whether these measures are effective and whether they deliver on their mandate to address energy vulnerabilities.[173]

My focus on the global perspective is justified for several reasons, including the important fact that the renewable energy injustices discussed in this chapter mainly affect countries and peoples that are already facing existential problems such as poverty, low literacy levels, lack of basic amenities, diseases, and other privations,[174] exacerbated by the nature of the global economic system. In addition, some of the solutions to the renewable energy injustices exist in the form of international support and assistance. As I noted, the unfair distribution of renewable energy benefits could be addressed through the redistribution of resources. Furthermore, it is imperative to consider these renewable energy injustices from an international perspective owing to the implications of the global transition to a low-carbon energy future.

The second point is that some of the renewable energy injustices easily beg to be addressed. When renewable energy projects cause harm to people or property damage, for example, it is intuitive to argue that such harm or damage should be addressed in the form of compensation. This is also the case when renewable energy projects disrupt people's means of livelihoods or dispossess them off their hectares of land without compensation or resettlement. This is mainly why a dimension of justice known as corrective justice is dedicated to these species of injustices.[175] Some of the other injustices may provoke controversial responses. This is mainly the case with the unfair distribution of renewable energy benefits. A cynical response to the call for redistribution of resources could take the form of the question: 'Why should there be a redistribution of resources?' Even when the answer to this question is that redistributing resources is just, the follow-up question could be, 'Whose justice?' There is also the contentious question about what form such distribution

[172] See Geoffrey Wood, Jędrzej Górski, and Gokce Mete, *The Palgrave Handbook of Social License to Operate and Energy Transitions* (Palgrave Macmillan 2022).
[173] For an example of a study that considers this question, see Sara Fuller and Harriet Bulkeley, 'Energy Justice and the Low-Carbon Transition: Assessing Low-Carbon Community Programmes in the UK' in Karen Bickerstaff, Gordon Walker, and Harriet Bulkeley (eds), *Energy Justice in a Changing Climate* (Zed Books 2013) 61.
[174] Lakshman Guruswamy, 'Energy Justice and Sustainable Development' (2010) 21 Colorado Journal of International Law and Policy 231.
[175] David Miller, 'Justice' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition) <Justice (Stanford Encyclopedia of Philosophy)> accessed 09 September 2023.

should take and who the objects of the distribution should be, in addition to the equally controversial question of who should bear responsibility for the cost of such distribution. These questions are not merely hypothetical or rhetorical. For example, they have arisen in the real world as questions of responsibility and fairness in the context of climate change mitigation and adaptation.[176] Their brief discussion is to signpost the significance of introducing a framework that would conceptualise and address them.

5. Conclusion

In this chapter, I noted that renewable energy could be used for climate change mitigation, energy access, energy security, and economic development. These are benefits associated with renewable energy, which the energy transition has accentuated. Nevertheless, I pointed out that renewable energy is also associated with a range of injustices that should be addressed as they arise. These injustices include the unfair distribution of renewable energy benefits in the international community; the potential mitigation burden of petroleum-rich countries and the related loss of livelihoods in fossil fuel communities; and the adverse human, environmental, and social impacts of renewable energy projects. I examined these injustices from a global perspective, though with a note that they could also be considered from a domestic perspective. While I contend that all the injustices should be addressed, I will focus on the unfair distribution of renewable energy benefits in this thesis because it is particularly troubling from an ethical perspective since it is connected with the underlying structural issues encountered by developing and low-income countries, as discussed in this chapter. Addressing the unfair distribution of renewable energy benefits could also address the structural problems. Moreover, focusing on this injustice will enable me to assess my conception of global energy justice, which I develop in the next chapter.

[176] I discuss these issues in detail in Chapter 4.

Chapter 3

Theoretical Framework:

An African Communitarian Approach to Global Energy Justice

1. Introduction

The previous chapter of this thesis alluded to the importance of energy justice while discussing the benefits and injustices associated with the development of renewable energy. This argument had first appeared in the introduction to this thesis where I identified energy justice as a potentially useful framework for the conceptualisation, analysis, and remediation of the myriad justice issues manifesting across the entire energy lifecycle[1] and in relation to diverse energy forms,[2] particularly renewable energy,[3] not just within local jurisdictions,[4] but also at the transnational level.[5] The chapter had specifically identified the idea of global energy justice as providing the theoretical underpinnings for my main arguments. Global energy justice is a subset of energy justice which examines energy justice from a global perspective. To advance the thesis further, it is necessary to unravel fully the concept of energy justice. This constitutes the main ambition of the present chapter.

Following this brief introduction, I will set out the rationales for adopting energy justice as the theoretical framework for this thesis by discussing the normative and pragmatic functions of the concept. Thereafter I will develop an African communitarian approach to global energy justice based on the application of African communitarianism to some dimensions of justice that I identify in the chapter. African communitarianism provides a justifiable philosophical foundation for addressing renewable energy injustices. My interpretation of the moral and

[1] Benjamin K. Sovacool and others, 'New Frontiers and Conceptual Frameworks for Energy Justice' (2017) 105 Energy Policy 677, 677.

[2] See e.g., Tedd Moya Mose and Mohammad Hazrati, 'Is Energy Justice in the Fossil Fuel Industry a Paradox?' in Geoffrey Wood and Keith Baker, *The Palgrave Handbook of Managing Fossil Fuels and Energy Transitions* (Palgrave Macmillan 2020) 529. See also Ann M. Eisenberg, 'Just Transitions' (2019) 92 Southern California Law Review 273.

[3] See Benjamin K. Sovacool and others, 'Decarbonization and its Discontents: A Critical Energy Justice Perspective on Four Low-Carbon Transitions' (2019) 155 Climatic Change 581. See also Aparajita Banerjee and others, 'Renewable, ethical? Assessing the Energy Justice Potential of Renewable Electricity' (2017) 5(5) AIMS Energy 768.

[4] See Yuwan Malakar, Matthew J. Herington and Vigya Sharma, 'The Temporalities of Energy Justice: Examining India's Energy Policy Paradox Using Non-Western Philosophy' (2019) 49 Energy Research and Social Science 16. See also Elisabet Dueholm Rasch and Michiel Köhne, 'Practices and Imaginations of Energy Justice in Transition. A Case Study of the Noordoostpolder, the Netherlands' (2017) 107 Energy Policy 607.

[5] See generally Raya Salter, Carmen G. Gonzalez, and Elizabeth A. Kronk Warner (eds), *Energy Justice: US and International Perspectives* (Edward Elgar 2018).

ethical theory embodies the value of relationality. This distinguishes African communitarianism from the dominant Western philosophical ideas that are mainly based on individualism. This distinguishing feature makes African communitarianism a more suitable philosophical idea for addressing global challenges like the unfair distribution of renewable energy benefits in the international community. I will justify these claims in this chapter.

2. Rationales for Adopting Energy Justice

The rationales for adopting energy justice as a theoretical framework for this thesis are both normative and pragmatic. This section explores these rationales below and additionally addresses the question of whether there are alternatives to the energy justice concept.

2.1. The Normative Value of Energy Justice

Energy justice can serve as a justification or basis for the measures to be proposed towards the resolution of the renewable energy injustices identified in the previous chapters. The concept is essentially concerned with the values and themes that *should* be prized whenever energy problems manifest across all facets of energy systems.[6] This introduces an ethical dimension to the deployment of justice in relation to energy matters,[7] making energy justice an attractive ethical framework for identifying and conceptualising energy issues. This is moreso at the global level where unique energy problems have arisen in recent times because of the global movement to phase out the use of conventional energy sources.[8] With an ethical lens, energy justice conceptualises these energy problems as ethical or moral questions deserving of redress. The concept effectively provides a *raison d'être* for interventions in such situations.[9]

Energy justice for example provides an ethical justification for addressing the unfair distribution of renewable energy benefits in the international community. It can therefore justify the distribution of resources for the development of renewable energy in developing and low-income countries. This will enable these countries enjoy the benefits of renewable

[6] Benjamin K. Sovacool, *Energy and Ethics: Justice and the Global Energy Challenge* (Palgrave Macmillan 2013) 1-2.
[7] See Benjamin K. Sovacool, 'Energy Decisions Reframed as Justice and Ethical Concerns' (2016) 1 Nature Energy 16024.
[8] See Andreas Goldthau, Laima Eicke, and Silvia Weko, 'The Global Energy Transition and the Global South' in Manfred Hafner and Simone Tagliapietra (ed), *The Geopolitics of the Global Energy Transition* (Springer 2020) 319.
[9] Raphael J. Heffron and Kim Talus, 'The Evolution of Energy Law and Energy Jurisprudence: Insights for Energy Analysts and Researchers' (2016) 19 Energy Research and Social Science 1, 8.

energy such as climate change mitigation, energy access, energy security, and economic development, and for realising relevant SDGs and a range of human rights. On the occasions where the fair distribution of resources proves contentious, such as when it involves the direct or indirect transfer of financial or technological resources from wealthy countries to poor countries,[10] the concept of energy justice intervenes to frame such a distribution as morally justifiable because the distribution fulfils an ethical purpose. That purpose is usually furnished by the philosophical principle or idea underpinning the energy justice concept. Similar argument applies to the other renewable issues considered in this thesis, such as the imperative to ensure that countries dependent on fossil fuels for revenue generation do not lose out in the transition to cleaner energy usage. It also applies to situations where energy decisions connected with renewable energy projects generate adverse impacts on people and the natural environment.[11]

As a normative framework, energy justice could be further utilised as a balancing mechanism for weighing and negotiating the competing interests between the rapid development of renewable energy sources and the issues arising from that development. It is necessary to point out that this balancing function has been recognised in the energy justice scholarly literature, albeit with respect to general energy issues.[12] In tracing the evolution of energy law, for example, Raphael Heffron and Kim Talus have noted the absence of a philosophical foundation that could give energy law a more coherent form and enable it to realise its objectives.[13] This absence had also meant that energy law lacked a framework that could treat the management of energy resources in a more comprehensive manner.[14] The authors argue further that the introduction of energy justice could facilitate the balancing of the competing imperatives associated with resource management, thereby ensuring that energy law is structured for society's benefit.[15] This underscores the role of energy justice as a balancing mechanism, further highlighting its use as a normative framework.

[10] See e.g., Garrett Hardin, 'Lifeboat Ethics: The Case Against Helping the Poor' in William Aikens and Hugh LaFollette (eds), *World Hunger and Morality* (Prentice Hall 1977).
[11] See generally Roman Sidortsov, 'Energy Justice: The Yin and Yang Approach' in Raphael J. Heffron and Gavin F.M. Little, *Delivering Energy Law and Policy in the EU and the US* (Edinburgh University Press 2016) 377-378.
[12] See e.g., Heffron and Talus (n 9) 1.
[13] ibid 4.
[14] ibid.
[15] ibid 5.

2.2. The Pragmatic Function of Energy justice

In addition to its use as a normative framework, energy justice also has a pragmatic function that is directly relevant to this thesis. This pragmatic function examines the measures by which the identified renewable energy injustices could be addressed. The identification of such issues as ones requiring remediation could only have arisen as a result of the ethical searchlight which energy justice beams on those issues in the energy sector. As an illustration, this thesis is making the argument that the patchy development of renewable energy across the globe raises a problem of justice, more especially the problem of the unfair distribution of renewable energy benefits. After conceptualising the problem this way, the next question is how the problem should be resolved. In this specific context, the normative and pragmatic functions of energy justice are underscored. As Robert Bullard notes, energy justice '…develops *theoretical and practical* linkages between communities, nations, and generations with regard to energy systems.'[16]

The pragmatic function of energy justice can also be seen in the use of the concept as an evaluative mechanism. Energy justice is being utilised in this thesis to assess the measures aimed at addressing renewable energy injustices. It is worth mentioning that this function of the concept is already recognised in the scholarly literature on energy justice where, for example, energy justice has been used to assess the fairness or otherwise of certain low carbon energy policies.[17] For example, in one study, Benjamin Sovacool and others identified a host of potential injustices related to low-carbon transitions by adopting an energy justice conceptual framework which they had developed.[18] Utilising this framework – developed along the lines of distributive justice, procedural justice, recognition justice and cosmopolitan justice – the authors of the study highlighted potential injustices presented by nuclear power in France, smart meters in Great Britain, electric vehicles in Norway, and solar energy in Germany.[19] The result of this investigation was a discovery of one-hundred-and-twenty unique instances of energy injustices with these low-carbon transition policies,[20] though a number of the respondents from the semi-structured interviews that formed part of the methodological

[16] Emphasis added. Robert D. Bullard, 'Foreword' in Raya Salter, Carmen G. Gonzalez, and Elizabeth A. Kronk Warner, *Energy Justice: US and International Perspectives* (Edward Elgar 2018) xvi.
[17] See Sovacool and others, 'Decarbonization and its Discontents: A Critical Energy Justice Perspective on Four Low-Carbon Transitions' (n 3) 581.
[18] See ibid.
[19] ibid 583.
[20] ibid 583.

basis of the study argued that they did not see any disadvantages or 'losers' in the policies.[21] The authors, while conceding that this minority view was reflective of the broader perceived utility or net social desirability of a low-carbon transition compared to the old system of fossil fuel technologies, nevertheless argued that the identification of many injustices by other participants in the interviews only served to advance the claim that most of the low-carbon injustices are not immediately apparent, or they are invisible.[22] This highlights the evaluative function of the energy justice concept.[23]

2.3. Addressing the Question of Alternatives

I now turn to the final question in this section: are there alternative concepts that could be relied upon in place of energy justice? An answer to this question would determine whether there are other concepts that could perform the above functions of energy justice. A helpful answer is that energy justice is itself an alternative to the status quo. This partly explains why energy justice has generated scholarly interest in recent times,[24] having been described as a novel way of conceptualising and addressing energy problems,[25] and one that fosters a sustained and dedicated focus on the moral and ethical aspects of energy systems.[26] The status quo that energy justice seeks to replace is mainly underpinned by a set of Western philosophical ideas that ground decision-making in relation to energy development, production, and consumption.[27] An example is neoliberalism, which is antagonistic to government interference with the economic system, relying instead on a minimal state, and favouring the distribution of resources and things by the market and the determination of prices by the economic principles of demand and supply.[28] A neoliberal approach to the

[21] ibid 590.
[22] ibid 590.
[23] See Darren McCauley and others, 'Energy Justice in the Transition to Low Carbon Energy Systems: Exploring Key Themes in Interdisciplinary Research' (2019) 233-234 Applied Energy 916, 917.
[24] See Aileen McHarg, 'Energy Justice: Understanding the ''Ethical Turn'' in Energy Law and Policy' in Íñigo del Guayo and others (eds), *Energy Justice and Energy Law: Distributive, Procedural, Restorative and Social Justice in Energy Law* (Oxford University Press 2020) 15.
[25] See Benjamin K. Sovacool and Michael H. Dworkin, 'Energy Justice: Conceptual Insights and Practical Applications' (2015) 142 Applied Energy 435, 436; see also Benjamin K. Sovacool and Michael H. Dworkin, *Global Energy Justice: Problems, Principles, and Practices* (Cambridge University Press 2014) 5.
[26] Kirsten Jenkins, 'Setting Energy Justice apart from the Crowd: Lessons from Environmental and Climate Justice' (2018) 39 Energy Research and Social Science 117, 119. See also Bullard (n 16) xv ('Energy justice builds upon the work of environmental justice and climate justice by examining the moral impacts of energy systems.')
[27] Darren McCauley, *Energy Justice: Re-Balancing the Trilemma of Security, Poverty and Climate Change* (Palgrave Macmillan 2018) 3; Benjamin R. Jones, Benjamin K. Sovacool, and Roman V. Sidortsov, 'Making the Ethical and Philosophical Case for ''Energy Justice''' (2015) 37 Environmental Ethics 145, 145-146; Sovacool and Dworkin, 'Energy Justice: Conceptual Insights and Practical Applications' (n 25) 437-438.
[28] See Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1962); Manfred B. Steger and Ravi K. Roy, *Neoliberalism: A Very Short Introduction* (2nd edn, Oxford University Press 2021).

distribution of resources can lead to injustice. For example, free market principles may be significant in creating wealth by prizing self-interest, efficiency, and competition but may ultimately fail to distribute that wealth to all sections of the society, thereby creating inequality in the process.[29] This is one of the reasons why wealth is concentrated in the purse of the few in many societies. If the intervention of national governments in the form of bailouts to private corporations or subsidies to individuals in times of crises is taken into consideration,[30] then the failure of neoliberalism to deliver a just distribution of resources may be better appreciated.[31] In fact, neoliberalism has come under attack in recent times as being unsuited for addressing common global problems.[32]

The indifference of neoliberalism to the radical redistribution of resources makes it an unsuitable philosophical theory for addressing the unjust distribution of renewable energy benefits in the international community. Neoliberalism's emphasis on profit maximation and self-interest means that it is antagonistic to the distribution of resources based on need.[33] This is not ideal, given the rise in injustices produced by renewable energy development and utilisation. Neoliberalism can also aggravate the unfair distribution of renewable energy benefits,[34] in the sense that it is the root cause of the economic issues facing many developing and low-income countries,[35] since it supports the current global economic system.[36] As I noted in chapters one and two, the economic and other structural issues confronting these countries

[29] See Mukesh Sud and Craig V. VanSandt, 'Of Fair Markets and Distributive Justice' (2011) 99 Journal of Business Ethics 131.

[30] See Peter Sloman, 'The Rise of Redistribution in an age of Neoliberalism' (*Political Studies Association Blog,* 23 November 2018) <The rise of redistribution in an age of neoliberalism | The Political Studies Association (PSA)> accessed 09 September 2023.

[31] Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin Books 2013).

[32] In a revealing interview conducted in 2020, for instance, Noam Chomsky pointed out how neoliberalism was at the root of the world's ineffective response to the coronavirus pandemic. See Cristina Magdaleno, 'Chomsky on COVID-19: The Latest Massive Failure of Neoliberalism' (*EURACTIV,* 25 April 2020) <Chomsky on COVID-19: The latest massive failure of neoliberalism – EURACTIV.com> accessed 09 September 2023.

[33] See David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005) 7, who notes that neoliberal theory enables 'profitable capital accumulation' and represents 'the interests of private property owners, businesses, multinational corporations, and financial capital.' See also Sandel, *What Money Can't Buy* (n 31).

[34] See David Harvey, 'Neoliberalism as Creative Destruction' (2007) 610 The Annals of the American Academy of Political and Social Science 22.

[35] See Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge University Press 2004) 25 ('Some global egalitarians have argued, for instance, that as long as the global economic structure remains fundamentally capitalistic, citizens of developing and underdeveloped countries will continue to be exploited and deprived of their basic human needs […]').

[36] ibid 23. See also Kean Birch and Vlad Mykhnenko (eds), 'Introduction – A World Turned Right Way Up' in Kean Birch and Vlad Mykhnenko (eds), *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order?* (Zed Books 2010) 15.

have worsened the unfair distribution of renewable energy benefits, thereby implicating neoliberalism. These characteristics of neoliberalism therefore necessitate the adoption of a philosophical conception that will adequately address the unfair distribution of renewable energy benefits. Energy justice, as developed in this thesis, embodies that philosophical approach and is better able to conceptualise and address the injustice. Failure to adopt energy justice as a framework would, in fact, be a missed opportunity.

3. Interpreting Energy Justice

I will commence this section by discussing the complexities surrounding the definition of justice and thereafter introduce and discuss the two-step methodology for arriving at a conception of global energy justice.

3.1. Difficulties of a Definition – What is Justice?

A robust interpretation of energy justice must inevitably contend with the inherently contentious nature of justice.[37] As a treatise on justice begins, '"What is justice?" asked Socrates in Plato's *Republic,* and ever since, it has been one of the leading questions of philosophy and all social thinking.'[38] Although there is no generally accepted definition of justice, the concept has not ceased to engage the attention of theorists and thinkers over the centuries, from ancient philosophers like Plato[39] and Aristotle[40] to modern day theorists like John Rawls[41] and Martha Nussbaum[42] in several attempts to explore its depths and to deconstruct its diverse meanings. Owing mainly to the fact that the concept of justice appeals to virtually everyone, the multiple meanings associated with it is said to 'bewilder and discourage those who seek precision and clarity in their approach to political issues'[43] or to life more generally.

[37] See Sidortsov (n 11) 378 (''What is energy justice?' is a hard question to answer.')
[38] Robert C. Solomon and Mark C. Murphy, *What is Justice: Classic and Contemporary Readings* (Oxford University Press 1990) 3.
[39] See Plato, *Republic* (Oxford World's Classics, Oxford University Press 1994).
[40] See Aristotle, *The Nichomacean Ethics* (Oxford World's Classics, Oxford University Press 1980); see also Mark LeBar, 'Justice as a Virtue' in Edward N. Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Stanford University, Fall 2020 Edition) <https://plato.stanford.edu/archives/fall2020/entries/justice-virtue/> accessed 09 September 2023.
[41] John Rawls, *A Theory of Justice* (Harvard University Press 1971).
[42] Martha Nussbaum, *Creating Capabilities* (Harvard University Press 2011).
[43] Tom Campbell, *Justice* (3rd ed, Palgrave Macmillan 2010) 1.

Justice is said to be invaluable to the functioning of the political state[44] such that in Plato's perception of an ideal society, justice plays a prominent role.[45] Plato proposed justice as the panacea to the moral deficiencies dominant in Athenian democracy in his time, the same political system that is said to have unjustly forced Socrates, another Greek thinker, to die by drinking hemlock.[46] On his part, Lorenzetti, the Italian painter, is said to have featured justice prominently in his painting, *Allegory of Good and Bad Government,* ostensibly to advance the idea that justice is not just a virtue that rulers should possess, but also one that is fundamental to the institutions in a state.[47] Following this pattern of thinking, Rawls declared justice to be 'the first virtue of social institutions, as truth is of systems of thought'[48] in an explicit nod to the indispensability of justice to social, political and economic institutional frameworks or, as Rawls himself collectively referred to these, 'the basic structure of the society'.[49] The basic structure argument played a major role in his formulation of distributive justice and, as considered later in this chapter, in his hesitation to extend distributive justice beyond the territorial borders of a state.

Political philosophy is however not the only area of human endeavour that has offered an insight into the nature of justice. Justice is in fact directly relevant to the legal sphere, for instance. This has made the concept an attractive field for legal scholars. When it comes to the interaction between law and justice, the criminal justice apparatus offers a notable example. It typically constitutes the idea of legal justice, distinguished from the social or reformative dimension of justice which broadly concerns the subject of distribution of resources and whether these have been structured in a fair manner.[50] The idea of punishment in this form of legal architecture is said to be responsible for the popular conception of justice as being inevitably threaded to legal rules and the pronouncements of judicial officers and other institutions.[51] Nevertheless, the perception of justice as a blindfold, scale, and sword that judges wield to weigh and punish or exonerate individuals[52] goes beyond modern criminal

[44] David Miller, *Political Philosophy: A Very Short Introduction* (Oxford University Press 2003) 74.
[45] See D.R. Bhandari, 'Plato's Concept of Justice: An Analysis' (1998) 3 The Paideia Archive: Twentieth World Congress of Philosophy 44, 44.
[46] ibid.
[47] Miller, *Political Philosophy: A Very Short Introduction* (n 44) 74.
[48] Rawls, *A Theory of Justice* (n 41) 3.
[49] ibid 7.
[50] D.D. Raphael, *Concepts of Justice* (Oxford University Press 2001) 4.
[51] See Sovacool and Dworkin, *Global Energy Justice: Problems, Principles, and Practices* (n 25) 9-10.
[52] See generally Valérie Hayaert, 'The Paradoxes of Lady Justice's Blindfold' in Stefan Huygebaert and others (eds), *The Art of Law: Artistic Representations and Iconography of Law and Justice in Context, from the Middle Ages to the First World War* (Springer 2018) 201.

law. For example, at the time when Homer's *Iliad* was written, the idea of punishment or revenge for wrongdoing was considered a primary component of justice.[53] The same can also be said of the period when the Old Testament of the Christian Bible was dominant. The idea of punishment would be tempered by the introduction of other ingredients such as social cohesion and mercy to the perception of justice.[54] Mercy is especially represented in the New Testament of the Christian Bible and may be illustrated by the following quote drawn from the diary of Saint Faustina Kowalska: 'Write this down: Before I come as the just Judge, I shall come first as the King of mercy.'[55] Punishment nevertheless is said to still maintain a central position in the idea of justice at least in 'every imperfect society.'[56]

A sustained insight into the nature of justice can be gleaned from the following definition contained in the *Institutes of Justinian*: 'justice is the constant and perpetual will to render to each his due.'[57] David Miller has argued that certain characteristics may be extracted from this definition to foster a deeper understanding of the concept of justice. Firstly, according to Miller, justice is said to concern itself primarily with how individuals are treated and would require everyone to be treated the right way, irrespective of the kind of society in which the individuals find themselves.[58] Saying with exactitude what the right form of treatment should be is a different matter entirely and one answered by the various contentious principles or conceptions of justice that have been propounded to answer such questions, such as those advanced by thinkers like John Rawls[59], Amartya Sen[60] or Thaddeus Metz.[61] One factor that appears important here is that the ill treatment of people could be cited as a form of injustice. Such ill treatment could arise in different ways and at different times. Secondly, justice entails that there should be a modicum of consistency in how a person is treated; this would mean that people must be treated non-arbitrarily.[62] Owing to the fact that justice requires consistency in the treatment of persons, this is said to explain the reason why acting justly –

[53] Solomon and Murphy (n 38) 4.
[54] ibid 4.
[55] Saint Maria Faustina Kowalska, *Diary of Saint Maria Faustina Kowalska: Divine Mercy in my Soul* (originally published 1981, The Congregation of the Sisters of Our Lady of Mercy 2019) para 83.
[56] Solomon and Murphy (n 38) 4.
[57] David Miller, 'Justice' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition) Section 1 <https://plato.stanford.edu/archives/fall2021/entries/justice/> accessed 09 September 2023.
[58] Miller, *Political Philosophy: A Very Short Introduction* (n 44) 76.
[59] See Rawls, *A Theory of Justice* (n 41).
[60] See Amartya Sen, *The Idea of Justice* (Penguin Books 2010).
[61] Thaddeus Metz, *A Relational Moral Theory: African Ethics in and Beyond the Continent* (Oxford University Press 2021).
[62] Miller, *Political Philosophy: A Very Short Introduction* (n 44) 76.

or doing justice – appears to be about following procedures largely established by rules or laws, since these could assure consistency by specifying what is to be done in different contexts.[63] Miller nevertheless argues that insisting too rigidly on consistency may produce difficult-to-justify outcomes which are also essentially unjust.[64] Based on this, the further element of *relevance* is added to argue that people must be treated equally and non-arbitrarily unless there are considerations relevant to the treatment that justify a deviation from this principle.[65] This could be referred to as substantive justice and is usually more favourable than a rigid insistence on rules and procedures. Finally, justice is said to engage the idea of proportion, meaning that when people are 'treated differently for relevant reasons, the treatment they receive should be proportionate to whatever they have done, or whatever feature they have, that justifies the inequality.'[66]

The above discussion has outlined how difficult it is to define or interpret justice. Nevertheless, it has shone a light on the nature of justice. The discussion may be regarded as important background material that is carried through this thesis, especially in the quest to develop an appropriate conception of global energy justice.

3.2. Methodology – Charting a Course for the Interpretation of Energy Justice

Before proposing the methodology to be used for defining energy justice, the point may be restated that the difficulty inherent in defining the concept of justice is also reflected in attempts to interpret the energy justice concept or at least any attempt to have a single generally accepted definition of the concept. An important point to stress here is that energy justice is a concept that engages a variety of disciplines and as has been opined, it '…is a concept that is being used across many academic disciplines in energy research at the moment.'[67] As Aileen McHarg has observed, energy justice 'has attracted the attention not only of legal scholars, but also geographers, sociologists, philosophers, political scientists, and others.'[68] We might therefore expect that theorisations of the concept would reflect those varied backgrounds, with different theorists interpreting the concept in ways that reflect their orientations and resonate with their research preoccupations and needs. This is a point that

[63] ibid.
[64] ibid 76-77.
[65] ibid 77.
[66] ibid.
[67] Raphael J. Heffron and Darren McCauley, 'The Concept of Energy Justice Across the Disciplines' (2017) 105 Energy Policy 658, 658.
[68] McHarg (n 24) 15.

appears under-emphasised within energy justice scholarship. Due to the potential of having varied interpretations of energy justice, it has been contended that the assortment of academic orientations poses a communication risk among energy justice scholars who have employed terminologies and expressions peculiar to their disciplines to describe concepts and terms that appear in energy justice scholarship.[69] This might eventually lead to confusion as to the exact meaning of the concept.[70] Nevertheless, this appears to be an inescapable outcome because of the contentious nature of justice, though this should not prevent the building of consensus round the meaning of energy justice which could be adopted within the energy justice scholarship community.[71] As McHarg has suggested, energy justice scholars must clarify their interpretations of the concept and justify why particular interpretations or approaches are being advanced.[72]

The two-step methodology for developing a conception of global energy justice involves the identification of three dimensions of justice, with a focus on global justice; and the selection of a conception of justice that provides theoretical guidance on the operation of the identified dimensions of justice.[73]

3.2.1. First Step – Dimensions of Justice

Certain dimensions of justice are important to my interpretation of energy justice.[74] These dimensions of justice broadly reflect the social and reformative aspects of justice which hold a great appeal, especially to theorists and reformers seeking to reform a social, political, or legal order. They may be broadly classed under the umbrella of social justice which mainly 'concerns the distribution of benefits and burdens throughout a society, as it results from the major social institutions – property systems, public organisations, etc.'[75] The following three dimensions of justice are therefore of significance to this thesis:

3.2.1.1. Distributive Justice

[69] Kirsten Jenkins and others, 'Towards Impactful Energy Justice: Transforming the Power of Academic Engagement' (2020) 67 Energy Research and Social Science 1, 2.
[70] For a critique of current energy justice scholarship, see McHarg (n 24) 29-30.
[71] Jenkins and others (n 69) 2.
[72] See McHarg (n 24) 30.
[73] See ibid 20-25.
[74] See generally Íñigo del Guayo and others, 'Introduction – Energy Justice: Defining the Scope' in Íñigo del Guayo and others (eds), *Energy Justice and Energy Law: Distributive, Procedural, Restorative and Social Justice in Energy Law* (Oxford University Press 2020) 6.
[75] David Miller, *Social Justice* (Oxford University Press 1976) 22.

Distributive justice essentially concerns the fair distribution of the benefits and burdens of primary goods across society.[76] Primary goods in this instance refer to wealth, opportunities, and other resources. These are the things that enable people to lead fully functional lives. Distributive justice typically involves three factors: First, it examines what types of things are to be distributed; second, it considers the beneficiaries of distribution as well as the objects to bear responsibility for such distribution; and third, it interrogates the fundamentals upon which a fair distribution should be made.[77] Principles of distributive justice attempt to provide answers to these questions, aiming for just distributive outcomes across all segments of the society.[78] Those principles are also known as conceptions or theories of justice.

3.2.1.2. Recognition justice

Recognition justice is premised on the argument that it is insufficient to talk of the fair distribution of things without first examining the root causes of maldistribution. Based on this, a sole focus on distributive justice merely paints an inchoate or incomplete picture. Recognition justice was pioneered by justice scholars[79] who had the ambition of altering traditional distributive justice's fixation on distribution. These scholars sought to present a mirror to distributive justice by proposing an alternative dimension of justice that broadly examined the underlying causes of maldistribution.[80] For these scholars, it was reasonable to talk of distribution, but only in consonance with the myriad factors that may not only affect the subject of distribution but that may also lead to one of two situations: objects of distribution unjustly missing out on the benefits of primary goods or objects of distribution unfairly bearing the burden of distribution. Identity, cultural factors, and other differences and how these affect distributional outcomes fall within the realm of issues addressed by recognition justice scholars.

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[76] A. Kaufman, 'Theories of Distributive Justice' in Ruth Chadwick (ed), *Encyclopedia of Applied Ethics* (2nd edn, Academic Press 2012) 842.

[77] Julian Lamont and Christi Favor, 'Distributive Justice' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition) Section 1 <https://plato.stanford.edu/entries/justice-distributive/> accessed 09 September 2023.

[78] Michael Allingham, 'Distributive Justice' in *The Internet Encyclopedia of Philosophy* <https://www.iep.utm.edu/dist-jus/> accessed 09 September 2023.

[79] For example, Iris Young and Nancy Fraser. See Iris Young, *Justice and the Politics of Difference* (Princeton University Press 1990); Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postcolonialist" Condition* (Routledge 1997). It is interesting to note that the pioneers of this form of justice were women. It implies that gender features prominently in discussions on resource maldistribution.

[80] David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press 2007) 14.

3.2.1.3. Global Justice

While it may appear settled that both distributive justice and recognition justice could be perceived at the domestic level in the form of domestic justice, there is the larger question as to whether they can be extended to the global level.[81] Significant to this question is the role of global justice which aims to extend distributive justice, recognition justice, and other dimensions of justice to the international level, ultimately grounding justice obligations at that level of governance.[82] As I noted in the introductory chapter of this thesis, the need for global justice is justified by the increase in problems that affect the world as a whole or problems whose solutions lie beyond territorially defined borders.[83] Nevertheless, there are intense debates on the theoretical possibility of extending domestic justice to the global level, some of which are visited later in this section. For now, it is helpful to note that an account of global justice is said to have the following key functions:[84]

i. Identifying and clarifying what concerns should be regarded as questions of global justice;
ii. Canvassing measures towards the resolution of these questions;
iii. Locating the burden bearers of global justice, essentially answering the question about who should bear the cost of resolving the identified global justice problems;
iv. Discussing the responsibilities of agents in terms of resolving these questions; and
v. Advancing a philosophical principle or idea to underpin items (a)-(d) above.

3.2.2. Second Step – Conception of Justice

It is necessary to consider the conception of justice that will underpin the dimensions of justice discussed above. While it is possible to adopt the dimensions of justice as a standalone framework to evaluate energy policies as has been done by some energy justice scholars,[85] it

[81] See Charles R. Beitz, 'Cosmopolitanism and Global Justice' in Gillian Brock and Darrel Moellendorf (eds), *Current Debates in Global Justice* (Springer 2005) 11-12. Some philosophers have denied global justice. See e.g., Thomas Nagel, 'The Problem of Global Justice' (2005) 33(2) Philosophy and Public Affairs 113; David Heyd, 'Justice and Solidarity: The Contractarian Case Against Global Justice' (2007) 38(1) Journal of Social Philosophy 112.
[82] See Thomas Pogge, 'Priorities of Global Justice' (2001) 32(1/2) Metaphilosophy 6. *Cf* Nagel (n 81).
[83] See Arnaud Kurze and Christopher K. Lamont, *Mapping Global Justice: Perspectives, Cases and Practice* (Routledge 2023).
[84] Gillian Brock, 'Global Justice' in Edward N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Summer 2020 Edition) Section 1.2 <https://plato.stanford.edu/archives/sum2022/entries/justice-global/> accessed 09 September 2023.
[85] See e.g., Sovacool and others, 'Decarbonization and its Discontents: A Critical Energy Justice Perspective on Four Low-Carbon Transitions' (n 3).

may be said that an interpretation of energy justice without a conception of justice could be perceived as without depth or robust composition.[86] The importance of a justice conception is therefore difficult to understate. A conception of justice is said to 'formulate the criteria we should use to identify what sort of situations and actions are properly described as just or unjust, thus answering the normative questions 'what is just?' or 'what does justice require?'.[87] These are questions that invite value judgements to be made. A conception of justice typically stipulates prescriptions that would help to close the gap between pure theorisation and practical realisation, a task that is considered inherently difficult.[88]

Conceptions of justice could be linked to the ethical question: 'What is the right thing to do concerning the question of justice?' Hazarding an answer to this question runs into obvious difficulties because of the diversity of views on what the right thing is in specific contexts. In the first section of this chapter, I argued that energy justice focuses on perspectives that should matter in relation to energy, signifying an ethical dimension in the adoption of energy justice by this thesis. That argument raised the question of right and wrong, thereby interrogating which actions should be so ascribed. Proffering an answer to the question as to what is right or wrong is expectedly difficult. For example Michael Sandel, in his aptly titled text, *Justice: What's the Right Thing To Do?*, recounts the runaway trolley car case to demonstrate that a utilitarian, who subscribes to the belief that justice should be positioned in such a manner as to produce the greatest benefit for the greatest number, would likely save five workers on a field who are about to be fatally harmed, rather than sparing the life of one worker on a side road; on the other hand, a libertarian who is committed to the absolute concept of self-ownership and autonomy and who believes in the prioritisation of property rights over other considerations, would likely question the moral justification of sacrificing one human being for the benefit of five persons.[89] In addition, there are other theorists who would answer this question by appealing to sentiments drawn from, and existing in, morality or religion or conceptions of the good life such as communal ties and solidarity.[90]

In choosing an appropriate conception of justice there is a need to pay attention to a conception of justice that is best able to conceptualise and address the injustices associated with renewable energy. This will necessitate going beyond the predominantly Western

[86] McHarg (n 24) 23-25.
[87] Campbell (n 43) 2.
[88] Solomon and Murphy (n 38) 4.
[89] See Michael J. Sandel, *Justice: What's the Right Thing to Do?* (Penguin Books 2010) 21-24.
[90] See ibid 244-269.

conceptions of justice that currently dominate the global energy system (as well as the global energy justice scholarly literature)[91] that have prevented equally significant and even more suitable non-Western philosophical ideas from making meaningful contributions. It is mainly owing to this reason that I adopt the ethical theory of African communitarianism. This ethical theory will be the only conception of justice to underpin distributive, recognition, and global justice. This is to ensure coherence and to avoid confusion, from a practical standpoint. The approach of adopting a single conception of justice is said to lead to more convincing outcomes.[92] The opposite of this approach is the adoption of a mix of conceptions of justice to apply to the dimensions of justice. In some cases, the approach of mixing conceptions of justice might inevitably arise when there is a need to develop a conception of energy justice that comprehensively captures disparate energy problems. For example, this approach appears in the work of Sovacool and Dworkin on global energy justice who adopt it to conceptualise and address a variety of energy issues such as energy externalities, energy poverty and access, energy subsidies and so on.[93] Nevertheless, this approach of mixing conceptions of justice has been criticised for, among other things, weakening the appeal and receptibility of energy justice.[94] Lack of appeal and low receptibility is unhealthy for the development of energy justice both as an academic discipline and as a tool for addressing energy injustices.[95]

3.2.2.1. African communitarianism

In the following paragraphs, I will discuss African communitarianism, beginning with an introduction to the basis of the ethical theory. Then, I will discuss the various interpretations of the concept, aiming to demonstrate why a moderate interpretation is necessary. I will equally address some of the criticisms against it. After that, I will conclude with the argument that African communitarianism is a justifiable ethical theory for conceptualising and addressing renewable energy injustices, particularly the unfair distribution of renewable energy benefits.

[91] See Chapter 1 for a review of the global energy justice literature.
[92] See McHarg (n 24) 24.
[93] See Sovacool and Dworkin, *Global Energy Justice: Problems, Principles, and Practices* (n 25).
[94] McHarg (n 24) 24.
[95] See ibid 30.

Communitarianism, as a philosophy, generally emphasises the significance of the community in shaping individuals' conceptions of the good life,[96] as well as extolling the virtues of human connectedness and interdependence within the context of communal values.[97] Within Western philosophical thought, communitarianism is often contrasted with liberalism which, amongst other things, emphasises individual autonomy and self-ownership and considers individuals as the sole determinant of the good life.[98] African communitarianism is a variant of communitarianism and while it shares some features with Western communitarianism, it is nevertheless unique in significant respects.[99]

To understand the ethical foundation of African communitarianism, it is pertinent to highlight its relationship with that body of ethical and moral philosophy known as African ethics. Oftentimes used interchangeably or in conjunction with morality, the ethics of a society have several functions, notably the setting of standards by which human behaviour is adjudged as either right or wrong; the stipulation of model forms of social interactions between members of the society; and the outlining of behavioural models that aim to achieve societal cohesion, as well as the meeting of the demands of justice and fairness in the society.[100] African ethics interact with the cultural norms and beliefs of the people and generally reflect 'African moral language and social structure and life'.[101] It is necessary to state however that African ethics finds applicability not just within the African society, but also beyond. This is an important point to make because of my ambition to apply African communitarianism to a dimension of justice such as global justice.

To clarify the use of terminologies, references to the descriptive adjective 'African' is to be understood as a reference to the mainly black and indigenous people living within the sub-Saharan African region, which is the area below the Sahara, and therefore excludes the Islamic Arabs of North Africa, for instance.[102] This is not to downplay the worldviews of the

[96] Amitai Etzioni, 'Communitarianism' in Michael T. Gibbons, *The Encyclopedia of Political Thought* (1st edn, John Wiley and Sons Ltd 2015) 1.
[97] Kwame Gyekye, 'Person and Community in Akan Thought' in Kwasi Wiredu and Kwame Gyekye (eds), *Person and Community: Ghanaian Philosophical Studies 1* (The Council for Research in Values and Philosophy 1992) 120.
[98] Etzioni (n 96) 1.
[99] See D.A. Masolo, 'Western and African Communitarianism: A Comparison' in Kwasi Wiredu (ed), *A Companion to African Philosophy* (Blackwell Publishing Ltd 2004) 483.
[100] Kwame Gyekye, 'African Ethics' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition) Introduction <https://plato.stanford.edu/archives/fall2011/entries/african-ethics/> accessed 09 September 2023.
[101] ibid Section 1.
[102] Thaddeus Metz, 'Toward an African Moral Theory (Revised Edition)' in Isaac E. Ukpokolo, *Themes, Issues and Problems in African Philosophy* (Palgrave Macmillan 2017) 97.

discounted region, which are important in their own right, but to demonstrate the uniqueness of the philosophy emanating from sub-Saharan Africa and its applicability to global justice. Although sub-Saharan Africa consists of diverse cultures that reflect the various countries that constitute the area, African communitarianism is salient among the societies in the region. While offering differing interpretations of African communitarianism, several African philosophers have argued that the concept is the dominant philosophical worldview within these societies.[103] African society is essentially communitarian, and to quote the African author Chinua Achebe, on this point, 'Africa believes in people, in cooperation with people.'[104] Ultimately, my aim in this chapter is to demonstrate how the central sub-Saharan philosophical concept of African communitarianism could inform global energy justice.

A final point concerning the use of terminologies is that I favour the expression 'African communitarianism'[105] in this thesis, even though the term 'Afro-communitarianism'[106] or 'Afro-communal' ethics[107] appears regularly in the African ethics literature. My use of 'African communitarianism' better reflects the sub-Saharan African roots of the ethical theory.

Since African communitarianism is a broad moral and ethical theory, it is helpful to note that African philosophers have canvassed differing interpretations of the philosophical concept in order to extract its normative contents. Based on the recurring motif of community, more especially within the etymological composition of African communitarian thinking, it is unsurprising to observe that some African scholars have sought to hinge their postulations on this communal value or theme as the core normative content of African communitarianism, seemingly elevating it above other considerations, such as individual liberty and human rights. For instance, Ifeanyi Menkiti has offered an interpretation of African communitarianism that suggests that the community is so indispensable to the life of the individual that it determines the very essence of that individual, declaring pointedly that a person is 'defined by reference

[103] Thaddeus Metz highlights and discusses the views of some of these philosophers in Thaddeus Metz, 'An African Theory of Social Justice: Relationship as the Ground of Rights, Resources and Recognition' in Camilla Boisen and Matthew C. Murray (eds), *Distributive Justice Debates in Political and Social Thought* (Routledge 2016) 175-176.

[104] Chinua Achebe, 'Africa is People' in Chinua Achebe (ed), *Africa's Tarnished Name* (Penguin Classics 2018) 54.

[105] See Thaddeus Metz, 'African Communitarianism and Difference' in Elvis Imafidon (ed), *Handbook of African Philosophy of Difference* (Springer 2020) 31. See also Masolo (n 99)

[106] Thaddeus Metz, 'An African Egalitarianism: Bringing Community to Bear on Equality' in George Hull (ed), *The Equal Society: Essays on Equality in Theory and Practice* (Lexington Books 2015) 203.

[107] See e.g., Thaddeus Metz, 'Relational African Values between Nations: Bringing Communion to the Global Order' in Francis Onditi and others (eds), *Contemporary Africa and the Foreseeable World Order* (Lexington Books 2019) 133.

to the environing community'.[108] The community dictates the conception of the good life that the individual should pursue leaving nothing to personal initiative or determination.

Menkiti extends his views to the concept of personhood. Personhood is the state or condition of being a human person.[109] According to Menkiti, a person's realisation of personhood is not an assured goal, meaning that a person may even fail to attain personhood.[110] The implication of Menkiti's view is that the community assumes an all-powerful existence over the individual down to the question whether the individual is a human person or not. Menkiti is said to claim that the 'community takes ontological and epistemological priority over the individual.'[111] The implication of this interpretation is that it may present African communitarianism as an extreme philosophical concept. Pointing this out is not a fatal indictment of African communitarianism, but as Masolo has remarked, it opens the theory to abuse and misunderstanding and makes it difficult to justify such other concepts as human rights that may appear antithetical to the very idea of community omnipotence.[112] One other criticism that has arisen against radical African communitarianism is its equating the common good with consensus which effectively 'absorbs multiple viewpoints through a totalitarian uniformity.'[113] In a pluralistic world, radical African communitarianism is difficult to justify or defend. Against competing philosophies such as those with roots in Western liberalism, the powerful presence of the community would make African communitarianism less appealing, especially because those other philosophies appear to make provisions for individuals to determine what moral goals they should pursue.[114] This situation inevitably calls for moderation in the primacy of the community within African communitarianism in order to make allowance for not only human rights but also the individual pursuit of the good life.

Consequently, counter interpretations have sought to steer a middle course between the community's importance and the person's status, offering a moderate form of African communitarian thinking that is plausible and defensible. Some of these interpretations seek to

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[108] See Ifeanyi A. Menkiti, 'Person and Community in African Traditional Thought' in Richard Wright (ed), *African Philosophy: An Introduction* (University Press of America 1984) 171.
[109] Frederick J. White, 'Personhood: An Essential Characteristic of the Human Species' (2013) 80(1) The Linacre Quarterly 74, 75-78.
[110] See Menkiti, 'Person and Community in African Traditional Thought' (n 108).
[111] Bernard Matolino, 'Radicals versus Moderates: A Critique of Gyekye's Moderate Communitarianism' (2009) 28(2) South African Journal of Philosophy 160, 161.
[112] Masolo (n 99) 495.
[113] Michael Onyebuchi Eze, 'What is African Communitarianism? Against Consensus as a Regulative Ideal' (2008) 27(4) South African Journal of Philosophy 386, 386.
[114] Examples being libertarianism. See Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974).

find relevance for concepts asides the community. In framing the question whether an individual may have an existence independent of the community as a metaphysical one, Kwame Gyekye argues that personhood could be determined independently of the community. Admitting that the African society is inherently communal and the person necessarily communitarian by nature, Gyekye nevertheless argues that 'the self, by virtue of – or by exploiting – its other natural attributes (beside the natural attribute of being communal) essential to its metaphysical constitution, can from time to time take a distanced view of its communal values and practices and reassess or revise them.'[115] Some of these other natural attributes include human dignity and the capacity to reason. The implication of this is that the community, though important in the life of the individual, cannot completely determine the essence of the human person.[116]

In respect to human rights specifically, Gyekye argues that communitarianism should not be antithetical to the idea of humans possessing rights for different reasons including the fact that the individual possesses the inviolable quality of individuality and personal will.[117] Despite the acknowledgement of the possibility of rights existing within communal settings within a moderate conception of African communitarianism, Gyekye is quick to nuance his position by noting that 'communitarianism cannot be expected to make a fetish of rights; thus rights talk will not be brought to the front burner of its concerns and preoccupations'[118] not least because of the communitarian preoccupation with communal values for the upliftment of the society.[119] Nevertheless, it is significant that a middle course is acknowledged with that course making room for concepts such as human rights within moderate African communitarianism though, as Gyekye has observed, communitarianism will lay more emphases on duties which individuals owe other members of the community – especially the least well-off,[120] without impeaching the status of individual rights.[121] The burden of duty placed on the individual and the ensuing emphasis on duty, rather than on rights, is due to 'the demands of the relational character of the person in the wake of his natural sociality…[which]… makes him naturally oriented to other persons with whom he must live in relation.'[122]

[115] Gyekye, 'Person and Community in Akan Thought' (n 97) 113.
[116] ibid 113.
[117] ibid 114. See also Kwame Gyekye, *African Cultural Values: An Introduction* (Sankofa Publishing 1996) 47.
[118] Gyekye, 'Person and Community in Akan Thought' (n 97) 115.
[119] ibid 115.
[120] ibid 116.
[121] ibid 119.
[122] ibid 118.

In further seeking a moderate formulation of African communitarianism, Thaddeus Metz offers a conception of social justice founded on African communitarian values and themes. Metz's interpretation of African communitarianism is based on the concept of relationality which focuses 'on the idea of living communally or relating to others in a harmonious way.'[123] For Metz, in order to fully grasp the meaning and significance of relationality, it is best to proceed from two related steps, namely the question of the location of moral status or moral value; and how the answer to the latter question could help to distinguish relationality from other competing ethical concepts, especially those drawn from a Western ethical worldview.[124]

In locating the moral status for the purpose of African communitarianism, Metz argues that this enquiry settles the question of what quality or feature merits moral contemplation for its own sake.[125] According to Metz, theories of social justice built on the location of moral status might be usefully categorised as either individualist, corporatist, or relational.[126] An individualist theory of justice, according to Metz, 'implies that properties intrinsic to an individual are what ground moral status. It is the view that features of an individual that make no essential reference to anything outside are what ground morality.'[127] This accounts for why philosophies such as Kantian ethics extol the virtue of human dignity, something that is inherently internal to the human person.[128] In contrast, corporatism holds that 'moral status inheres not in properties internal to an individual, but rather to those of a group.'[129] Corporatism could be read to cover some ideas of communitarianism, including the versions said to be found both within the Western hemisphere and the Global South, particularly the African continent. Conceptually, both individualist and corporatist conceptions of justice represent two extreme ends of a pole. In order to negotiate a balance between both, Metz argues the need to call forth a third conception of justice. Thus, according to Metz, relationality seeks to bridge the apparently inflexible theoretical chasm between individualism and corporatism. It draws from relational themes found among the sub-Saharan people of

[123] Metz (n 103) 176. Metz is an American philosopher who moved to the African continent many years ago and has written extensively on African communitarianism.
[124] ibid 172.
[125] ibid 172.
[126] ibid 172.
[127] ibid 172.
[128] In a latter work, Metz attempts to reconstruct the foundation of human dignity, arguing for relationality to be the basis of human dignity. See Thaddeus Metz, '*Ubuntu* as a Moral Theory and Human Rights in South Africa' (2011) 11 African Human Rights Law Journal 532.
[129] Metz, 'An African Theory of Social Justice: Relationship as the Ground of Rights, Resources and Recognition' (n 103) 173.

Africa and seeks to incorporate certain values of the political and moral community as fundamental constituents.[130] From this well of moral thought, Metz constructs his moral principle of relationality which focuses on 'the idea of living communally or relating to others in a harmonious way.'[131]

What does it then mean to carry on a communal or harmonious relationship with members of a community? Metz answers this question by promoting two different but inter-related values namely, identity and solidarity. Hence, identifying with others entails the awareness that one's existence is intricately bound up or tied with that of others.[132] It requires seeing oneself as part of a collective and enjoying and promoting deep ties with every member of that collective.[133] This expresses a 'psychological attitude', one which promotes a pluralised way of relating with others with the result that the singular personal pronoun 'I' is de-emphasised while the plural personal pronoun 'We' is promoted.[134] Identifying with others also requires engaging in co-operative behaviour which, amongst other things, includes 'being transparent about the terms of interaction […] adopting common goals and, at the extreme end, choosing for the reason that "this is who we are".'[135]

Expressing the act of solidarity with others includes being aware about the conditions of others in the relationship and engaging in behavioural acts that make 'the other better off or even a better person' for their own sake.[136] In more general terms, solidarity requires 'achieving the good of all… acting for the common good, serving others in the community, and being committed to the good of one's society (or rather its members).'[137] Importantly, it '…includes a belief that the other merits aid for her own sake, an empathetic awareness of the other's condition, and a sympathetic emotional reaction to this awareness.'[138] Metz argues that both identity and solidarity are ideals that would achieve optimum results if they were applied together, although they are values that could stand alone separately.[139]

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[130] Metz, 'An African Egalitarianism: Bringing Community to Bear on Equality' (n 106) 204-205.
[131] Metz, 'An African Theory of Social Justice: Relationship as the Ground of Rights, Resources and Recognition' (n 103) 176.
[132] ibid 177.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Metz, 'An African Egalitarianism: Bringing Community to Bear on Equality' (n 106) 207.
[139] Metz, 'Ubuntu as a Moral Theory and Human Rights in South Africa' (n 128) 538.

Proceeding from the above, Metz presents the following moral principle which underpins his theory of social justice:

> An act is right if it prizes other persons in virtue of their natural capacity to relate harmoniously; otherwise, an act is wrong, and especially insofar as it prizes discordance. An agent must honour those who can by nature be party to relationships of identity and solidarity, and she ought above all to avoid honouring relationships of division and ill-will.[140]

Although African communitarianism is a significant moral and ethical theory for framing issues of justice or the questions of rightness or wrongness of human actions and conducts, it is nevertheless not free from criticisms. The discontent with an extreme version of the philosophy, which I highlighted in the preceding paragraphs, could be cited as an example. It is owing to that discontent that a moderate version of the philosophy has emerged and gained prominence. The emergence of this restricted and compatibilist form of African communitarianism has not, however, prevented ongoing criticisms of the philosophy. One criticism relates to Gyekye's apparent concession that African communitarianism would not make a fetish of rights nor be obsessed with rights, extolling instead the place of duty owing to the relational nature of the individual.[141] The criticism also involves Gyekye's seeming admission that the 'communitarian society, perhaps like any other type of human society, deeply cherishes the social values of peace, harmony, stability, solidarity, and mutual reciprocities and sympathies.'[142] Bernard Matolino has labelled Gyekye's assertions as a volte face and a contradiction.[143] The crux of Matolino's criticism is that if Gyekye wanted to carve a niche for human rights within African communitarian thinking, then he should not be making references to values such as harmony, stability, solidarity, and mutual cooperativeness, all of which are hallmarks of communitarianism. Doing so would strip moderate African communitarianism of its essential features and make it like the radical version of the philosophy. Matolino closes his criticism by noting that both forms of African

[140] Metz, 'An African Theory of Social Justice: Relationship as the Ground of Rights, Resources and Recognition' (n 103) 178.
[141] Gyekye, 'Person and Community in Akan Thought' (n 97) 115-118.
[142] Kwame Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (Oxford University Press 1997) 65.
[143] Matolino (n 111) 168.

communitarianism are 'not obsessed with rights and they value harmony, peace, stability and solidarity.'[144]

It is argued that Matolino's criticism is relevant, but it fails to undermine the pillars upon which moderate African communitarianism stands. Gyekye's argument that the individual has personal qualities that make her a person is attractive and defensible. His nuanced concession that the individual is relational does not rebut his original postulation on the presence of rights in African societies. Matolino appears to have capitalised on that nuanced concession to say that Gyekye failed 'to show that radical communitarianism abridges individual rights and oppresses autonomy whereas moderate communitarianism seeks to protect these individual endowments.'[145] Yet, by advancing a moderate form of African communitarianism, Gyekye sought to demonstrate the perils of relying on the radical form of the philosophy as a guiding ethos of the community. The fact that radical African communitarianism could be utilised to justify the taking away of human rights or that it could be used to justify a myopic view of the world is problematic. This is one of the reasons communitarianism has drawn criticisms from Western philosophers. Martha Nussbaum for instance draws attention to the danger of unhealthy attachment to national values, since it casts a pall on the theme of solidarity and interconnectedness.[146] Both themes are increasingly important in a world where distances are continually bridged. Writing about patriotism in America, which extols the value of seeing one's country first and above all else, Nussbaum muses as follows:

> As students here grow up, is it sufficient for them to learn that they are above all citizens of the United States but that they ought to respect the basic human rights of citizens of India, Bolivia, Nigeria, and Norway? Or should they – as I think – in addition to giving special attention to the history and current situation of their own nation, learn a good deal more than they frequently do about the rest of the world in which they live, about India and Bolivia and Nigeria and Norway and their histories, problems, and comparative successes?[147]

Ultimately, there is a necessity to present a version of African communitarianism, as Gyekye did, that is alive to individual differences with a recognition of the place of identity, solidarity,

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[144] ibid.
[145] ibid 169.
[146] Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' in Joshua Cohen (ed), *Debating the Limits of Patriotism, Martha C. Nussbaum with Respondents* (Beacon Press 1996) 3.
[147] ibid 6.

duty, and other relational characteristics. The presence of these relational values does not impeach the existence of human rights, as moderate African communitarianism is liberal enough to accommodate human rights.[148] The existence of these values in fact makes human rights communitarian in nature, as opposed to 'individualistic human rights'.[149] Scholars have even utilised communitarian themes such as identity and solidarity to reconstruct human rights within African communitarianism.[150] This lends human rights conceived within African communitarianism a conceptual edge over human rights espoused mainly within Western liberal philosophical ideas.

In addition to the above criticisms, scholars have also subjected Metz's relational interpretation of African communitarianism to critical scrutiny. Olusegun Samuel and Ademola Fayemi for example argue that Metz's theory is problematic for two main connected reasons. The first is the claim that Metz's insistence that his theory prizes the capacity of humans to be the objects and subjects of communal relationships is external to African thought and undermining of the attractiveness of the theory.[151] The authors specifically note that this makes Metz's theory overtly anthropocentric for locating moral status in the capacity of humans to enter harmonious relationships. They claim that the theory 'ignores that we do face situations of conflicting obligations in human-to-human relationships, human-to-animal relationships, animal-to-animal relationships and human/animal-to-inanimate environment relationships.'[152] The second reason, flowing from the first, is that the relational theory is improbable as a tool for justifying interventions in environmental problems because of its emphases on anthropocentrism.[153] It is claimed that the theory is specifically 'inadequate for engaging biodiversity loss.'[154] The authors suggest the inclusion of other principles found within African ethics as complements. These include 'transparency, openness, respect and acceptability.'[155]

Concerning the charge of anthropocentrism, Metz has replied to his critics by acknowledging that while his interpretation of African communitarianism is essentially anthropocentric since

[148] Munamato Chemhuru, 'African Communitarianism and Human Rights: Towards a Compatibilist View' (2018) 65(4) Theoria 37, 38 and 48-54.
[149] ibid 45.
[150] A prominent example is Metz, '*Ubuntu* as a Moral Theory and Human Rights in South Africa' (n 128).
[151] Olusegun Steven Samuel and Ademola Kazeem Fayemi, 'A Critique of Thaddeus Metz's Modal Relational Account of Moral Status' (2020) 67(1) Theoria 28, 29.
[152] ibid 33-34.
[153] ibid 40.
[154] ibid.
[155] Ibid.

it considers moral status based on certain capacities (that is, identity and solidarity) of humans, his theory is nevertheless 'not anthropocentric in the most clearly questionable forms.'[156] This implies that this version of African communitarianism, moderate in nature, cannot be used to justify evil, especially against non-human species. This is a reasonable point. It should also be pointed out that, while Metz's critics insist that his capability approach to moral status is problematic, they still appear to agree with the broad foundation of relationality, declaring that 'Metz is right that the appropriate basis for moral status is relationality.'[157]

To conclude, moderate African communitarianism remains a justifiable philosophical concept due to its emphasis on relationality, its core normative content. The essence of relationality is seen in its use as a normative basis for justifying and launching interventions against global problems arising in the context of renewable energy development and other areas that engage the international community. These global problems are better conceptualised and addressed based on a philosophical notion that prizes relationality, expressed through identity and solidarity, as opposed to one that is essentially based on individualism, as with many Western philosophical ideas.[158] When a philosophical concept like moderate African communitarianism emphasises communal or harmonious relationships, it will endorse measures aimed at realising such relationships. Those measures are typically facilitated through instrumental devices like law and regulation. From a legal perspective, therefore, African communitarianism supplies the normative foundation for the intervention of the law and, in this light, operates purely as a normative framework for addressing global problems.

Due to its emphasis on relationality, African communitarianism is thus the appropriate conception of justice to underpin distributive, recognition, and global justice, which I discussed in the previous section as the key dimensions of justice.

3.2.3. Application of African Communitarianism to Distributive Justice, Recognition Justice, and Global Justice

What effect does moderate African communitarianism, particularly the theme of relationality, have on the dimensions of justice contained in the first step of the two-step methodology? For distributive justice, it is to be found out first what thing is to be distributed and then how

[156] Thaddeus Metz, 'An African Theory of Moral Status: A Relational Alternative to Individualism and Holism' (2012) 15(3) Ethical Theory and Moral Practice 387, 400.
[157] Samuel and Fayemi (n 151) 35.
[158] See Thaddeus Metz, 'How the West was one: The Western as Individualist, the African as Communitarian' (2015) 47(11) Educational Philosophy and Theory 1175.

that thing is to be distributed. According to Metz, 'treating people as special in virtue of (in part) their capacity to be party to a relationship of solidarity means helping them (when they are innocent).'[159] Such help could manifest as ensuring the well-being of people, including meeting their basic needs as well as more complex needs.[160] When it comes to what to distribute and what specific provisions African communitarianism makes for this, 'a central way for the state to exhibit solidarity with its residents would be to ensure they have access to things and services particularly useful for communing with others.'[161] The things and services sought to be distributed could assist people to carry on a shared way of life, in addition to caring for their quality of life.[162] Specifically, Metz argues that while a state (including one committed to the ideals of justice) cannot reasonably be expected to distribute everything, it should be able to distribute such resources that are '…particularly able to improve people's lives, where that includes not merely education, but also museums, outdoor artworks, libraries, healthcare, couples counselling, parks and natural beauty.'[163]

Regarding how these things and services are to be distributed, Metz proposes a balanced mode of distribution. This is distribution based on the family setting since the latter is a quintessential example of a communal relationship, an incubator that fosters the sharing of a way of life and the caring for others' quality of living.[164] Thus, distribution is to be arranged in such a way that everyone receives the amount of resources that will aid them to meet their needs, but with a proviso that such distribution should cater for those who are least well-off and those who have exceptional talents.[165] On closer inspection, it is to be discovered that this mode of distribution does not appear to favour strict egalitarianism, since distribution is made so that both the talented and the untalented could obtain '…something greater than a strictly equal share.'[166] The aim of this balanced form of distribution is to ensure that the least well-off are given enough resources that could make them flourish while the talented are given resources that encourage their talent and exceptionalism. This is an important point to stress because it demonstrates that African communitarianism does not punish merit. Since

[159] Metz, 'An African Theory of Social Justice: Relationship as the Ground of Rights, Resources and Recognition' (n 103) 181.
[160] ibid 182.
[161] ibid.
[162] ibid.
[163] Metz, 'An African Egalitarianism: Bringing Community to Bear on Equality' (n 106) 211.
[164] Metz, 'An African Theory of Social Justice: Relationship as the Ground of Rights, Resources and Recognition' (n 103) 183.
[165] ibid.
[166] ibid.

distribution in this way is based on a family model, Metz suggests that a figure who commands authority could oversee the mode of distribution and decide how the balanced distribution should be achieved. This is a potentially dicey point because it could lead to a charge of paternalism against African communitarianism. A way to respond to this is to recognise individual differences and to note that anyone could assume this authority. Metz has suggested that this mode of distributing resources could be replicated in the state. As he notes, 'If that is indeed the proper distribution for a family, and if a society ought to be modelled on an ideal family, then resources ought also to be distributed in a balanced way within a state's territory.'[167] Distribution made this way will correspond to justice as fairness. At the state level, there is little dispute as to who commands authority.

Recognition justice, on the other hand, considers larger social issues that are not necessarily matters of distribution but that could have an impact on distribution. Considering how African communitarianism could apply to matters of recognition, Metz argues that people who belong to certain constituencies, such as those based on sexuality or race or gender, should be treated with respect by the state or other agents.[168] Such treatment is predicated on the reasoning that those people have the capacity to enter a harmonious relationship. Showing them disrespect would therefore be a downgrade of that capacity which also makes a mockery of their inherent value. This idea can be extended by adding that recognition justice considers how individual features could contribute to maldistribution. While a fair amount of resources are to be made to the least well-off in the society, there is the basic question as to how they became least well-off in the first place. This must be answered even before distribution is being made.

As it concerns the global justice dimension, it is important to make the preliminary point that African communitarianism can make a significant contribution here. African philosophers have in fact sought to extend African communitarianism to the global level based on the understanding that African ethics have a major role to play with respect to global justice and global ethics.[169] Menkiti has for instance drawn attention to the specific role which an understanding of African philosophy could have on global justice by noting that, 'Africa being part of the larger world, African philosophy has a date to keep, conversations to make, with

[167] ibid 184.
[168] ibid 185.
[169] See e.g., Thaddeus Metz, 'Harmonizing Global Ethics in the Future: A Proposal to Add South and East to West' (2014) 10(2) Journal of Global Ethics 146.

the larger philosophical community.'[170] Dorine Norren specifically highlights the presence of relationality within the concept of Ubuntu and how this could be channelled towards the realisation of global developmental goals.[171] Ubuntu is a significant component of African communitarianism.[172] Although Ubuntu has been interpreted in diverse ways, the concept still accommodates the value of relationality or identity and solidarity, evincing a communitarian dialogic feature to the effect that an individual is not an autonomous entity that exists alone but one whose essence is highlighted by being in communion with others.[173] Sympathetic to humanistic considerations, the dialogic idea contained in Ubuntu ethics is often expressed in the African adage: *Umuntu ngomuntu ngabantu,* which in Zulu language means 'A person is a person because of other persons'.[174] An individual could only be regarded as a complete human being if they achieved Ubuntu.[175]

Applied to global justice, African communitarianism will demand that members of the international community see themselves as a part of a whole. It also means that members should engage in cooperative behaviour with one another, including providing aid and assistance to those least well-off in the society. The concept of duty can also be highlighted here as an expression of identity and solidarity, with members of the community regarding both identity and solidarity as an act of duty. In practical terms, this would mean developed countries expressing identity and solidarity with developing countries. Moving on further, the implication of applying African communitarianism to global justice is that the matters of distributive justice and recognition justice considered above will be elevated to the global level. One of the criteria of a theory of global justice is the identification of a problem. Another is how that problem should be remediated. When the identified problem engages distributive justice or issues of recognition justice for instance, the philosophy should say how that is to be arranged. African communitarianism has the capacity to achieve this, especially through its emphasis on relationality as expressed through identity and solidarity.

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[170] Ifeanyi A. Menkiti, 'Africa and Global Justice' (2017) 46(1) Philosophical Papers 13, 25.
[171] See Dorine Eva Van Norren, 'The Nexus Between Ubuntu and Global Public Goods: Its Relevance for the Post 2015 Development Agenda' (2014) 1(1) Development Studies Research 255.
[172] Mogobe B. Ramose, 'The Philosophy of *Ubuntu* and *Ubuntu* as a Philosophy' in PH Coetzee and APJ Roux (eds), *Philosophy from Africa: A Text with Readings (*2nd edn, Oxford University Press 2002) 230 ('*Ubuntu* is the root of African philosophy'.)
[173] Munyaradzi Felix Murove, 'Ubuntu' (2014) 59 (3-4) Diogenes 36, 37.
[174] ibid 37.
[175] ibid.

Notwithstanding the above, it might be incomplete to argue, without more, that African communitarianism could simply be extended from the domestic sphere to the international realm. Indeed, certain conceptual questions need to be addressed in order to give a balanced discussion. The first question has roots in Rawlsian thoughts and concerns the absence or otherwise of a global basic structure while the second touches the question whether duties could be owed to nationals of a country as well as foreigners. Both questions, which are also central to intense debates concerning the theoretical possibility of global justice, are each dealt with below.

3.2.3.1. Basic Structure of Society Argument

Discussions of global distributive justice are usually dominated by – or normally begin with – the influential writings and thoughts of Rawls on distributive justice.[176] Although Rawls developed what he termed as 'Justice as Fairness' which amongst other things stipulates that distributive justice should be structured to benefit the least well-off in the domestic state (Rawls called this the 'Difference Principle'),[177] he maintained a healthy scepticism about this principle's wholesale replication at the international level, permitting only a comparatively less onerous sense of justice to exist at the global level.[178] An ensuing debate has centred on the presence or otherwise of a basic structure of society at the global level.[179] Rawls's scepticism of global justice is founded on the belief that there is an absence of a basic structure at the global level. Rawls had intended the basic structure of the society to be the target of his account of justice, including his Difference Principle. An indication is found in Rawls' declaration that 'Justice is the first virtue of social institutions, as truth is of systems of thought.'[180]

Why is the basic structure of the society relevant to a conception of justice? It has been suggested that the basic structure is significant because of the gravitational effect it is thought to have on the ability of citizens to exist as humans,[181] including their ability to do other things

[176] See e.g., Michael Blake and Patrick Taylor Smith, 'International Distributive Justice' in Edward N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Summer 2020 Edition) Section 1 <https://plato.stanford.edu/archives/sum2020/entries/international-justice> accessed 09 September 2023.
[177] Rawls, *A Theory of Justice* (n 41).
[178] See John Rawls, *The Law of Peoples* (Harvard University Press 1999); see also John Rawls, 'The Law of Peoples' (1993) 20(1) Critical Inquiry 36, 39 ('In justice as fairness the principles of justice for the basic structure of society are not suitable as fully general principles.')
[179] Chris Armstrong, 'Global Basic Structure' in Deen K. Chatterjee (eds), *Encyclopedia of Global Justice* (Springer 2011) 392.
[180] Rawls, *A Theory of Justice* (n 41) 3.
[181] Armstrong (n 179) 392.

such as to lead flourishing and fully functional lives. As Rawls himself declared in *A Theory of Justice,* 'The basic structure is the primary subject of justice because its effects are so profound and present from the start.'[182] A further importance of the basic structure has to do with the argument that it is an embodiment of a political conception of justice based on political liberalism which Rawls had carefully set out in his later theorisations about justice.[183] A major rationale for this political conception of justice is that, where there are competing moral or religious notions of justice, there is a need to present a neutral conception that makes no references to either morality or religion or conceptions of the good life. One facet of this argument 'is that if a diverse society organizes itself around principles acceptable only to members of a certain religion, it will inevitably break down into civil war.'[184] The basic structure of society thus becomes important, as an evaluative ground for a political conception of justice, mainly because it is neutral but also because of its profound impact and the coercive influence it exerts over peoples' lives.[185] This political conception of justice has nevertheless been criticised by scholars, with some of these criticisms ultimately influencing the debates over whether a basic structure of society is central to global justice.

Sandel for example has countered the idea of developing principles of justice that are independent of moral or religious accounts of justice.[186] He argues that it is not always reasonable to disregard moral or religious convictions for the purpose of securing social cooperation based on mutual respect in society. Doing so would entail depriving people the opportunity of appealing to moral or religious doctrines when confronted with big moral questions. Political liberalism is said to be incapable of answering the question whether the interest of securing social cooperation far outweighs interests emanating from moral or religious convictions.[187] Related to this is the insistence by political liberalism that serious questions of political and constitutional significance should be discussed without recourse to moral or religious beliefs. As Sandel argues, this insistence could be interpreted as a 'severe restriction that would impoverish political discourse and rule out important dimensions of public deliberation.'[188] It could be added that this insistence on ostracising moral or religious

[182] Rawls, *A Theory of Justice* (n 41) 7.
[183] See John Rawls, *Political Liberalism* (Columbia University Press 1993).
[184] Jon Mandle, *Global Justice* (Polity Press 2006) 20. See however Mandle's caveat that this argument should not be taken as a general thesis as it is rebuttable.
[185] ibid 20-21.
[186] See Michael J. Sandel, *Liberalism and the Limits of Justice* (2nd edn, Cambridge University Press 1998) 195-218.
[187] ibid 196-202.
[188] ibid 196.

convictions in debates may be interpreted as a clog on free speech which, ironically, political liberalism ought to be championing.

On the question whether a basic structure of society that could ground global distributive obligations exists at the global level, theorists opposed to the idea of extending Rawls' Difference Principle beyond the confines of the state have presented the argument – in differing forms – that the global institutional architecture lacks the ingredients to produce and sustain distributive justice duties.[189] By contrast, many theorists have argued that there should be no limitations to the application of Rawls' Difference Principle beyond the state noting, amongst other things, the presence of a global basic structure by the presence of institutions such as the World Trade Organisation (WTO) and the International Monetary Fund (IMF).[190] These institutions may be utilised to foster justice at the international level. Their presence furthermore could obviate the need of a central state, otherwise known as a world state. For example, within the international climate regime, there is the presence of the COP which oversees the international climate legal regime. The potential of this organ to render justice is vast.[191]

Despite its apparent importance, the 'basic structure of society' argument is not an indispensable determinant of global distributive justice duties. Some theorists[192] have even sought to frame distributive justice theories beyond ideas established by Rawls, with notable examples including ideas advanced by thinkers of a mainly cosmopolitan ideological persuasion.[193] Cosmopolitan theorists generally hold that obligations of justice should be global in scope. Although cosmopolitanism has appeared in various conceptual forms from historical times to the present, it is safe to suggest that 'every cosmopolitan argues for some community among all human beings, regardless of social and political affiliation.'[194] Cosmopolitanism is modelled on the concept of the 'cosmopolis' or world city which takes its origins from the Stoic thought of a human community founded upon the worth of reason

[189] See e.g., Samuel Freeman, 'The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice' (2006) 23(1) Social Philosophy and Policy 29, 38-9; see also Kenneth Waltz, *A Theory of International Politics* (McGraw-Hill 1979) 88. See also Nagel (n 81); Heyd (n 81).
[190] Armstrong (n 179) 392-3. See also Charles R. Beitz, 'Justice and International Relations' (1975) 4(4) Philosophy and Public Affairs 360.
[191] This theme is explored further in Chapter 5.
[192] For example, see Simon Caney, 'International Distributive Justice' in Garrett Wallace Brown and David Held (eds), *The Cosmopolitanism Reader* (Polity Press 2010) 134.
[193] Blake and Smith (n 176) Section 4.
[194] Pauline Kleingeld and Eric Brown, 'Cosmopolitanism' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition) Section 2 <https://plato.stanford.edu/archives/win2019/entries/cosmopolitanism/> accessed 09 September 2023.

in each and every human being.[195] Reason supplies each person with an equal moral worth and 'is the ground of an innate natural law common to us all which makes us fellow citizens of a universal moral order.'[196] Since individuals possess equal moral worth, according to the cosmopolitan, each individual is to be respected because of their status as members of the human race, rather than their status as citizens of any political community or ordering.[197] Regarding what obligations of justice are owed at the global level, Moellendorf has for instance argued that cosmopolitanism implies that 'duties of justice are global in scope, and these duties require adherence to general principles including respect for civil and democratic rights and substantial socioeconomic egalitarianism.'[198] Indeed, the attempt by cosmopolitans to frame questions of global distributive justice – and global justice in general – beyond Rawls apparently signals a break from the Rawlsian-dominated past. Whether this is successful however may be a matter for another debate. That it is an idea that is being discussed is however indicative of attempts to ensure that global justice is not restricted by theoretical fixtures.

What does the above discussion portend for the application of African communitarianism to global justice? An argument might be made that it would be unfair to use Rawlsian ideas – essentially one idea about justice – as a yardstick to measure the applicability of a vastly different conception of justice, such as African communitarianism. Yet, a counter point to this argument is that any moral theory that seeks to be applied at the international level should be subjected to a rigour using established standards, though the very basis of the word 'established standards' in relation to Rawlsian stipulations leaves room for contention as the writings of cosmopolitans – seeking to break from the Rawlsian influence – has shown. African communitarianism is an attractive philosophical theory because of the idea of relationality which is at its core. Though the idea is debatable, relationality is a missing ingredient in many Western philosophical worldviews, especially within liberal philosophical ideas. As Metz opines on this point:

> Euro-American-Australian approaches to global ethics are *characteristically* (though neither exhaustively nor exclusively) 'individualist'. That is, the dominant or salient

[195] Sharon Anderson-Gold, 'Cosmopolitan Justice' in D.K. Chatterjee (ed), *Encyclopedia of Global Justice* (Springer 2011) 203.
[196] ibid.
[197] Luis Cabrera, 'Cosmopolitanism' in D.K. Chatterjee (ed), *Encyclopedia of Global Justice* (Springer 2011) 209.
[198] Darrel Moellendorf, *Cosmopolitan Justice* (Westview Press 2002) quoted in Darren McCauley and others, 'Energy Justice in the Transition to Low Carbon Energy Systems: Exploring Key Themes in Interdisciplinary Research' (2019) 233-34 Applied Energy 916, 917.

> normative theories found in books and journals from the West devoted to global ethical matters appeal, at bottom, to the ideas that moral status is grounded upon something intrinsic to an individual and that right action is a matter of honouring or promoting it.[199]

This is the case even with a liberal philosophy like cosmopolitanism. It could be said that philosophers such as Immanuel Kant have been a main influence on the development of contemporary cosmopolitan theory owing to the argument that Kant for instance was the first philosopher to proffer a detailed theorisation of cosmopolitanism and to apply his thinking to international issues relevant to his time.[200] As Kantian ethics have been deemed mainly individualistic, for example, this makes the core of cosmopolitanism following Kantian cosmopolitan ideas mainly individualistic.[201] In comparison, African communitarianism as discussed locates moral value in the ability of individuals to relate harmoniously or communally with themselves within a relational setting.[202] Without considering Kantian-inspired cosmopolitanism as inferior nor considering African communitarianism as superior, it might be said that African communitarianism is relevant to this thesis, given that the idea of relationality fits easily with the need of this thesis to utilise a philosophical notion that supports the idea of addressing injustices associated with renewable energy development.

Relationality, or the main ideals of identity and solidarity, are useful considerations when matters of global justice are being considered. On a conceptual level, the question whether a global basic structure negatively affects the application of African communitarianism to global justice is a recondite one because the answer is in the negative. On a practical level, however, there are potential obstacles to such application. Nevertheless, these obstacles are surmountable. In the next chapter of this thesis, I will demonstrate how this could be achieved when I discuss the operationalisation of global energy justice. One of the arguments I will

[199] Thaddeus Metz, 'Harmonizing Global Ethics in the Future: A Proposal to Add South and East to West' (n 169) 147.

[200] Garrett Wallace Brown and David Held, 'Introduction' in Garrett Wallace Brown and David Held (eds), *The Cosmopolitanism Reader* (Polity Press 2010) 15.

[201] Metz, 'Harmonizing Global Ethics in the Future: A Proposal to add South and East to West' (n 169) 147 ('First off, the most influential Western approach to human dignity, as invoked for purposes of distributive justice across the globe and the like, is Kantian. According to it, a human being has a dignity in so far as she has a capacity for autonomy or rationality of some kind.')

[202] Thaddeus Metz, 'An African Theory of Moral Status: A Relational Alternative to Individualism and Holism' (n 156) 390; see also Thaddeus Metz, 'Replacing Development: An Afro-Communal Approach to Global Justice' (2017) 46(1) Philosophical Papers 111, 119.

make is for the adoption of legal interpretation as a strategic tool for overcoming obstacles to the promotion of global energy justice.

3.2.3.2. Duties to Nationals and Non-nationals

Another point which needs to be taken into consideration when discussing the possibility of applying African communitarian ethics to global justice is whether special duties are owed to both compatriots and foreigners uniformly. This has been a source of debate between nationalists and cosmopolitans. Gillian Brock notes that when nationalists theorise about what duties are owed to compatriots and foreigners, they generally tend to proceed from the pedestal of the nation-state or national communities because these are argued to ground a special relationship and identity among co-nationals and further make justice obligations more meaningful.[203] In this light, nationalists argue that global responsibilities must not discount the fact that people have attachments to different national communities. Neglecting this salient fact would thus repudiate the theoretical underpinnings of global justice. It is against this background that Miller, who is an advocate of nationalism, presents his own idea of global justice. Dismissing the idea that principles of social justice could apply easily at the international level without considering salient factors such as nationalism, Miller proposes a global justice theory which consists of three components.[204] According to him, conceptions of justice could enable nation-states to negotiate how the benefits and burdens of cooperation should be apportioned in areas of common concern like the environment. Furthermore, basic human rights are to be protected and respected everywhere as a minimum demand of global justice, even if it would mean intervening in other states to enforce them. And finally, people should be given the opportunity to be self-governing, although independence is not an assured outcome. Conversely, cosmopolitans argue for the elimination of any distinction between nationals and co-nationals when it comes to deciding what duties should be owed to nationals and foreigners.[205] Once again, cosmopolitans tend to base the core of their theory on the argument that humans share a common ancestry and are therefore deserving of equal moral merit. Differences imposed by stations of birth or where people are born should therefore not obstruct obligations of justice.

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[203] Brock (n 84) Section 2.3. See also David Miller, *National Responsibility and Global Justice* (Oxford University Press 2007).

[204] Miller, *Political Philosophy: A Very Short Introduction* (n 44) 126-130.

[205] See generally Nussbaum, 'Patriotism and Cosmopolitanism' (n 146) 3; see also Tan (n 35) 19; Thomas Pogge, 'Concluding Reflections' in Gillian Brock (ed), *Cosmopolitanism versus Non-Cosmopolitanism* (Oxford University Press 2013) 294.

How should African communitarian ethics view duties to nationals and foreigners in view of global distributive justice or global justice? Metz, who is a vocal proponent of relationality, intended for egalitarian distributive concerns to be applied to nationals of a state when distribution is to be made within a territorially-defined state.[206] As he noted, '… a state that must honour people in virtue of their capacity for relationships must in the first instance give priority to each of its people, those to whom it is already communally related.'[207] As it concerns how countries should relate with one another in a harmonious way through their foreign policies, Metz further notes that countries could favour their own people first when it concerns the allocation of goods.[208] Nevertheless, he also canvasses for aid to other countries as a positive act of harmonious or communal relationship, which reflects the positive values of African communitarianism which he propounded.[209] The point to take from these is that nationality may have a bearing when it comes to deciding the question of global distributive justice. Yet, nationality or patriotism is not a bar to the existence of global distributive justice, especially one developed in line with African communitarianism. It does not repudiate for instance the duty which developed states have to assist developing states in times of need. In fact, if the theme of relationality is followed to its logical conclusion, then there would be no nationals or foreigners as every unit will be a member of the international community. That would be reflective of the ideals of identity and solidarity.

Beside the above points, there are other questions that need to be addressed before deriving a robust African communitarian approach to global justice. Being a moral theory derived from the cultures and mores of African people, could the ideals inherent in African communitarianism find relevance to a non-African audience? This question has been raised with respect to Ubuntu regarding whether the moral theory could be used to conceptualise moral problems beyond the African continent. On this question, Norren offers an interesting insight.[210] She argues that there is no reason why the ethical reach of Ubuntu should be stunted just because it has roots in Africa. More concretely, she notes that the core Ubuntu quality of interconnectedness or relationality equips the philosophical concept with the capacity to have global relevance since the idea of human interconnectedness is a value that could be

[206] Metz, 'An African Egalitarianism: Bringing Community to Bear on Equality' (n 106) 211.
[207] Ibid.
[208] Metz, 'Harmonizing Global Ethics in the Future: A Proposal to Add South and East to West' (n 169) 152-3.
[209] ibid.
[210] See Norren (n 171) 257.

found in other cultures outside the African culture.[211] She further notes that this specific point against Ubuntu could be rebutted by questioning the worldwide application of Western philosophy.[212] The latter could be phrased in the form of a rhetorical question: if Kantian or Hobbesian ideas could influence global ethics and global justice, why should African or other non-Western ideas be deprived of similar influence? It is in this light that Metz offers an account of Ubuntu built on relationality.[213] He viewed this conception of Ubuntu as being bulletproof against the charge of anachronism, not least because it favours human rights built on the idea of relationality, an idea that likely has a global appeal.[214]

It is useful to note that certain moral ideas rooted in non-Western cultures are now increasingly used in relation to themes that are not necessarily restricted to local settings, and in the field of energy justice in particular, there is now a recognition that the early literature which dominated the energy justice field had been overwhelmingly Western in nature.[215] The latter has manifested in the campaign for energy justice theorisations to utilise ideas drawn from non-Western worldviews such as Ubuntu, Confucianism, Hinduism, and indigenous American perspectives.[216]

In summary, African communitarianism has the capacity to apply to global justice on a conceptual level. The features of the moral theory speak for it, especially against Western philosophical ideas. To quote Achebe again:

> If the philosophical dictum of Descartes 'I think, therefore I am' represents a European individualistic ideal, the Bantu declaration '*Umuntu ngomuntu ngabantu*' represents an African communal aspiration: 'A human is human because of other humans.' Our humanity is contingent on the humanity of our fellows. No person or group can be human alone. We rise above the animal together, or not at all.[217]

[211] See ibid.
[212] See ibid.
[213] See generally Metz, '*Ubuntu* as a Moral Theory and Human Rights in South Africa' (n 128).
[214] ibid 545-547.
[215] Gunter Bombaerts and others, 'Expanding Ethics Justice Across Borders: The Role of Global Philosophy' in Gunter Bombaerts and others (eds), *Energy Justice Across Borders* (Springer 2020) 6.
[216] See Sovacool and others, 'New Frontiers and Conceptual Frameworks for Energy Justice' (n 1) 678-680.
[217] Achebe (n 104) 54.

4. An African Communitarian Approach to Global Energy Justice

In this section, I will demonstrate what an African communitarian approach to global energy justice should look like in relation to the renewable energy injustices that I discussed in the previous chapters. It is therefore helpful to commence by identifying and clarifying what should be regarded as a problem of global energy justice. From an African communitarian perspective, the issues associated with renewable energy qualify to be global energy justice problems. The unfair distribution of renewable energy benefits with respect to developing countries is a specific example; the costs associated with the energy transition, such as those borne by hydrocarbon countries in the context of climate change mitigation, could be added as a further example. As discussed in the previous chapter, the unfair distribution of renewable energy benefits disproportionately affects mainly developing and low-income countries. It is a matter of justice to recognise that these countries are not only disadvantaged because they do not have the capacity of fully harnessing their renewable energy potential, but that they equally encounter structural issues that negatively impact them. It is a matter of justice to recognise them as the least well-off of the international community and to further recognise that they need assistance to enable them to enjoy the benefits of renewable energy development. These benefits are in the areas of climate mitigation, energy access, energy security, and economic development. The benefits also would enable them to realise the SDGs and a range of human rights.

Some countries identify as developing countries but have advanced considerably in socio-economic terms. For example, the BRICS countries (Brazil, Russia, India, China, and South Africa) are usually described as 'emerging market economies', which suggests that they are still developing but relatively strong compared with others. Many of these countries have also advanced considerably in renewable energy development. For example, as I pointed out in the previous chapter, China is leading the Asian region in renewable energy development. The African communitarian approach to global energy justice developed in this chapter does not apply to this class of developing countries. Instead, it applies to those developing countries that are both lagging in renewable energy development and struggling with structural issues, as discussed in the previous chapter. This class of developing countries cuts across the different categories of country classification at the international level, such as Least Developed Countries, Small Island Developing States, and the rest.

The assistance to be rendered to these developing countries is in consonance with the African communitarian value of relationality as expressed through the ideals of identity and solidarity. Support should take the form of distribution of resources that will aid these countries to develop their renewable energy systems in order to derive benefits from renewable energy use. The resources in question are financial, technological, and other capacity-based support. At the centre of it should be the conscious effort to distribute the benefits of renewable energy more fairly and equitably in the international community. This makes renewable energy an important subject of distribution, with the potential to promote and enhance harmonious or communal relationships through its many merits as highlighted all through this thesis. The distribution is made to people living in developing countries as the objects of distribution because they are capable of being objects of harmonious relationships. Distribution should be made to the extent of allowing them to enjoy the fruits of renewable energy. This will enable them to enter into greater communion with other members of the international community.

The final crucial point concerns the question of responsibility for the distribution. Based on the African communitarian principle of solidarity, it is developed and high-income countries that should bear the cost of distribution. Ethically, these countries can be said to be well-off in the community and should therefore assist other members of the community that are disadvantaged. Pragmatically, it is developed countries that possess large reserves of financial, technological, and other capacity-based resources that are central to the dissemination of renewable energy benefits. It is therefore the duty of these states to assist. Developing countries also have a role to play. They should ensure that the resources given to them are further distributed fairly and equitably among the people, prioritising the needs of the most vulnerable and those able to exploit and develop renewable energy. This will be in line with African communitarianism.

5. Conclusion

In this chapter, I developed an African communitarian approach to global energy justice. I began by noting that energy justice is a normative framework for justifying solutions aimed at addressing injustices associated with renewable energy worldwide. Such a justification is required to settle questions that may arise when the solutions to renewable energy injustices are proposed. Energy injustice also serves a pragmatic function, in the sense that it highlights the means for addressing those renewable energy injustices. On the question of alternatives, I argued that energy justice is itself an alternative to a status quo dominated by Western

philosophical ideas which are unable to address the renewable energy injustices, particularly the unfair distribution of renewable energy benefits. A conception of energy justice based on relationality is a more justifiable approach to solving the identified injustices. To develop this conception of energy justice, I proposed and adopted a two-step methodology. The first step consisted in the identification of distributive, recognition, and global justice as the dimensions of justice. It was important to highlight and include the global justice dimension because of the global nature of the renewable energy injustices. The second step consisted in the adoption of African communitarianism as the conception of justice to underpin the justice dimensions. African communitarianism here prizes relationality as expressed through identity and solidarity. Notwithstanding the criticisms against African communitarianism, the ethical theory is the appropriate philosophical concept for addressing the unfair distribution of renewable energy benefits. By emphasising harmonious relationships, the philosophical concept prizes the things that should merit moral consideration for their own sake. I noted how this perspective is lacking in some of the dominant Western philosophical ideas which mainly prize individualism. Finally, I demonstrated what the African communitarian approach to global energy justice entails with respect to the unfair distribution of renewable energy benefits. I noted that this injustice should be viewed as a global energy justice problem. This is the starting point. I emphasised how this injustice negatively affects mostly developing countries and how these countries are also faced with other structural issues. From an African communitarian perspective, these countries are the least well-off members of the international community. I proposed that developed countries, which are the well-off members of the international community, should assist the developing countries by transferring resources for the development of renewable energy. I noted also that developing countries that receive assistance should ensure that the resources are further distributed fairly among the people.

By addressing the unfair distribution of renewable energy benefits, the African communitarian approach to global energy justice would help to promote harmonious or communal relationships among members of the international community. In the next chapter, I will demonstrate how this conception of global energy justice could move from theory to practice.

Chapter 4
Operationalising Global Energy Justice: Legal Interpretation

1. Introduction

In the previous chapter, I developed an African communitarian approach to global energy justice. This conception of global energy justice is underpinned by relationality, expressed as the idea of living communally or relating harmoniously with members of a community. It emphasises the themes of identity and solidarity. These values distinguish African communitarianism from the mainstream of Western philosophical ideas that are mostly dominated by individualism and highlights the distinct and fresh contribution which African communitarianism could make to global energy justice. As I noted, the African communitarian approach to global energy justice is intended to conceptualise and address the injustices generated by the development of renewable energy following the global transition to a low-carbon energy future. The main injustice in question concerns the unfair distribution of renewable energy benefits in the international community which is negatively affecting mainly developing countries. Based on my idea of global energy justice, I advocated for this injustice to be addressed through the distribution of resources to developing countries for the development of renewable energy. International law has a crucial role to play in facilitating this African communitarian approach to global energy justice. I will advance this claim further in the present chapter by placing the spotlight on the strategic tool of legal interpretation in international law.

After this introduction, the chapter will revisit some of the reasons for the adoption of international law as an instrument for operationalising energy justice. The objective is to underscore the central importance of international law in global justice matters. The chapter will then introduce the tool of legal interpretation. I will demonstrate that legal interpretation is a strategic tool for overcoming certain problems associated with the promotion of global energy justice. In doing this, I will identify and propose the re-interpretation of certain concepts within international law in line with African communitarianism. The essence of using African communitarianism as a basis for re-interpretation is not only because the philosophy has an affinity with the concepts to be re-interpreted but also because the philosophy can enrich those concepts. Furthermore, the re-interpretation of the international law concepts

will be undertaken within international climate law and international human rights law. Doing so will be useful in identifying means of implementation which will be relied upon in the next chapter to achieve the proposed re-interpretations.

2. International Law and the Promotion of Global Energy Justice

In my introductory chapter, I highlighted the role of international law in facilitating the achievement of moral and ethical goals. One of the reasons for highlighting this connection between international law and morality is that traditional international law scholarship and practice has often downplayed the importance of international law to morality.[1] Steven Ratner notes in this light that some international lawyers, especially those in academic practice, have often relegated morality to the background with the argument that morality belongs to a realm unsupervised by the law.[2] If they take note of the relationship between morality and international law, it is to interpret this nexus as simply the outputs emanating from judicial bodies such as international courts or tribunals or 'equate it, in an undertheorized way, with a greater concern for populations that have been marginalized in the international legal system'.[3] This is understandable because practical legal training has helped to shape the perspective of many international lawyers who view issues mostly through a pragmatic lens.[4] Neil Walker has identified this situation as one of the causes of the gap between international law and global justice.[5] He labels it as the effect of 'institutional pragmatism'.[6] Adding to this is the influence of the Austinian theory of legal positivism which conceptualises and presents law as valid only if it issues forth from a legal sovereign, backed by sanctions, thereby leaving morality out of the equation.[7]

The above situation, where some international lawyers took an indifferent approach to morality and ethics, is nevertheless being upended. This can be witnessed in the relatively

[1] Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press 2015) 2.
[2] ibid 2.
[3] ibid 2.
[4] Neil Walker, 'The Jurist in a Global Age' in Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 84.
[5] Neil Walker, 'The Gap Between Global Law and Global Justice' in Nicole Roughan (ed), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017) 216-217.
[6] ibid 217.
[7] Mark Weston Janis, 'International Courts and the Efficacy of International Law' (1987) 167 Faculty Articles and Papers 261, 262.

recent increase in work on the symbiotic relationship between international law and morality.[8] It is increasingly being recognised that international law has a discernible relationship with morality and ethics.[9] As Allen Buchanan notes, '[T]hose who eschew moral argumentation about international law often unwittingly take a moral position on it. Because they avoid moral argumentation, their moral judgments are unsupported. But they are moral judgments nonetheless.'[10]

While there is merit in highlighting the significance of international law as a force for good, as an instrument for facilitating just outcomes, it also makes sense to direct the spotlight on aspects of that body of law that have raised salient questions.[11] An example is the use of international law as an instrument for perpetuating injustice, subjugation and for tilting the power imbalance against weaker members of the international community.[12] International law's association with colonialism for example is a clear reminder that international law could be wielded for unjust and immoral purposes.[13] International law facilitated the balkanisation and consequent colonisation of the African continent through the Berlin Conference of 1884-85.[14] Based on this, it is unsurprising to see critiques of international law emanating from underrepresented parts of the community. Examples of these critical perspectives are TWAIL;[15] the feminist critique of international law;[16] and the Marxist perspective on international law.[17] Adopting a TWAIL perspective for example, we can see how the contents of international law have served to perpetuate the material inequality existing between

[8] For a sample of the general literature in this direction, see Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press 1998); Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2004); Ratner (n 1). For a representative of specific literature in the field of environment, see Elisa Morgera, 'Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity' (*BENELEX Working Paper*, 26 May 2015); Lakshman Guruswamy, *Global Energy Justice: Law and Policy* (West Academic Publishing 2016).

[9] See Jochen von Bernstorff and Ingo Venzke, 'International Law and Justice' (Research Paper No. 15/2023) paras 9-31 who consider various natural law traditions that consider justice as the basis for international law.

[10] Buchanan (n 8) 3.

[11] Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020).

[12] Eyal Benvenisti and George W. Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (Cambridge University Press 2017).

[13] U.O. Umozurike, 'International Law and Colonialism in Africa: A Critique' (1971) 3(1-2) Zambia Law Journal 95.

[14] Robert J. Miller and Olivia Stitz, 'The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery' (2021) 32(1) Duke Journal of Comparative and International Law 1.

[15] See Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 20(20) The European Journal of International Law 1.

[16] See Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) The American Journal of International Law 613.

[17] Robert Knox, 'Marxist Approaches to International Law' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 306.

countries of the Global North and the Global South.[18] International law has been wielded to exclude peoples typically domiciled in non-European countries, ultimately serving as an instrument of exclusion.[19] As has been noted, the question of the inclusion or exclusion of international law 'is about who wields the authority to include and exclude. It is about subordinate inclusion, privileged exclusion and marginalization upon inclusion.'[20] Understanding this nature of international law is crucial. It helps us to move from the present where international law is still imbued with relics of the dark past to a future where international law is inclusive and embracing.[21] Attempts to achieve this goal can sometimes be characterised as the integration of 'non-liberal and largely non-Western norms, conventions and principles – determined with reference to a multiplicity of spatial orders existing over time – into international law.'[22]

To conclude this section, international law can represent a force for good but can equally be wielded for immoral purposes. The aim of this work is to demonstrate how international law could be utilised to advance moral and ethical goals as they relate to the injustices associated with renewable energy. Indeed, it is difficult to tackle the issues connected with renewable energy without addressing the role of international law.[23] Through legal and regulatory measures,[24] international law can unlock solutions that are useful in correcting those problems. This is especially the case with the unfair distribution of renewable energy benefits where international law can help to declare this a global energy justice problem; help to recognise parts of the international community affected by the problem; and assist in facilitating the distribution of resources to address the problem. In this light, international law will be helping to promote communal relationships among members of the international community.[25] As I will explain in the next section, the first step to set international law on this course is through the tool of legal interpretation.

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[18] Bernstorff and Venzke (n 9) para 44.

[19] E. Tendayi Achiume, 'The In- or Ex-clusiveness of International Law' (2023) 34(1) The European Journal of International Law 225, 225.

[20] ibid 228.

[21] See Michelle Staggs Kelsall, 'Disordering International Law' (2022) 33(3) The European Journal of Internal Law 729.

[22] ibid 732.

[23] Catherine Redgwell and Lavanya Rajamani, 'And Justice for All? Energy Justice in International Law' in Íñigo del Guayo and others (eds), *Energy Justice and Energy Law* (Oxford University Press 2020) 48.

[24] I discuss these measures in the next chapter.

[25] See generally Bruno Simma and Andreas L. Paulus, 'The 'International Community': Facing the Challenge of Globalization' (1998) 9 European Journal of International Law 266; Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011).

3. Legal Interpretation as a Strategic Tool

3.1. Background

Operationalising the African communitarian approach to global energy justice developed in this thesis requires a strategic approach. Being a distinct and fresh way of conceptualising and addressing the injustices associated with renewable energy following the energy transition, the African communitarian approach to global energy justice requires a host of measures for its actualisation. These measures mainly involve changing existing practices and instituting new ones. At the international level, these are difficult tasks to undertake,[26] especially when international law is involved.[27] Wielding international law as a force to change what exists must confront the fact that change presents a challenge to the law's traditional preference for stability and certainty.[28] This does not mean that change is not possible with international law;[29] it only means that bringing about that change is oftentimes difficult.[30] As one legal commentator notes in this context, '…changing existing legal instruments – e.g., through an amendment or the negotiation of a new treaty superseding existing ones – faces major political hurdles and will take time…'[31] With respect to the operationalisation of global energy justice through international law, there are some interrelated factors that make change difficult to achieve and that make the case for a strategic approach. These factors are dealt with in turn below.

3.1.1. The Nature of Global Energy Governance

The way energy is governed at the international level is a factor to consider when operationalising global energy justice. Energy is essentially perceived as an issue within the domestic jurisdiction of states.[32] This does not imply that international law is wholly divorced

[26] Aileen McHarg, 'Energy Justice: Understanding the ''Ethical Turn'' in Energy Law and Policy' in Íñigo del Guayo and others (eds)*, Energy Justice and Energy Law: Distributive, Procedural, Restorative and Social Justice in Energy Law* (Oxford University Press 2020) 27.
[27] See Vincy Fon and Francesco Parisi, 'Stability and Change in International Customary Law' (2009) 17(1) Supreme Court Economic Review 279, 280.
[28] Nico Krisch, 'The Dynamics of International Law Redux' (2021) 74 Current Legal Problems 269, 269.
[29] ibid 271-272.
[30] Harro van Asselt, 'Governing Fossil Fuel Production in the age of Climate Disruption: Towards an International Law of 'Leaving it in the Ground'' (2021) 9 Earth System Governance 100118, 6.
[31] ibid.
[32] Neil Gunningham, 'Confronting the Challenge of Energy Governance' (2012) 1(1) Transnational Environmental Law 119, 126.

from energy governance.[33] As I noted above, international law is a desirable instrument for helping to achieve moral and ethical goals such as global energy justice. In addition to this, the involvement of international law with energy is said to be driven in practice by two main factors. The first concerns the increased trade in energy among nations which has seen international law facilitating the exchange of goods and services in energy.[34] The second concerns the recognition that energy use and production are associated with environmental issues,[35] some of which are transboundary in nature, necessitating the intervention of international law. We can see the involvement of international law with practical measures such as the imposition of legal safeguards, due diligence, and good faith commitments on states with respect to the control of transboundary pollution caused by the domestic development, production, and consumption of energy.[36] We can also find international law's role in facilitating solutions to global problems such as climate change, caused mainly by the production and consumption of energy.[37]

Despite the above considerations, the overriding sentiment is that energy is essentially within the national jurisdiction of states. Factors such as states' imperative to maintain energy security and their willingness to assert sovereignty and control over their natural resources give credibility to this claim.[38] States are generally reluctant to surrender or outsource their power to make decisions on energy affairs to foreign influences.[39] In the past, states had agitated to possess exclusive rights over resources found within domestic domains through the exercise of permanent sovereignty over natural resources, a principle that is now recognised in international law.[40] The wave of resource nationalisation that swept many hydrocarbon states in the past is an example of this need to assert sovereignty and control

[33] Adrian J. Bradbrook, 'The Development of Renewable Energy Technologies and Energy Efficiency Measures through Public International Law' in Don N. Zillman and others (eds.), *Beyond the Carbon Economy: Energy Law in Transition* (2008) 112-113.
[34] ibid 113.
[35] ibid.
[36] See United States v Canada (1938 and 1941) 3 Rep. Int'l Arb. Awards 1905 [*The Trail Smelter Arbitration*].
[37] Ernst Nordtveit, 'International Energy Law in Perspective: The Relationship between National and International Energy Law' in Tina Hunter and others (eds.), *Routledge Handbook of Energy Law* (Routledge 2020) 44-45.
[38] McHarg (n 26) 27.
[39] See John Paterson, 'Law's Role in the Tension Between Security and Sovereignty in the Field of Energy Resources' in John-Andrew McNeish and Owen Logan(eds), *Flammable Societies: Studies on the Socio-economics of Oil and Gas* (Pluto Press 2012) 287; Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997).
[40] UNGA, Resolution 1803 (XVII), 'Permanent Sovereignty over Natural Resources', 14 December 1962.

over natural resources for national needs.[41] Energy policy is, in fact, viewed by many states as a 'sacred national sovereign prerogative, causing states to be highly sensitive to any international process aimed at imposing obligations on, or otherwise practically or legally restricting, their freedom over domestic energy choices, policies and technologies.'[42]

Thus, the nature of global energy governance is a factor to consider when attempting to promote global energy justice, given that such operationalisation will make changes that engage national sovereignty.[43]

3.1.2. The Absence of a Global Decision-making Institution on Energy

The nature of global energy governance also accounts for the absence of a permanent and central decision-making institution on energy.[44] This equally affects the promotion of global energy justice.[45] It is not possible to identify a central decision-making apparatus (whether legislative or executive)[46] that makes decisions on matters of energy for all parts of the international community.[47] The situation is markedly different from the domestic level where there is usually a discernible decision-making structure governing energy production and use.[48] Domestic regulatory and administrative competencies for energy matters may be allocated to different organs in many national jurisdictions. Still, it is the case that most times a central decision-making institution may be detected. This is usually represented by the state or, as

[41] See Sergei Guriev, Anton Kolotilin, and Konstantin Sonin, 'Determinants of Nationalization in the Oil Sector: A Theory and Evidence from Panel Data' (2009) 27(2) The Journal of Law, Economics, and Organization 301; Vlado Vivoda, 'Resource Nationalism, Bargaining and International Oil Companies: Challenges and Change in the New Millennium' (2009) 14(4) New Political Economy 517.

[42] Stuart Bruce, 'Energy Governance and Institutions (International)' in Walter Leal Filho and others (eds), *Encyclopaedia of the UN Sustainable Development Goals. Affordable and Clean Energy* (Springer 2019) 413-414.

[43] Lakshman Guruswamy, 'Energy Justice and Sustainable Development' (2010) 21 Colorado Journal of International Environmental Law and Policy 231, 263.

[44] See Thomas W. Wälde, 'International Energy Law: Concepts, Context and Players: A Preliminary Introduction' (2003) 4 Oil, Gas and Energy Law.

[45] McHarg (n 26) 27.

[46] Although there is an international court of justice, which sits at the Hague, its jurisdiction is usually constrained by consent of the parties. See the Statute of the International Court of Justice (18th April 1946) 33 UNTS 993, art 36. See also Hugh Thirlway, 'The International Court of Justice' in Malcolm Evans (ed), *International Law* (5th edn, Oxford University Press 2018) 573 ('No dispute can be the subject of a decision of the Court unless the States parties to it have consented to the Court's jurisdiction over that specific dispute, or over a class of disputes of which that dispute is one'). Consent also features prominently in other areas of international law. See Andrew T. Guzman, 'Against Consent' (2012) 52(4) Virginia Journal of International Law 747, 748.

[47] See Sijbren de Jong and Jan Wouters, 'Institutional Actors in International Energy Law' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 18-43. This problem also arises in many other areas addressed in international law. See Marti Koskenniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553.

[48] See Raphael J. Heffron and others, 'A Treatise for Energy Law' (2018) 11 Journal of World Energy Law and Business 34, 34-35.

commonly referred, the government.[49] Admittedly, in practice, the lines may blur in jurisdictions with complex governance models, where competencies over energy regulation are exercised at multiple levels, and where there is an actual risk of confusion and overlap.[50] This example is further reflective of the complex scenario sometimes posed by the domestic regulation of energy. Notwithstanding these facts, the domestic level consists of a political state with authority to advance an energy agenda more easily, sometimes, as a matter of political expediency.[51] This type of authority is clearly missing at the international level. It is a situation that is unlikely to change in the foreseeable future.[52] A permanent and central decision-making institution on energy would have flourished under the auspices of the world state that was conceived and proposed by some political philosophers in the past.[53] Despite a resurgence of this idea in recent times,[54] the notion of a globalised executive and legislative government appears unrealisable.[55]

A question that arises here is whether there is a specific advantage in having a permanent and global decision-making institution on energy? What use will such an institution be to the promotion of global energy justice? Before answering these questions, it is helpful to note that such an institution is akin to the basic structure which John Rawls highlighted in his work on justice and which was discussed in the previous chapter of this thesis as part of the disputations surrounding global justice. While such an institution does not exist at the global level, we can however speculate on its importance to the operationalisation of global energy justice. The basis of this speculation is drawn from the operation of such an institution within

[49] Machiel Mulder, *Regulation of Energy Markets: Economic Mechanisms and Policy Evaluation* (Springer 2021) 7-8.

[50] See Paul Cairney and others, 'How to Conceptualise Energy Law and Policy for an Interdisciplinary Audience: The Case of Post-Brexit UK' (2019) 129 Energy Policy 459.

[51] See Christopher Carrigan and Cary Coglianese, 'The Politics of Regulation: From New Institutionalism to New Governance' (2011) 14 Annual Review of Political Science 107. Nevertheless, this should not obscure the fact that there are still challenges associated with domestic energy regulation that reflect the intricacies surrounding not just regulation as a mechanism for altering the behaviour of parties, but energy regulation as a tool for regulating energy activities. See Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012); John Paterson, 'Health and Safety at Work Offshore' in Greg Gordon, John Paterson, and Emre Üşenmez (eds), *UK Oil and Gas Law: Current Practice and Emerging Trends (Resource Management and Regulatory Law)* (3rd edn vol 1, Edinburgh University Press 2018).

[52] McHarg (n 26) 27.

[53] See generally Catherine Lu, 'World Government', in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition) <https://plato.stanford.edu/archives/spr2021/entries/world-government/> accessed 09 September 2023.

[54] See example Arvind Ashta, 'It is Time to Seriously Consider the Advantages of a World Federal Government' (*EUROPP Blog,* 18 March 2021) <It is time to seriously consider the advantages of a world federal government | EUROPP (lse.ac.uk)> accessed 09 September 2023.

[55] David Miller, *Political Philosophy: A Very Short Introduction* (Oxford University Press 2003) 112-132.

the domestic level which we considered above. The presence of a permanent and central decision-making structure would have represented a formal mechanism of change that is needed to alter existing practices.[56] It would have had the authority to make far-reaching decisions on global energy justice. The presence of such an institution would have made it simpler to declare the unfair distribution of renewable energy benefits as a global energy justice problem. Such an institution would have simplified the tasks of recognising those impacted by the problem and making decisions concerning the fair and just distribution of resources to correct the problem. Equally, it may have been easier to hold such decision-making structures to account since such structures would have been defined and their authority clearly delineated.[57] I should nevertheless add a note of caution here that the presence of such an institution may not have fully guaranteed the successful promotion of global energy justice as things could go wrong.

3.1.3. Ideological Factors

Added to the above is the expected opposition that will greet an African communitarian solution to the problem of unfair distribution of renewable energy benefits, given that such a measure involves the radical redistribution of resources from developed countries to developing countries for the development of renewable energy. There is the problem of self-interest[58] that is mainly rooted within a realist conception of international relations.[59] It is recognised for instance that states are primarily motivated by self-interest when considering whether to conclude certain treaties or, more generally, when considering how to conduct relations with other states.[60] Self-interest may also be found in reactions against world poverty reduction programmes and the redistribution of resources from the rich to the poor.[61] It is a characteristic associated with psychological egoism which deems all actions as selfish and directed at maximising personal welfare.[62] Added to these are the neoliberal principles that

[56] Krisch (n 28) 270.
[57] See *The Social and Economic Rights Action Center (SERAP) and the Center for Economic and Social Rights (CESR) v Nigeria*, ACHPR Communication 155/96 (2002).
[58] Philippe Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations' (1999) 10(3) European Journal of International Law 549, 559-561.
[59] See Mark Clarence Walker, 'Morality, Self-interest, and Leaders in International Affairs' (2006) 17(2) The Leadership Quarterly 138, 140.
[60] Philippe Cullet, *Differential Treatment in International Environmental Law* (first published 2003, Routledge 2016).
[61] See Garrett Hardin, 'Lifeboat Ethics: The Case Against Helping the Poor' in William Aikens and Hugh LaFollette (eds), *World Hunger and Morality* (Prentice Hall 1977).
[62] See Robert Shaver, 'Egoism' in Edward N. Zalta, *Stanford Encyclopedia of Philosophy* (Spring 2019 Edition) https://plato.stanford.edu/archives/spr2019/entries/egoism/ accessed 09 September 2023.

underpin the international order[63] and that have the potential to undermine an African communitarian approach to global energy justice since they place main preference on non-interference in the markets as a form of freedom.[64] As I noted in chapter three, neoliberalism is nevertheless undesirable, and unsuited for the present times when greater relationality or identity and solidarity are needed to address pressing global problems.[65] It is even more unsuited when it comes to the promotion of global energy justice.

3.2. Legal Interpretation

The tool of legal interpretation can help to overcome or lessen the impact of the above problems associated with the operationalisation of global energy justice.[66] Interpretation in international law entails the assignment of 'meaning to texts and other statements for the purposes of establishing rights, obligations, and other consequences relevant in a legal context.'[67] With respect to global energy justice, interpretation involves the identification of useful international law concepts and the re-interpretation of these in line with my African communitarian approach to global energy justice. Interpretation can help to identify existing institutions to implement the desired re-interpretation.[68] This can help to overcome the problems posed by global energy governance and absence of a permanent and central decision-making institution on energy. In the place of a permanent and central decision-making institution on energy, we have a multiplicity of institutions carrying out work relating directly or indirectly to energy at the international level.[69] In the previous chapter, I pointed out how some political philosophers have held up these institutions as potential agents of global distributive justice, arguing that the institutions should be regarded as a global basic structure.[70] The potential of these institutions to render global justice is vast and will be

[63] See Chukwumerije Okereke, *Global Justice and Neoliberal Environmental Governance*: *Ethics, Sustainable Development and International Co-operation* (Routledge 2010).
[64] See David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005).
[65] See Peter Singer, *The Life You Can Save: Acting Now to End World Poverty* (Random House 2009); Obiora C. Okafor, 'Solidarity Key to Post-19 Response' (*Open Global Rights*, 28 April 2020) <Solidarity key to post COVID-19 response | OpenGlobalRights> accessed 09 September 2023.
[66] Margaretha Wewerinke-Singh, 'A Human Rights Approach to Energy: Realizing the Rights of Billions Within Ecological Limits' (2021) Review of European, Comparative and International Environmental Law 16.
[67] Matthias Herdegen, 'Interpretation in International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2020) para 1.
[68] Wewerinke-Singh (n 66) 16.
[69] Ann Florini and Benjamin K. Sovacool, 'Who Governs Energy? The Challenges Facing Global Energy Governance' (2009) 37(12) Energy Policy 5239.
[70] See Chris Armstrong, 'Global Basic Structure' in Deen K. Chatterjee (ed), *Encyclopedia of Global Justice* (Springer 2011) 392; Charles R. Beitz, 'Justice and International Relations' (1975) 4(4) Philosophy and Public Affairs 360.

utilised in this thesis. Examples of these institutions, as they relate to global energy justice, include the COP within international climate law and the human rights treaty- and non-treaty bodies within international human rights law. Interpretation reframes states' existing legal obligations in order to include additional requirements or to extend it to new situations, aligning them with the objective of the interpreter. Thus, interpretation does not lead to the creation of entirely new legal obligations. This is important in addressing some of the ideological problems discussed above such as self-interest and the expected opposition that will trail calls for the redistribution of resources for the development of renewable energy. Interpretation can also help to highlight areas for legal reforms.[71]

In the introduction to this chapter, I pointed out that one of the objectives of this thesis is to influence developments in the real world. In other words, there is the conscious desire to propose solutions that will address the unfair distribution of renewable energy benefits as well as the other injustices associated with renewable energy. This objective seeks to serve as a bridge between the academic aspirations of this thesis and its policy and practical intention. Influencing events in reality requires subtle and strategic thinking which legal interpretation offers. As Peri Roberts and Peter Sutch note in this regard:

> Making radical plans for the international redistribution of wealth or of ownership of resources has often attracted criticisms of utopianism, idealism, abstraction from and irrelevance to the harsh real world of international politics […] the positivist challenge can be met by paying closer attention to ideas and values that are already present in our international law and politics.[72]

To buttress the claim that legal interpretation offers a strategic approach to operationalising global energy justice, I draw a comparison with work already being carried out by scholars campaigning for fossil fuels to remain in the ground because of climate change; for pandemic vaccines to be distributed equitably; for technology to be fairly transferred with respect to small-scale fisheries; and for energy poverty to be addressed within ecological limits. Harro van Asselt, for instance, has canvassed for the recognition of an international law on leaving fossil fuels in the earth's crust.[73] This campaign engages one of the renewable energy injustices

[71] Morgera (n 8).
[72] Peri Roberts and Peter Sutch, 'The Global Commons and International Distributive Justice' in Camilla Boisen and Matthew C. Murray, *Distributive Justice Debates in Political and Social Thought: Perspectives on Finding a Fair Share* (Routledge 2017) 239-240.
[73] See van Asselt (n 30).

which concerns the mitigation costs borne by oil and gas producing and exporting countries.[74] Van Asselt proposes a unique set of legal reforms with an end to developing an international legal framework on leaving fossil fuels in the ground. The boldest of these measures is for states 'to move to negotiate a specific treaty to provide for a just transition away from fossil fuel production.'[75] Before advancing this proposal however van Asselt first makes a case for legal interpretation, writing in one part of his scholarly intervention that 'existing international legal principles can also help identify how the burden of moving away from fossil fuels should be shared, thereby aiding the pursuit of equal justice for all humans'[76] and writing in another part that some existing human rights obligations could help 'to point to corresponding duties for states to respect, protect, and fulfil those human rights.'[77]

The strategic device of legal interpretation has also been deployed elsewhere such as in the area of the global distribution of pandemic vaccines, where existing human rights obligations have been interpreted in a way that facilitates the equitable distribution of Covid-19 vaccines across the globe. For example, Diane Desierto has argued that developed countries have existing legal obligations within international human rights law to ensure that vaccines were distributed to developing countries on equitable terms.[78] Furthermore, through the interpretation of international legal norms existing within the international law of the sea, international biodiversity law, and international human rights, Elisa Morgera and Mara Ntona canvass for the transfer of technology for the effective working of small-scale fishery activities.[79] Also, Lakshman Guruswamy situates his conception of global energy justice within the existing concept of sustainable development, using that as a pedestal, together with the philosophy of John Rawls, to call for assistance to those classed as the energy poor of the world.[80] Finally, Margaretha Wewerinke-Singh has deployed legal interpretation to address the vexatious issue of energy poverty affecting hundreds of millions around the world.[81] Her

[74] See Chapters 1 and 2.
[75] van Asselt (n 30) 7.
[76] ibid 6.
[77] ibid.
[78] See Diane Desierto, 'Equitable COVID Vaccine Distribution and Access: Enforcing International Legal Obligations Under Economic, Social, and Cultural Rights and the Right to Development (*EJIL:Talk!*, 2 February 2021) <Equitable COVID Vaccine Distribution and Access: Enforcing International Legal Obligations under Economic, Social, and Cultural Rights and the Right to Development – EJIL: Talk! (ejiltalk.org)> accessed 09 September 2023.
[79] See Elisa Morgera and Mara Ntona, 'Linking Small-Scale Fisheries to International Obligations on Marine Technology Transfer' (2018) 93 Marine Policy 295.
[80] See Guruswamy (n 43) 231; see also Lakshman Guruswamy, 'Global Energy Justice' in Lakshman Guruswamy (ed), *International Energy and Poverty: The Emerging Contours* (Routledge 2016) 55.
[81] See Wewerinke-Singh (n 66) 16.

approach 'focuses on existing norms and institutions'.[82] She adopts these as part of her human rights approach to energy which she argues is central to resolving the problem of energy poverty within ecological limits.

There is therefore merit in recognising what exists in international law in relation to global energy justice, and using these to promote the concept, first through re-interpretation, and secondly, through the implementation of that re-interpretation. Through implementation, more radical suggestions for reform can be made. Based on all these reasons, I identify the CBDR principle as significant in facilitating the operationalisation of global energy justice. The reasons are that the CBDR principle has a firm link with African communitarianism; it is at the centre of global distributive justice concerns;[83] and it shares relationships with other relevant concepts in international law such as equity, sustainable development, and cooperation. The proposed re-interpretation of the CBDR principle will be reinforced by a further re-interpretation of human rights obligations, particularly the duty to cooperate. Once again, the duty to cooperate has links with African communitarianism. The proposed re-interpretations will not be creating entirely new obligations in international law, and it is important to emphasise this point again because of the objection that may attend the creation of entirely fresh legal obligations. In a way, the re-interpretations will also present the opportunity to enrich both CBDR and the duty to cooperate with African philosophy. The interpretative exercise is however ultimately symbiotic, allowing existing international law concepts to be enriched by non-Western philosophies such as African communitarianism while giving African communitarianism the opportunity to realise its potential.

The next section of this chapter will discuss the CBDR principle and its proposed reinterpretation.

[82] ibid.

[83] Phillipe Cullet, 'Principle 7: Common but Differentiated Responsibilities', in Jorge Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 231.

4. The Common but Differentiated Responsibilities Principle

4.1. Introduction

CBDR is a recognised principle in international law.[84] On a conceptual level, the principle is an instantiation of differential treatment in public international law.[85] Differentiation in the treatment of ordinarily equal states in international law is a manifestation of equity,[86] with a central connection to the overarching themes of justice and fairness in international law.[87] CBDR has the potential to support the distribution of resources for the development of renewable energy. Crucially, the principle is suited for identifying the beneficiaries of global distributive justice as well as locating the duty-bearers of global distributive justice obligations. The duty-bearers are not the weak members of the international community, but those members who in the past either caused an environmental problem or, in the case of differentiation, were instrumental to the disadvantaged condition of the weaker members of the international community. The genesis of differentiation in international law buttresses these arguments.

Philippe Cullet notes that the roots of differentiation are mainly traceable to the expansion of the international community as a result of the wave of decolonisation that swept the world in the twentieth century.[88] According to this narrative, decolonisation precipitated the admission of newly independent states into the community of free nations, leading to a fundamental change in the community's composition.[89] The newly independent states seemed to possess similar characteristics, which included 'a common past of colonial exploitation and a relatively similar socio-economic profile, very different from that of other countries that had been recognised as states for much longer.'[90] The newly independent states were mainly the former colonies of some developed countries.[91] The fact that these countries were on a different

[84] See Christopher D. Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98(2) American Journal of International Law 276. See also Yoshiro Matsui, 'Some Aspects of the Principle of ''Common but Differentiated Responsibilities''' (2002) 2 International Environmental Agreements: Politics, Law and Economics 151.
[85] See Cullet, 'Principle 7: Common but Differentiated Responsibilities' (n 83) 229.
[86] See Cullet, *Differential Treatment in International Environmental Law* (n 60); Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006).
[87] See Franck (n 8).
[88] Philippe Cullet, 'Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps' (2016) 5 Transnational Environmental Law 305, 307.
[89] ibid.
[90] ibid.
[91] See Hamilton J. Birrel, *The British Empire* (Chambers 1939); Elise Huillery, 'The Black Man's Burden: The Cost of Colonization of French West Africa' (Cambridge University Press 2014) 74.

socio-economic level from the rest of the world – a relationship that continues till this day and manifests as a division of the world into the rigid strata of developed and developing countries or high-income and low-income countries – justified the introduction of differential treatment concerning matters of global concern. Differential treatment should also be regarded as a way of international law atoning or making amends for its association with vices such as colonialism.[92] The CBDR principle is a manifestation of differential treatment grounded, as it is, on a foundation of justice and fairness.[93]

4.2. Philosophical Foundation

The discussion here is helpful in resolving anticipated conceptual questions that may be associated with the philosophical foundation of CBDR. It draws largely on the works of Lavanya Rajamani[94] and Cullet[95] who have both separately considered the philosophical underpinnings of differential treatment in international law. Differentiation, of which the CBDR principle is a prime component but mainly within international environmental law,[96] is said to possess philosophical bases that are mainly entrenched in Western philosophical ideas.[97] The most popular among these ideas is traced to Aristotelian ethics. Centuries ago, the classical Greek philosopher, Aristotle, had argued that justice required, as a basic minimum, that individuals who shared equal endowments and characteristics should be treated equally whilst those who shared unequal endowments and properties should be treated unequally.[98] Aristotle's postulation also finds credence, though in a different context, within Nietzschean thought. Friedrich Nietzsche had endorsed the idea of 'equality for equals, inequality for unequals' as the accurate measure of justice and had argued explicitly against the idea of making equal what is unequal. Further to this, the Justinian conception of justice requires the fair and consistent treatment of all individuals over a temporal scale,[99] save in the cases where equal treatment will produce disproportionately unfair outcomes. The

[92] See generally Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) Third World Quarterly 739.
[93] Rachel Boyte, 'Common but Differentiated Responsibilities: Adjusting the ''Developing''/ ''Developed'' Dichotomy in International Environmental Law' (2010) 14 New Zealand Journal of Environmental Law 63, 64.
[94] Rajamani, *Differential Treatment in International Environmental Law* (n 86) 150-55.
[95] Cullet, *Differential Treatment in International Environmental Law* (n 60).
[96] ibid 87.
[97] See Rajamani, *Differential Treatment in International Environmental Law* (n 86) 150-55.
[98] See Aristotle, *The Nicomachean Ethics* (Oxford World's Classics, Oxford University Press 1980).
[99] David Miller, *Political Philosophy: A Very Short Introduction* (Oxford University Press 2003) 74-91. See also Chapter 3 of this thesis.

exceptions in those instances would therefore support the differential treatment of otherwise equal individuals.

At the international level, differential treatment may be regarded as a radical ethical principle[100] insofar as it pursues the goal of altering the existing legal relationships between otherwise sovereign states.[101] In the eyes of international law, states possess a form of equality known as 'sovereign equality', which makes them equal irrespective of their geographical location, economic situation, technological advancement, or other differential indices.[102] This is a fundamental basis of the international legal order, underpinning foundational international legal instruments such as the Charter of the United Nations, which recognises the sovereign equality of all member states that constitute the United Nations.[103] Sovereign equality may therefore be linked to the concept of sovereignty which is concretely recognised in international law.[104] It may be utilised to justify the currency and existence of other salient rules in international law, such as the prohibition against the use of force and the sanction against external intervention in the domestic affairs of states,[105] even though the operation of these rules in practice sometimes appears to point to a direction not envisaged by international law.[106]

A rigid insistence on sovereign equality in all cases may, however, produce disproportionate and inequitable outcomes, especially when states' inequalities in many spheres, such as in the areas of economic development and technological advancement, or states' responsibility in causing a global problem, are taken into consideration.[107] Simply treating states as equals on some issues – for example, on the issue of tackling a common global problem – will be unfair and unjust.[108] The reason is that, owing to a lack of resources and capabilities, some states may not have the capacity to generate ideas and implement solutions to particular global issues. As Henry Shue writes, 'Among a number of parties, all of whom are bound to

[100] Ivo Wallimann-Helmer, 'Common but Differentiated Responsibilities: Agency in Climate Justice' in Paul G. Harris, *A Research Agenda for Climate Justice* (Edward Elgar 2019) 27.
[101] Cullet, *Differential Treatment in International Environmental Law* (n 60) 22-23.
[102] Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53(2) The Yale Law Journal 207.
[103] Charter of the United Nations, art 2(1).
[104] Samantha Besson, 'Sovereignty' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011).
[105] Juliane Kokott and Lauri Mälksoo, 'States, Sovereign Equality' in Peters A and Wolfrum R (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2023).
[106] With prominent examples being wars.
[107] Cullet, *Differential Treatment in International Environmental Law* (n 60) 22.
[108] See Henry Shue, 'Global Environment and International Inequality' (1999) 75(3) International Affairs 531.

contribute to some common endeavour, the parties who have the most resources normally should contribute the most to the endeavour.'[109] This position is strengthened by the fact that the states in question may be faced with other structural issues such as poverty, wars, disease outbreaks, and natural disasters.[110] Moreover, the existence of sovereign equality in the past did not automatically translate into 'equality of influence', even as the ability of states to influence global decision-making is still currently associated with national characteristics such as scientific and technological endowments and the possession of immense financial resources.[111] In other words, the more resources a state possesses, the more it is able to influence international developments and steer the course of history in its desired direction. Differential treatment – and the CBDR principle in particular – is thus an attempt to inject notions of equity and fairness into the interactions between and amongst otherwise equal states.[112]

Differentiation is therefore related to the concept of substantive equality, both in form and substance. The notion of substantive equality keeps ideas of justice and fairness as live considerations in inter-state relations, playing a role where a static or rigid enforcement of sovereign equality will deepen not only existing inequalities but also produce more unfair outcomes.[113] As Cullet notes, differential treatment 'seeks to foster a form of substantive equality which cannot be achieved through reliance on sovereign equality in a world where states are unequal in many respects.'[114] More practically, the CBDR principle as a tool of justice recognises characteristics that differentiate states from one another – whether in terms of contribution to a global environmental problem; or in connection with the capacity to tackle an ecological situation at issue.[115] To the extent that CBDR aims for equitable outcomes, it is helpful to global energy justice which is also built on fairness and justice. When invoking the principle of CBDR, there is a need to lay more emphasis on relationality as exemplified by the themes of identity and solidarity. This will completely align CBDR with the

[109] ibid 537.
[110] For a discussion on these issues, see Chapter 2 of this thesis.
[111] See Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2(1) GIMPA Law Review 14.
[112] Rowena Maguire, 'The Role of Common but Differentiated Responsibility in the 2020 Climate Regime: Evolving a New Understanding of Differential Commitments' (2013) 7(4) Carbon and Climate Law Review 260, 260.
[113] Cullet, *Differential Treatment in International Environmental Law* (n 60) 23-26.
[114] Philippe Cullet, 'Equity and Flexibility Mechanisms in the Climate Change Regime: Conceptual and Practical Issues' (1999) 8(2) Review of European, Comparative & Environmental Law 168, 169.
[115] Rajamani, *Differential Treatment in International Environmental Law* (n 86) 152.

moderate form of African communitarianism adopted in this thesis. In this way, the CBDR principle will be enriched by a non-Western philosophy such as African communitarianism. I will unravel the ramification of this proposal when I propose a re-interpretation of the CBDR principle further below.

4.3. Expression and Content

Differential treatment is expressed as CBDR within international environmental law and occupies a central position within that branch of transnational law.[116] As a division of international law, international environmental law mainly consists of rules, principles, institutions, and processes that collectively seek to protect the environment from harmful anthropocentric activities.[117] Illustrative examples of international environmental legal instruments in which CBDR may be found are the Vienna Convention for the Protection of the Ozone Layer[118] and the Montreal Protocol on Substances That Deplete the Ozone Layer[119]; the Rio Declaration on Environment and Development,[120] which was one of the outcomes of the 1992 United Nations Conference on Environment and Development and which contains one of the most comprehensive restatements of the CBDR principle; the United Nations Framework Convention on Biological Diversity;[121] and the United Nations Framework Convention on Climate Change (UNFCCC).[122] One way of highlighting the centrality of CBDR is by observing that the adoption and signing of some multilateral environmental law instruments are usually hinged on the inclusion of some species of differentiation.[123] In the time leading to the negotiation and the drafting of certain important international environmental legal texts, for example, the character of CBDR is hotly debated.

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[116] Cullet, *Differential Treatment in International Environmental Law* (n 60) 87; Empire Hechime Nyekwere and Ngozi Chinwe Ole, 'Understanding the Principle of Common but Differentiated Responsibilities and Its Manifestations in Multilateral Environmental Agreements (MEAS)' (2021) 11 UNIZIK Journal of Public and Private Law 262, 262.

[117] Ellen Hey, *Advanced Introduction to International Environmental Law* (Edward Elgar 2016) 1.

[118] The Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293.

[119] The Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 01 January 1989) 1522 UNTS 3.

[120] UNGA 'Report of the United Nations Conference on Environment and Development', 12 August 1992, A/CONF.151/26 (Vol 1).

[121] United Nations Framework Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

[122] United Nations Framework Convention on Climate Change (adopted 09 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

[123] Cullet, 'Principle 7: Common but Differentiated Responsibilities' (n 83) 229.

A ready instance is provided by the negotiations on the Paris Agreement on Climate Change and the incarnation of CBDR in the ensuing agreement.[124]

In terms of expression, Principle 7 of the Rio Declaration contains one of the most comprehensive articulations of the CBDR principle, capturing the essence of the principle by providing that:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. *In view of the different contributions* to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment *and of the technologies and financial resources they command.*[125]

Principle 7 builds on references to differential treatment in the Stockholm Declaration which was the outcome of the United Nations Conference on the Human Environment that held in 1972.[126] Principle 7 of the Rio Declaration embeds the idea of all countries bearing a collective responsibility to tackle environmental problems of global concern. In essence, it is a common 'moral responsibility between different groups of countries to address global climate change…'.[127] The idea that states assume a shared commitment in tackling a common ecological problem stem from the fact that some environmental issues require the participation of all countries to achieve an optimum result,[128] with a quintessential example of this being the problem of climate change. This ostensibly explains why Principle 7 also enshrines the principle of cooperation in its corpus, exhorting states to 'cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.'

[124] ibid 229-230.
[125] Emphasis supplied.
[126] See Stone (n 84) 277.
[127] Yanzhu Zhang and Chao Zhang, 'Thirty Years With Common but Differentiated responsibility, why do we Need it Ever More Today?' (*Blavatnik School of Government Blog,* 04 May 2022) <Thirty years with common but differentiated responsibility, why do we need it ever more today? | Blavatnik School of Government (ox.ac.uk)> accessed 09 September 2023.
[128] Edith Brown Weiss, 'Common but Differentiated Responsibilities in Perspective' (2002) Proceedings of the Annual Meeting (American Society of International Law) March 13-16, 366-367.

Cooperation is in fact a recognised concept in international environmental law,[129] as it is in other areas of international law. For example, the Charter of the United Nations places cooperation at the centre of solutions to 'international problems of an economic, social, cultural, or humanitarian character.'[130] Furthermore, the Declaration on Principles of Friendly Relations and Cooperation Among States imposes both general and specific cooperation obligations on states following the Charter of the United Nations in order to maintain international peace and security and to promote global economic stability, welfare, and prosperity.[131] It is proper to note here that cooperation is embedded as part of the duty to cooperate which is considered in the next section on human rights obligations. Also, co-operation is intrinsically linked with the African communitarian theme of identity. This once again establishes the connection between CBDR and African communitarianism and provides a further avenue for African communitarianism to enrich the CBDR principle. As Thaddeus Metz writes on the theme of identity:

> More carefully, then, it is revealing to understand identifying with another […] to be the combination of exhibiting certain psychological attitudes of 'we-ness' and cooperative behaviour. The psychological attitudes include a tendency to think of oneself as part of a relationship with the other and to refer to oneself as a 'we' (rather than an 'I') […] The cooperative behaviours include being transparent about the terms of interaction […] adopting common goals and, at the extreme end, choosing for the reason that 'this is who we are'.[132]

Cooperation in the form of joint responsibility is nevertheless not the only important component of CBDR. The idea of joint responsibility is just one pattern in the mosaic that is CBDR and hardly paints a complete picture of Principle 7. Since states would have made varying contributions to a specific global environmental problem, Principle 7 can be read as providing that states are bound to shoulder differing responsibilities once the discussion involves the remediation of that problem.[133] Therefore, the common responsibility of states

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[129] Neil Craik, 'The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect' (2019) 30(1) Yearbook of International Environmental Law 22, 22-24.
[130] Charter of the United Nations, art 1(3).
[131] UNGA, Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).
[132] Thaddeus Metz, 'An African Theory of Social Justice: Relationship as the Ground of Rights, Resources and Recognition' in Camilla Boisen and Matthew C. Murray (eds), *Distributive Justice Debates in Political and Social Thought* (Routledge 2016) 177.
[133] Steve Vanderheiden, 'Common but Differentiated Responsibilities' in Jean-Frederic Morin and Amandine Orsini (eds), *Essential Concepts of Global Environmental Governance* (2nd edn, Routledge 2020) 41.

is circumscribed by the various contributions which states make to the cause of the environmental problem at hand. In effect, CBDR denotes an understanding that '…while pursuing a common goal, States take on different obligations, depending on their socio-economic situation and their historical contribution to the environmental problem at stake.'[134]

Taking the problem of climate change as a point of reference once more, it is often recognised that some states are responsible for precipitating the increased warming of the world through their past industrial activities,[135] which had contributed to their own economic growth, but left the climate in a bad shape.[136] Nevertheless, the issue of historical responsibility is always a sore point of debate in the international environmental law context,[137] and arose prominently when negotiations were ongoing for a post-2015 global climate agreement. Despite the differentiated responsibilities which states possess over global environmental problems, there is a further recognition that states also have different capacities that may affect how they respond to the troubling environmental issue at play. This is still recognised as part of differentiated responsibilities which states bear. As Rajamani notes in the context of climate change, 'The notion of differentiated responsibility derives from both the differing contributions of States to climate change and the differing capacities of States to take remedial measures.'[138]

4.4. The Common but Differentiated Responsibilities Principle and International Climate Law

The re-interpretation of CBDR cannot occur in a vacuum and needs to happen within a context, that being the international climate regime. Within this regime, the CBDR principle is incorporated as Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC) of states. The UNFCCC is the signature treaty of the international climate change regime. An important observation in relation to the UNFCCC is that the convention was

[134] Ellen Hey and Sophia Paulini, 'Common but Differentiated Responsibilities', in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2021) para 1.
[135] Nadja Popovich and Brad Plumer, 'Who Has the Most Historical Responsibility for Climate Change?' (*The New York Times,* 12 November 2021) <Who Has The Most Historical Responsibility for Climate Change? - The New York Times (nytimes.com)> accessed 09 September 2023.
[136] Shue (n 108) 531.
[137] Lazarus Chakwera, 'The West Caused the Climate Crisis – it Should Now Pay to Clean Up the Mess' (*The Guardian,* 31 October 2021) <The west caused the climate crisis – it should now pay to clean up the mess | Lazarus Chakwera | The Guardian> accessed 09 September 2023.
[138] Lavanya Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime' (2000) 9)2) Review of European, Comparative and International Environmental Law 120, 121.

intended to be a framework treaty, meaning that it was negotiated to serve as an organic setup which would make allowance for subsequent elaborate and tailored measures on climate change to be agreed upon by actors.[139] The main objective of the UNFCCC is the protection of the climate system through the stabilisation of greenhouse gas concentrations in the atmosphere at levels that will prevent damage to the climate system.[140]

Article 3(1) of the UNFCCC directs the implementation of the convention and all its provisions in accordance with equity and CBDRRC, with developed countries charged with the burden of restoring the global patrimony.[141] Other parts of the UNFCCC equally embody differential treatment in favour of developing countries. For example, there is the recognition that low-lying and small-island nations and developing countries possess unique geographical features that make them vulnerable to the adverse effects of climate change;[142] the affirmation that climate change responses (both mitigation and adaptation) will negatively affect developing countries that have economies that are intertwined with the usage of fossil fuels,[143] a provision that came to play at the twenty-sixth climate change conference in Glasgow;[144] the affirmation that climate change responses should be integrated with social and economic development to enable developing countries to grow economically and to eradicate poverty in their respective domains;[145] and the acknowledgement that the energy consumption of developing countries need to grow for these countries to achieve sustainable social and economic development.[146]

Financial, technological, and capacity building support were also made available for developing countries to allow them to meet their legal obligations under the agreement. Accordingly, Article 4(1)(c) commits all parties to the UNFCCC to promote and cooperate in the transfer and diffusion of technologies that 'control, reduce or prevent anthropogenic emissions of greenhouse gases' in all material sectors of the economy, including the energy industry.[147] This promotion and cooperation are to be based on CBDRRC. Similarly, Article 4(5) mandates

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[139] Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 357.
[140] UNFCCC, art 2.
[141] UNFCCC, art. 4(7).
[142] UNFCCC, preambular ref 19.
[143] UNFCCC, preambular ref 20.
[144] See Simon Jessop, 'India Proposes New Wording on Phasing Coal ''down'' not ''out''' (*Reuters,* 13 November 2021) <India proposes new wording on phasing coal "down" not "out" | Reuters> accessed 09 September 2023.
[145] UNFCCC, preambular ref 21.
[146] UNFCCC, preambular ref 22.
[147] UNFCCC, art. 4(1)(c).

developed countries – the verb used in the provision is 'shall' and therefore mandatory[148] – to do whatever is necessary to facilitate and finance the transfer and diffusion of 'environmentally sound technologies and know-how' to developing countries, which will enable them to meet their obligations under the UNFCCC. The support also includes aiding developing countries to cultivate an indigenous climate technology industry.[149] Furthermore, Article 4(3) commits both 'developed country Parties and other developed Parties' to provide adequate and definite financial assets and funds to enable developing countries to finance the cost of their climate change response initiatives, including for the transfer of climate technologies. To facilitate the flow of financial resources to developing countries, the UNFCCC establishes a Financial Mechanism as an enabling funding facility.[150] Nevertheless, developed countries are allowed to exploit other avenues for transferring funds to developing countries, such as through 'bilateral, regional and other multilateral channels.'[151]

The cumulative effect of the provisions on CBDR, as made manifest through CBDRRC, within the UNFCCC was the shouldering of ambitious emissions reductions cut by developed countries under the Kyoto Protocol to the UNFCCC.[152] The Kyoto Protocol was an instance of further and detailed climate change rulemaking under the UNFCCC. Under the terms of the Kyoto Protocol, parties listed under Annex B of the agreement (which consisted of industrialised nations and countries transitioning to a market economy at the time the agreement came into force) were required to take on binding emission-reduction commitments as part of their climate change obligations.[153] These commitments concerned the reduction of greenhouse gases outlined in Annex A by a minimum of 5% below levels set against a benchmark of 1990 during the protocol's first commitment period (2008-2012).[154] The setting of overarching emission targets in the form of commitments represented the adoption of a top-down approach to international climate change governance, with the Kyoto Protocol concretising this approach.[155]

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[148] For a reading on the effect of the use of *shall* and *should* in international law, see Germana D'Acquisto and Stefania D'Avanzo, 'The Role of SHALL and SHOULD in two International Treaties' (2009) 3(1) Critical Approaches to Discourse Analysis Across Disciplines 36.
[149] UNFCCC, art. 4(5).
[150] UNFCCC, art. 11.
[151] UNFCCC, art. 11(5).
[152] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.
[153] Kyoto Protocol, art 3.
[154] Kyoto Protocol, art 3.
[155] Panos Merkouris and Marie-Aure Perreaut, 'United Nations Framework Convention on Climate Change 1992' in D. Farber and M. Peeters (eds), *Climate Change Law (*Edward Elgar 2016) 379.

The Kyoto Protocol also reaffirmed the provisions of the UNFCCC on technology transfer, committing parties to cooperate in the diffusion and financing of 'environmentally sound technologies' mainly in favour of developing countries who lack appropriate technical know-how on controlling greenhouse gas emissions from source.[156] The provision on technology transfer also includes the mobilisation of both the public and private sectors in assisting to formulate sound policies and programmes for the transfer and diffusion of environmentally sound technologies.[157] Further, the Kyoto Protocol reaffirmed existing UNFCCC provisions on capacity and institutional building for the benefit of developing countries to enable them to build capacity and expertise in climate change mitigation measures.[158]

In addition to the foregoing provisions, there were aspects of the Kyoto Protocol that equally embodied differential treatment in favour of developing countries.[159] An instance of this was the Clean Development Mechanism (CDM), which was one of the three market-based flexibility measures entrenched in the agreement to enable developed countries to meet their emission-reduction targets under the protocol.[160] The CDM created a cooperative relationship between developed and developing countries in the context of climate change mitigation and adaptation:[161] on the one hand, developed countries could site climate-compliant projects in developing states which would enable developing states to meet the climate change objectives imposed on all countries by the UNFCCC;[162] on the other hand, developed states could also generate Certified Emission Reductions (CERs) from such projects which would count towards their compliance with the emission reduction targets imposed on them by the Kyoto Protocol.[163]

However, the CDM has been criticised heavily. For example, the siting of CDM projects in the past was noted to produce distributive justice concerns, with the projects dominated by a few countries such as India, China, Brazil, and Mexico,[164] to the marginalisation and exclusion of other developing countries that equally required the projects for the generation of

[156] Kyoto Protocol, art 10(c).
[157] Kyoto Protocol, art. 10(c).
[158] Kyoto Protocol, art. 10(e).
[159] Peter K. Oniemola, 'International Law on Renewable Energy: The Need for a Worldwide Treaty' (2013) 56 German Yearbook of International Law 239, 254.
[160] Kyoto Protocol art 12. The other flexibility measures are Joint Implementation and Emissions Trading Scheme. See Kyoto Protocol arts. 6 and 17, respectively.
[161] Kyoto Protocol, art 12(2).
[162] Kyoto Protocol, art 12(3)(a).
[163] Kyoto Protocol, art 12(3(b).
[164] Tomilola Eni-Ibukun, 'Climate Justice: The Clean Development Mechanism as a Case Study' in Erkki J. Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law* (Springer 2012) 229.

electricity and economic development. The CDM also generated other controversies, such as cases of human rights violations that arose from the siting of some CDM projects,[165] which led to the scholarly debate whether to tackle these by introducing new human rights tools[166] or through the application of existing devices like the ecosystem approach to environmental protection.[167] The criticisms of the CDM could be linked to broader criticisms of the Kyoto Protocol itself,[168] one of which was the non-participation of big carbon emitters like the United States of America,[169] and the eventual withdrawal of countries such as Canada from the climate agreement.[170]

It has been said that the sort of differential obligations within the Kyoto Protocol, which witnessed developed states being under an obligation to cut down on emissions through mitigation measures, is now rare to find.[171] This is due to the outcome of negotiations that followed an update to the Kyoto Protocol. Thus, at the 17th COP which held in Durban, delegates had agreed to 'negotiate another legal instrument or an agreed outcome with legally binding force' to come into effect in 2020.[172] The Durban Platform was instituted to oversee the drafting of the new legal instrument. This eventually led to the adoption of the Paris Agreement on Climate Change at the 21st COP in 2015. In the months preceding the climate conference, negotiating parties and delegates had been drawn in a bitter conflict over what form the CBDR principle should take in the new agreement.[173]

On the one hand, developed countries (led by the United States of America) argued for the abandonment of the CBDR principle in the form in which it manifested in the UNFCCC and

[165] Damilola S. Olawuyi, 'Advancing Climate Justice in International Law: An Evaluation of the United Nations Human Rights-Based Approach' (2015) 11(1) Florida A & M University Law Review 103.
[166] ibid.
[167] See e.g., Elisa Morgera, 'No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law' in E. Hollo and others (eds.), *Climate Change and the Law* (Springer 2012) 359; see also C. Gearty, 'Do Human Rights Help or Hinder Environmental Protection?'(2010) 1 Journal of Human Rights and the Environment 7, 7-22; M. Koskieniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power (2010) 1 Humanity 47.
[168] See Benjamin J. Richardson and others, 'Introduction: Climate Law and Developing Countries' in Benjamin J. Richardson and others (eds), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Edward Elgar 2009) 13.
[169] Jon Hovi, Detlef F. Sprinz and Guri Bang, 'Why the United States Did Not Become a Party to the Kyoto Protocol: German, Norwegian, and US Perspectives' (2012) 18(1) Climate Change Governance 129.
[170] Alex Scott, 'Canada Withdraws from Kyoto Protocol' (2011) 173(31) Chemical Week 12.
[171] Redgwell and Rajamani (n 23) 62.
[172] Zerrin Savaşan, *Paris Climate Agreement: A Deal for Better Compliance? Lessons Learned from the Compliance Mechanisms of the Kyoto and Montreal Protocols* (Springer 2019) 217.
[173] Saurabh Thakur, 'From Kyoto to Paris and Beyond: The Emerging Politics of Climate Change (2021) 77(3) India Quarterly 366.

instead canvassed for a new provision that would reflect what they perceived to be current realities.[174] They argued that it was anachronistic to maintain a polar description of countries as developed and developing, as many developing countries had witnessed spells of sustained economic growth and therefore rising per capita emissions. In effect, developed countries sought to make developing countries to take on more committed mitigation obligations such as the financing of climate action.[175] A similar opposition by developed countries was in fact raised during the 15th COP in Copenhagen which had led to a non-binding political document known as the Copenhagen Accord.[176] In a different context, the discontent against differential treatment has risen recently with developed countries opposing the inclusion of CBDR in the recently proposed pandemic instrument.[177]

Developing countries, on the other hand, had opposed the jettisoning of the CBDR in the run up to the conclusion of the Paris Agreement.[178] Represented variously by the Africa Group, G77, and Like-Minded Countries, these countries re-emphasised the claim (which was not denied) that developed countries had enriched themselves through historical emissions and therefore should continue to take the lead in climate change mitigation, including the associated responsibility of providing finance, transferring technology and building capacity, all in favour of developing countries. As one representative dramatically stated during the negotiations:

> You (the developed countries) grew to this level of prosperity because you burnt fossil fuel at an unabated rate […] You created the problem and now you say that we want you [developing countries] to share – on an equal basis – the responsibility[…] You are trying to freeze the development pace of developing

[174] Radoslav S. Dimitrov, 'The Paris Agreement on Climate Change: Behind Closed Doors' (2016) 16 (3) Global Environmental Politics 1, 5.
[175] Christina Voigt and Felipe Ferreira, ''Dynamic Differentiation': the Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5(2) Transnational Environmental Law 285, 291.
[176] Svitlana Kravchenko, Tareq M.R. Chowdhury, and Md Jahid Hossain Bhuiyan, 'Principles of International Environmental Law' in Shawkat Alam and others (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013) 56.
[177] Nithin Ramakrishnan, 'WHO: Developed Countries Oppose CBDR Inclusion in new Pandemic Instrument' (*Third World Network,* 29 July 2022) <WHO: Developed countries oppose CBDR inclusion in new pandemic instrument (twn.my)> accessed 09 September 2023.
[178] Annalisa Savaresi, 'The Paris Agreement: A New Beginning?' (2016) 34(1) Journal of Energy and Natural Resources Law 16, 18.

> countries […] Do people stop industrialisation that meets the needs of the country? Do people stop eating?'[179]

A compromise was reached with the consequent adoption of the Paris Agreement.[180] Since its adoption in 2015 and consequent entry into force in 2016, the Paris Agreement has generated massive interest. The significance of the landmark agreement may be observed in its near universal participation[181] and in its adoption by consensus.[182] The climate accord contains notable features that appear to give it a distinctive form.[183] Some of these include the high level of climate ambition, which seeks to hold 'the increase in the global average temperature to well below 2 degree Celsius above pre-industrial levels' and implementing measures to keep temperature rise to 1.5 degree Celsius above pre-industrial levels;[184] the bottom-up approach of climate governance, notably exemplified by the requirement for all parties to the agreement to submit Nationally Determined Contributions (NDCs) which are in fact national climate change mitigation plans and policies;[185] an enhanced transparency mechanism that is purposed to achieve compliance;[186] and a facilitative and periodic global stocktake that aims to review progress made over the implementation of the agreement.[187]

While the Paris Agreement maintains the CBDR principle, it presents it in an altered format, even renaming the principle as 'common but differentiated responsibilities and respective capabilities in the light of national circumstances (CBDRR – NC).' Summarising the effect of this development, Catherine Redgwell and Lavanya Rajamani note that:

> The Paris Agreement operationalizes the CBDRRC – NC principle not by tailoring commitments to categories of Parties, but by tailoring differentiation to the specificities

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[179] Gurdial Singh Nijar of Malaysia, speaking on behalf of the Like-Minded Developing Countries. See Nitin Sethi, 'Developing Countries Unite on CBDR Principle' (Business Standard, Paris, 5 December 2015) <Developing countries unite on CBDR principle | Business Standard News (business-standard.com)> accessed 09 September 2023.

[180] Paris Agreement to the United Nations Framework on Climate Change (adopted 22 April 2016, entered into force 4 November 2016).

[181] As of the time of writing this thesis, the Paris Agreement has 195 signatories and 195 parties. See UNTC, 'Paris Agreement' <UNTC> accessed 09 September 2023.

[182] Judith Blau, *The Paris Agreement: Climate Change, Solidarity, and Human Rights* (Palgrave Macmillan 2017) ix.

[183] I discuss some of these characteristics in prior research. See Chitzi C. Ogbumgbada, 'The Paris Agreement: An Imperfect but Progressive Document' (2016) 8 International Energy Law Review 320. See also Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110(2) American Journal of International Law 288.

[184] Paris Agreement, art 2(1)(a).

[185] Paris Agreement, arts 3 and 4(2).

[186] Paris Agreement, art 13(1).

[187] Paris Agreement, art 14(1)(2).

> of the issue area – mitigation, adaptation, finance, technology, capacity-building, and transparency. In effect, this has resulted in different forms of differentiation in different areas, and in arguably diluting the differentiation in favour of developing countries, an enduring site of conflict in the climate negotiations.[188]

A significant fallout of the adoption of the Paris Agreement is the obligation imposed on both developed and developing countries to take on mitigation measures. This is seen in Article 4 which provides that 'Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.'[189] As can be observed, this is different from the approach taken by previous climate change instruments, in particular the Kyoto Protocol, regarding the instantiation of the CBDR principle. Indeed, the obligation on all parties to the climate agreement to prepare and communicate NDCs is a signal that both developing and developed countries must now participate 'to achieve the long-term temperature goal set out in Article 2' of the Paris Agreement.[190] To achieve the temperature goal, parties are to execute measures to hold the increase in the global average temperature to well below 2˚C above pre-industrial levels and to pursue efforts to deaccelerate the temperature increase to 1.5˚C still above pre-industrial levels.[191] This would require raising climate ambition as well as implementing far-reaching mitigation measures, including the rapid deployment of renewable energy. The NDCs help to direct the focus on these mitigation measures to be implemented by parties.[192]

While it may appear as though CBDR has been watered down in the Paris Agreement,[193] differentiation with respect to mitigation is still expressed in many ways in the climate agreement. For example, the agreement provides for developed state parties to continue to be at the forefront of climate change mitigation measures, including setting and meeting economy-wide absolute emission reduction targets.[194] Developing countries are only encouraged to enhance their mitigation efforts and to move with time towards economy-

[188] Redgwell and Rajamani (n 23) 62.
[189] Paris Agreement, art 4(2).
[190] Paris Agreement, art 4(1).
[191] See Paris Agreement, art 2(1)(a).
[192] Robert Falkner, 'The Paris Agreement and the new Logic of International Climate Politics' (2016) 92(5) International Affairs 1107, 1115.
[193] See Redgwell and Rajamani (n 23) 62. See also Joost Pauwelyn, 'The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes' (2013) 22(1) Review of European Community and International Environmental Law 29.
[194] Paris Agreement, art 4(4).

wide emission reduction or limitation targets in the context of their different national circumstances.[195] Of note in this provision is the use of the word 'should' signifying that the provision was not meant to be binding, but only aspirational.

A further example of differentiation is the provision of support to enable developing countries to meet their mitigation obligations under the Paris Agreement. As Article 4(5) of the agreement provides, 'Support shall be provided to developing country Parties for the implementation of this Article [that is, Article 4], in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.' Those means of support respectively refer to climate finance, technology transfer and capacity building. Thus, the agreement recommits developed countries towards the task of mobilising financial resources for the benefit of developing countries to aid them to achieve the long-term emissions-reduction goals of the Paris Agreement.[196] The financial burden is split in an egalitarian manner to include other parties to the agreement who can provide such financial assistance to developing countries.[197] This is significant because it reduces the financial burden on developed countries. Nevertheless, the primary duty-bearers are developed countries, and this is justifiable because they are mainly the countries in the international community with possession of vast economic and financial resources.

The agreement also prioritises the technological needs of developing countries, as it calls for financial support to be given to them for the purpose of consolidating 'cooperative action on technology development and transfer at different stages of the technology cycle, with a view to achieving a balance between support for mitigation and adaptation.'[198] And regarding capacity building, the Paris Agreement recognises the significance of adequate human and institutional structures in the context of climate change mitigation and adaptation measures and therefore calls for the capacity and ability of developing countries to be strengthened.[199] This could take the form of '[…] access to climate finance, relevant aspects of education, training and public awareness, and the transparent, timely and accurate communication of information.'[200] Specifically, the agreement enjoins developed countries to take the lead in this

[195] Paris Agreement, art 4(4).
[196] Paris Agreement, art 9(1).
[197] Paris Agreement, art 9(2).
[198] Paris Agreement, art 10(6).
[199] Paris Agreement, art 11(1).
[200] Paris Agreement, art 11(1).

capacity building effort, nevertheless charging all parties to the agreement to 'cooperate to enhance the capacity of developing country Parties to implement this Agreement.'[201] Importantly, there are monitoring requirements imposed on parties to check for compliance. Further instances of CBDR relating specifically to mitigation can be found in the stipulation that parties shall consider the concerns of countries, particularly developing countries, whose economies will be affected by the impacts of climate change response measures[202] and the provision that 'All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 and taking into account their common but differentiated responsibilities and respective capabilities in the light of different national circumstances.'[203]

From the foregoing, we can observe that the CBDR principle appears to be still relevant in shaping the global response to climate change,[204] notwithstanding the fact that the principle has now assumed a character significantly different from previous iterations of the principle.[205] The compromise to spread the burden of climate change mitigation between developed and developing countries continues to provoke dissent from developing countries, with this dissent based on the argument that both mitigation and adaptation obligations should be borne by developed countries.[206] Despite this dissent, the copious provisions on international support for developing and least developed countries as demonstrated in the immediately preceding section, and the explicit recognition that developing countries require support and assistance to implement both their climate change mitigation and adaption obligations under the agreement,[207] appear to be a counterpoint to the dissatisfaction raised against the current formulation of the CBDR principle. Through legal interpretation, the CBDR principle as expressed in the foregoing climate change provisions can be aligned to goals that are beyond climate change mitigation and adaptation, such as global energy justice. Interpretation in this

[201] Paris Agreement art 11(3).
[202] Paris Agreement, art 4(15).
[203] Paris Agreement, art 4(19).
[204] See Daria Shapovalova, 'In Defence of the Principle of Common but Differentiated Responsibilities and Respective Capabilities' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021) 63. *Cf* Thomas Leclerc, 'The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable but Failed Effort to Enhance Equity in Climate Law' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021) 76.
[205] Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65(2) International and Comparative Law Quarterly 493.
[206] For example, the President of Malawi articulated this position in an opinion before COP26 in Glasgow. See Chakwera (137).
[207] Paris Agreement, art 3.

sense, according to Ronald Dworkin, should be able to portray a concept in the best possible light.[208] In its best portrayal, the CBDR principle should be re-interpreted to emphasise the relational nature of African communitarianism.

4.5. Re-interpretation

As a prelude to re-interpretation, it should first be acknowledged that the unfair distribution of renewable energy benefits is a global energy justice problem that is being generated by renewable energy development and use following the energy transition. It should further be recognised that this injustice is adversely affecting developing and low-income countries. These countries are also contending with several structural issues like extreme poverty, wars, disease outbreaks, low life expectancy, and so on, which have prevented their populations from leading flourishing lives and from living harmoniously or communally with other members of the international community. The CBDR principle should therefore be re-interpreted to facilitate the distribution of resources for the development of renewable energy in these developing countries. This will enable the people living in these countries to utilise renewable energy for climate change mitigation, energy access, energy security, and economic development. It will also enable them to achieve other SDGs and realise a wide array of human rights. The CBDR principle should be re-interpreted in a manner that settles the question of responsibility for the distribution of resources. African communitarianism demands that members of the community who are well-off have a duty to identify with, and aid, other members of the community who are less fortunate. On this basis, the cost of distribution should be borne by developed and high-income countries which are well-off since they are in possession of vast amounts of resources. Developing countries equally have a role to play. They must ensure that the received resources are further distributed fairly among the people.[209] Such distribution should prioritise the needs of the most vulnerable as well as those able to exploit and develop renewable energy in the society. Re-interpreting the CBDR principle as suggested here ultimately advances relationality as expressed via the themes of identity and solidarity. It reaffirms the African communitarian maxim that *a person is a person because of other persons.* Such re-interpretation would enable the people in developing countries to enter into greater communion with the rest of the international community. This makes the proposed re-interpretation morally and ethically right.

[208] See Stephen Guest, *Ronald Dworkin – Jurists: Profiles in Legal Theory* (3rd edn, Stanford Law Books 2012).
[209] See Guruswamy (n 43) 264.

To sum up the above section, CBDR is an important principle with global distributive justice implications. It is at the centre of actions and measures against global environmental problems especially climate change where it settles the question of responsibility. It is time to re-interpret the principle in a way that facilitates other ethical goals such as global energy justice. Re-interpreting the CBDR principle helps to set this goal on course as such re-interpretation strongly emphasises relationality. The re-interpretation of the CBDR principle has not created any new obligations on states and it is significant to continue to emphasis this point owing to the discussion in the second part of this chapter. Re-interpreting the CBDR principle within international climate law is important for identifying means of implementation which will constitute the discussion in the next chapter of this thesis.

In the next section, I will seek to reinforce the re-interpretation of CBDR.

5. The Duty to Cooperate

5.1. Setting the Scene

In this section, I will re-interpret the duty to cooperate as part of human rights obligations in a way that supports and strengthens the re-interpretation of CBDR as above. As I noted in Chapters One and Two, human rights have a strong connection with renewable energy. Renewable energy can contribute to the realisation of a range of human rights,[210] though it can sometimes lead to the curtailment of human rights especially when renewable energy projects produce human rights abuses.[211] Further to this, there is a connection between human rights and climate change.[212] This connection is being recognised in some climate change instruments. For example, the preamble of the Paris Agreement contains the following references to human rights:

> *Acknowledging* that climate change is a common concern of humankind, 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

[210] Adrian J. Bradbrook and Judith G. Gardam, 'Placing Access to Energy Services Within a Human Rights Framework' (2006) 28 Human Rights Quarterly 389, 390.

[211] Olawuyi (n 165) 103; Benjamin K. Sovacool and others, 'Dispossessed by Decarbonisation: Reducing Vulnerability, Injustice, and Inequality in the Lived Experience of Low-Carbon Pathways' (2021) 137 World Development 105116.

[212] See Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2010); Wewerinke-Singh (n 66) 16; Verena Kahl, 'A Human Right to Climate Protection – Necessary Protection or Human Rights Proliferation?' (2022) 40(2) Netherlands Quarterly of Human Rights 158.

> disabilities and people in vulnerable situations and the right to development, as well as gender quality empowerment of women and intergenerational equity.[213]

Although the preamble of a treaty is generally considered non-legally binding,[214] it is relevant to a consideration of the context to a treaty and should therefore be taken into account when interpreting that treaty.[215] This is as stipulated by the Vienna Convention on the Law of Treaties.[216] States already have an interpretative obligation to interpret all treaties in good faith in accordance with the ordinary meaning of the words used in the treaty and in the light of the treaty's object and purpose.[217] Therefore, the reference to human rights in climate change instruments establishes complementariness between human rights and climate change.[218]

Following this brief introduction, I will outline the relevant human rights obligations, paying particular attention to the duty to cooperate, which is the obligation of interest in this section. I will thereafter offer a re-interpretation of the duty to cooperate in line with African communitarianism in such a way that supports the re-interpretation of CBDR and the promotion of my African communitarian approach to global energy justice. A point to highlight here is that the moderate form of African communitarianism utilised in this thesis accommodates the notion of human rights.[219] The human rights obligations which I will discuss below, especially the duty of states to cooperate with each other, are primarily targeted at states rather than individuals.[220] This equally makes the human rights obligations essentially communitarian. This is significant because it helps to address the perceived tension between the individualistic nature of human rights and the conception of global energy justice which I have advanced in this thesis.[221]

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[213] Emphasis retained. Paris Agreement, preambular ref 11.
[214] See Jan Klabbers, 'Treaties and Their Preambles' in Michael J. Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 172.
[215] See Sarah Lothian, 'The BBNJ Preamble: More Than Just Window Dressing' (2023) 153 Marine Policy 105642.
[216] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331, art 31(2).
[217] ibid art 31(1). See also Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2017).
[218] John H. Knox, 'Climate Change and Human Rights Law' (2009) 50 Virginia Journal of International Law 163.
[219] See Chapter 3 for a discussion on this.
[220] *Cf* Diane Desierto, 'Beyond the State: Our Shared Duties to Cooperate to Realize Human Rights during the Evolving Risks of a Global Pandemic' (*EJIL:Talk!*, 20 August 2020) <Beyond the State: Our Shared Duties to Cooperate to Realize Human Rights during the Evolving Risks of a Global Pandemic – EJIL: Talk! (ejiltalk.org)> accessed 09 September 2023. There is still a form of communitarianism in this approach, insofar as it argues for shared duties to realise human rights.
[221] For a discussion on individual and group rights, see Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Addison Wesley 2009) 10-11.

Human rights obligations can be expressed through the duties to respect, to protect, and to fulfil. The duty to cooperate embodies these tripartite duties, making the duty to cooperate a central obligation of states.[222] Taking each in turn, the duty to respect binds states to the obligation of avoiding acts and measures that would act as barriers to the enjoyment of human rights in a third country.[223] Stated in a different way, the duty to protect 'refers to the duty to abstain from activities or measures that will have a negative impact on the enjoyment of economic, social and cultural rights outside its own territory.'[224] The duty to protect commits state parties to human rights treaties to implement measures that would prevent non-state entities under their legal control from interfering with the enjoyment of human rights across border.[225] The obligation to fulfil is a positive duty on developed states to facilitate and provide conditions for the enjoyment of human rights in other states. With respect to economic, social, and cultural rights, these obligations involve 'taking measures so that rights are not infringed by others; it also means being proactive, to the point of implementing direct measures to provide certain goods and services […]'[226]

For its part, the duty to cooperate incorporates the principle of cooperation.[227] Cooperation may be viewed as replacing the old concept of co-existence, which was dominant in the formative years of the international legal order and which was characterised mainly by agreements for the delimitation of political boundaries as well as rules for the non-interference of a state in other states' domestic affairs.[228] At the heart of cooperation is the realisation that states must work together to advance their interest in areas of mutual concerns.[229] Cooperation is a general principle of public international law that is found in international law instruments such as the Charter of the United Nations, and the ICESCR.

[222] See Benjamin M. Meier, Judith B. de Mesquita, and Caitlin R. Williams, 'Global Obligations to Ensure the Right to Health: Strengthening Global Health Governance to Realise Human Rights in Global Health' (2022) 3(1) Yearbook of International Disaster Law Online 3, 16-22.
[223] Magdalena Sepúlveda Carmona, 'The Obligations of 'international assistance and cooperation' under the International Covenant on Economic, Social and Cultural Rights. A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8' (2009) 13(1) The International Journal of Human Rights 86, 90.
[224] ibid.
[225] ibid 91.
[226] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (3rd edn, Cambridge University Press 2020) 80.
[227] Rüdiger Wolfrum, 'International Law of Cooperation' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).
[228] Christina Leb, 'Implementation of the General Duty to Cooperate' in Stephen C. McCaffrey, Christina Leb, and Riley T. Denoon, *Research handbook on International Water Law* (Edward Elgar 2019) 97.
[229] ibid.

It has been suggested that the duty to cooperate should also include the notion of solidarity.[230] This would entail states demonstrating authentic commitment and taking cooperative actions against pertinent and common global problems.[231] This suggestion makes sense, despite the fact that the status of solidarity in international law remains doubtful[232] or, in some cases, contentious.[233] Amidst global challenges like climate change, poverty, pandemics, the unfair distribution of renewable energy benefits and so on, greater solidarity is needed among members of the international community.[234] This accounts for why the theme of solidarity is salient within African communitarianism where solidarity involves 'exhibiting certain psychological attitudes and engaging in helpful behaviour'.[235] These 'attitudes are ones positively oriented towards the other's good and include an empathetic awareness of the other's condition and a sympathetic emotional reaction to this awareness.'[236]

The Charter of the United Nations and the ICESCR will serve as the contexts within which I will offer a re-interpretation of the duty to cooperate. The significance of the Charter to the international protection of human rights is well recognised,[237] notwithstanding the fact that it does not contain an enumeration of human rights as with the ICESCR. The non-enumeration of human rights does not diminish the importance of the Charter because, as has been pointed out, when the Charter was being negotiated there was a 'common understanding of what were the most basic human rights, broadly defined.'[238] When discussing relevant provisions of the ICESCR in this section, I will also highlight the relevant parts of instruments such as the

[230] See UNGA, 'Revised Draft Declaration on Human Rights and International Law', 2 May 2023, A/HRC/53/32, arts 1(2) and 2(3).
[231] OHCHR, 'UN Expert Calls for Declaration on the Right to International Solidarity' <UN expert calls for declaration on the right to international solidarity | OHCHR> accessed 09 September 2023.
[232] Volker Roeben and Mark Amakoromo, 'Responsibility, Solidarity and their Connections in International Law: Towards a Coherent Framework' in M. den Heijer and H. van der Wilt (eds), *Netherlands Yearbook of International Law: Global Solidarity and Common but Differentiated Responsibilities* (T.M.C. Asser Press 2022) 25.
[233] Kostiantyn Gorobets, 'Solidarity as a Practical Reason: Grounding the Authority of International Law' (2022) 69(3) Netherlands International Law Review 3, 10-11.
[234] Benjamin Mason Meier, Judith Bueno de Mesquita, and Sharifah Sekalala, 'The Pandemic Treaty as a Framework for Global Solidarity: Extraterritorial Human Rights Obligations in Global Health Governance' (*Bill of Health Harvard Law,* 13 October 2021) <The Pandemic Treaty as a Framework for Global Solidarity: Extraterritorial Human Rights Obligations in Global Health Governance | Bill of Health (harvard.edu)> accessed 09 September 2023.
[235] Metz (n 132) 177.
[236] ibid.
[237] Louis B. Sohn, 'The Human Rights Law of the Charter' (1977) 12(2-3) Texas International Law Journal 129, 129-130.
[238] Zenon Stavrinides, 'Human Rights Obligations under the United Nations Charter' (1999) 3(2) The International Journal of Human Rights 38, 47.

Convention on the Rights of the Child[239] insofar as these engage economic, social, and cultural rights with respect to the duty to cooperate. Along with the ICESCR, the Convention on the Rights of the Child is one of the nine core international human rights treaties enacted under the auspices of the UN system.[240] The instruments discussed in this section all have a strong and clear legal value and are thus suited as contexts for re-interpreting the duty to cooperate. They are all examples of hard law in international law. This expression refers to laws that are legally binding. This form of law is distinguished from soft law,[241] which is generally not legally binding, albeit with the potential to have a normative force that influences state behaviour, in addition to influencing the progressive development of international law.[242]

I will first present the relevant parts of these instruments that engage with the duty to cooperate, before offering a re-interpretation of the obligation.

5.1.1. Charter of the United Nations

The Charter of the United Nations recognises cooperation as a solution to 'international problems of an economic, social, cultural, or humanitarian character'[243] and imposes a duty to cooperate on states to achieve economic, social, and cultural goals. This duty is found in Articles 55 and 56 of the Charter. Both provisions appear in a section of the instrument that is aptly labelled as 'International Economic and Social Co-operation', overtly signifying the socio-economic and cultural perspectives of both provisions. The heading further underlines the role which 'cooperation' plays in achieving the economic, social, and cultural objectives of the UN, even as the principle appears in such a foundational global instrument as the Charter.[244] Article 55 is premised on the understanding that stability and well-being conditions could enhance a harmonious relationship between the nations that constitute the international legal order or, as the article frames this relationship, 'peaceful and friendly relations among nations.'[245] We can observe that the value of communal or harmonious relationship features

[239] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[240] See OHCHR, 'What are the treaty bodies?' <Treaty Bodies | OHCHR> accessed 09 September for a list of these treaties and the corresponding treaty bodies.
[241] Arnold N. Pronto, 'Understanding the Hard/Soft Distinction in International Law' (2015) 48(4) Vanderbilt Journal of Transnational Law 941.
[242] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007). The next chapter discusses the nature of soft law in great detail.
[243] Charter of the United Nations, art 1(3).
[244] See Nico J. Schrijver, 'The Future of the Charter of the United Nations' (2006) 10(1) Max Planck Yearbook of United Nations Law Online 1, 2.
[245] Charter of the United Nations, art 55.

prominently in this provision, just as it does within African communitarian thinking. The reason for the clear emphasis on harmonious relationship is not far-fetched. It is traceable to the formation of the UN in the throes of World War II.[246] The Charter appears to signal this assertion by making a preambular reference to the UN's ultimate aim of saving 'succeeding generations from the scourge of war, which has brought untold sorrow to humankind twice in our lifetime.'[247] It therefore follows that the global body will discourage attempts to plunge the world into disharmony.[248] Although there has not been a major world war since the conclusion and coming into force of the Charter, there is the broader question as to the effectiveness of the UN system in preventing not only conflicts but also other global problems like economic instability and climate change.[249]

Article 55 of the Charter does not stop at recognising the instrumental role played by stability and well-being in achieving friendly relations among states; it proceeds to list the parameters for measuring stability and well-being. These are:

i. Standards of living at a sufficiently high level, full employment, and socio-economic progress and development;
ii. Solutions to international economic, social, health, and related problems, as well as international cultural and educational cooperation; and
iii. Universal respect for, and adherence to, human rights of people irrespective of race, sex, language, or religion.[250]

Article 56, on its part, contains a duty on members to cooperate.[251] Explicitly, the article provides that, 'All members pledge themselves to take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55.'

5.1.2. International Covenant on Economic, Social and Cultural Rights

Adopted in 1966 and coming into force in 1976, the ICESCR was enacted as part of the early human rights instruments, enshrining what has now come to be known as second-generation

[246] Ian Shapiro and Joseph Lampert, 'Introduction' in Ian Shapiro and Joseph Lampert (eds), *Charter of the United Nations* (Yale University Press 2014) vii.
[247] Charter of the United Nations, preambular ref 1.
[248] Richard A. Falk, 'What Future for the UN Charter System of War Prevention?' (2003) 97(3) American Journal of International Law 590.
[249] See Peter Nadin, 'The United Nations: A History of Success and Failure' (2019) 90 (4) Australian Quarterly 11.
[250] Charter of the United Nations, art 55(a)(b)(c).
[251] Stavrinides (n 238) 47.

human rights.[252] These rights are so called based on their distinction from rights of a civil and political nature, which constitute the International Covenant on Civil and Political Rights (ICCPR),[253] adopted at about the same time.[254] The second-generation rights are mainly socio-economic and cultural human rights such as the right to work;[255] the right to social security, including social insurance;[256] the right to an adequate standard of living;[257] the right to health, both mental and physical;[258] right to education;[259] and the right to science,[260] which also includes a commitment on states to ensure the development and diffusion of science.[261] As I have noted in this thesis, renewable energy is central to the realisation of most of these rights.

With respect to the duty to cooperate, the ICESCR provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and *through international assistance and cooperation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[262]

The Convention on the Rights of the Child contains a similar provision on the duty to cooperate, albeit with respect to children.[263] Its reference to economic, social, and cultural rights justifies its importance and discussion here. Thus, the Convention provides that:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to *economic, social and cultural rights*, States Parties shall

[252] Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 1.
[253] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [Note that the provisions of article 41 (Human Rights Committee) entered into force 28 March 1979].
[254] See Maya Hertig Randall, 'The History of the Covenants: Looking Back Half a Century and Beyond' in Daniel Moeckli, Helen Keller, and Corina Heri, *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 7-9.
[255] ICESCR, art 6.
[256] ICESCR, art 9.
[257] ICESCR, art 11.
[258] ICESCR, art 12.
[259] ICESCR, art 13.
[260] ICESCR, art 15(1)(b).
[261] ICESCR, art 15(2).
[262] ICESCR, art 2(1). Emphasis supplied.
[263] Wouter Vandenhole, 'Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?' (2009) 17 International Journal of Children's Rights 23, 23.

undertake such measures to the maximum extent of their available resources and, where needed, within the *framework of international co-operation*.[264]

5.2. Re-interpretation

The duty to cooperate in the foregoing legal instruments could be interpreted in a manner that complements the interpretation of CBDR contained in the preceding section. To begin the re-interpretation of the duty to cooperate under the Charter of the United Nations and the ICESCR, it should first be acknowledged that the unfair distribution of renewable energy benefits is a global energy justice problem that is hampering the ability of people living in developing countries from fully realising their human rights. In the case of the Charter, the unfair distribution of renewable energy benefits militates against the creation of conditions of stability and wellbeing especially in developing countries, and ultimately affects peaceful and friendly relations among nations of the world.[265] With respect to the ICESCR, the unfair distribution of renewable energy benefits impacts the ability of people living in developing countries from enjoying those rights listed in the instrument. Article 56 of the Charter and Article 2(1) of the ICESCR should both be interpreted as requiring developed countries to distribute resources to developing countries for the development of renewable energy. This would enable people living in developing countries to enjoy the benefits of renewable energy. While developed countries should shoulder the cost of cooperation and assistance, developing countries on the other hand must ensure that the resources are further distributed fairly among their populations.[266] Re-interpreting the duty to cooperate in this way advances relationality.

In the next chapter of the thesis, I will demonstrate how several interpreters in the form of human rights treaty- and non-treaty bodies have relied on the provisions of the Charter of the United Nations, the ICESCR, and other human rights treaties, to render a dynamic interpretation of the duty to cooperate. For example, the CESCR, which oversees the implementation of the ICESCR,[267] and which acts as the ICESCR's monitory mechanism, has interpreted Article 2(1) in a way that supports the re-interpretation of the duty to cooperate as above. After clarifying that Article 2(1) imposes an obligation on all states to cooperate for

[264] Convention on the Rights of the Child, art 4. Emphases supplied.
[265] Charter of the United Nations, art 55.
[266] Guruswamy (n 43) 264.
[267] OHCHR, 'Committee on Economic, Social and Cultural Rights' <OHCHR | Committee on Economic, Social and Cultural Rights> accessed 09 September 2023.

development and to realise important economic, social, and cultural rights, the CESCR notes that 'it is particularly incumbent upon those States which are in a position to assist others' to help with facilitating such cooperation.[268] The implication of this is that developed and high-income countries, which are clearly in possession of economic and technical resources should shoulder the cost of cooperation and assistance.[269] This interpretation is once again backed by African communitarianism because parties in possession of resources have a duty to assist those less fortunate in the community.[270] A similar interpretation, as will also be discussed, has equally been given by the Committee on the Rights of the Child (CRC) under its work on children's rights and the environment with a special focus on climate change.[271]

In summary, this section has shown the importance of the duty to cooperate as part of human rights obligations and how the obligation can be re-interpreted in a way that facilitates the African communitarian approach to global energy justice developed in this thesis. The re-interpretation of the duty to cooperate did not create any new obligations on states. The re-interpretation has relied mainly on existing provisions on the duty to cooperate as contained in important international legal instruments. This could be significant in guarding against the sort of anticipated opposition to the promotion of the African communitarian approach to global energy justice, which I discussed in the second section of this chapter. The introduction of human rights to the discourse not only helps to reinforce the re-interpretation of CBDR but also acts as a means for uncovering implementation tools within international human rights law that will be useful in holistically implementing the proposed re-interpretation of the duty to cooperate. Those implementation tools mainly include human rights treaty- and non-treaty bodies and the processes associated with them. These tools will also be useful in helping to overcome any challenges associated with the use of international climate law mechanisms to implement the re-interpretation of CBDR. I will demonstrate these points in the next chapter of this thesis.

[268] CESCR, General Comment No. 3, 'The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant)', 14 December 1990, E/1991/23, para 14.
[269] Hakeem Yusuf and Philip Oamen, 'Realising Economic and Social Rights Beyond COVID-19: The Imperative of International Cooperation' (2022) 32 Indiana International and Comparative Law Review 43, 62.
[270] Metz (n 132) 177.
[271] OHCHR, 'The UN Committee on the Rights of the Child Commits to a new General Comment on Children's Rights and the Environment with a Special Focus on Climate Change' <The UN Committee on the Rights of the Child commits to a new General Comment on Children's Rights and the Environment with a Special Focus on Climate Change | OHCHR> accessed 09 September 2023.

6. Conclusion

I began this chapter by highlighting the importance of international law in promoting the African communitarian approach to global energy justice developed in this thesis. Although international law has been used to advance immoral objectives in the past, it can be wielded for good purposes. This recognition is important because international law can help to move global energy justice from theory to practice by facilitating solutions for the redress of the unfair distribution of renewable energy benefits. Utilising international law in this way requires a strategy. This is due to the problems posed by global energy governance, the absence of a permanent and central decision-making institution and ideological issues relating to self-interest and neoliberalism. To overcome these problems, I proposed the use of legal interpretation which consisted in the identification of existing international law concepts and the re-interpretation of those in line with my African communitarianism. As I demonstrated, this approach has been adopted elsewhere as a blueprint for overcoming difficult problems posed by changing current practices at the international level.

In the light of the above, I proposed a re-interpretation of the CBDR principle in line with relationality as found within African communitarianism. The re-interpretation recognises the burden being faced by people living in developing countries as a result of the unfair distribution of renewable energy benefits. It also facilitates the distribution of resources from developed countries for the development of renewable energy in developing countries. In order to support and strengthen this re-interpretation, I equally proposed a re-interpretation of the duty to cooperate as imposing a legal obligation on developed countries to assist developing countries in overcoming the problem of unfair distribution of renewable energy benefits, which is a global energy justice that is preventing the ability of people living in developing countries from realising their rights. I also emphasised that developing countries have a duty to distribute the resources to their populations fairly. In the next chapter, I will do several things. I will discuss how institutions and processes existing in international climate law and international human rights law can implement these re-interpretations. Amidst these discussions, I will emphasise the use of legal and regulatory techniques in facilitating my African communitarian approach to global energy justice.

Chapter 5
Operationalising Global Energy Justice: Means of Implementation

1. Introduction

In the previous chapter, I proposed a re-interpretation of the CBDR principle in order to facilitate the African communitarian approach to global energy justice which I developed in this thesis. The proposed re-interpretation is to address the unfair distribution of renewable energy benefits in the international community which was conceived as a global energy justice problem. The re-interpretation mainly involves developed countries distributing resources for the development of renewable energy in developing countries. The distribution of these resources will enable developing countries to utilise renewable energy for climate change mitigation, energy access, energy security, and economic development. It will also assist them to achieve other SDGs and realise a wide range of human rights. The distribution of resources in this way is acknowledged in African communitarianism as expressing the value of relationality. The distribution will ultimately enable people living in developing countries to enter into communion, and to live harmoniously, with other members of the international community. Re-interpreting the CBDR principle in this way also served as a pathway for introducing energy justice into the climate agenda. To support the re-interpretation of the CBDR principle, I further proposed a re-interpretation of the duty to cooperate in a way that also reflected the ideals of African communitarianism. I argued that developed countries had an obligation founded on human rights to distribute resources for the development of renewable energy in developing countries. The re-interpretation supported the idea of developing countries ensuring that all resources received from developed countries are further distributed fairly among the people living in those countries. In the present chapter, I will demonstrate how to implement these proposed re-interpretations.

To begin with, the chapter will identify the means of implementation that are available within international climate law. These involve institutions that have been set up to govern and regulate the issue of climate change. They also involve processes that are governed and regulated by the institutions in question. The chapter will concurrently assess whether existing institutional practice supports the distribution of resources for the development of renewable energy in developing countries. The chapter will thereafter move to international human rights

law, identifying and assessing how relevant human rights bodies and processes can further strengthen the re-interpretation of CBDR. It will equally demonstrate how these mechanisms can help to overcome some of the challenges associated with a reliance on international climate law mechanisms.

Before proceeding to the substance of this chapter, I will make two preliminary remarks. The first is that while the focus of the chapter is on 'implementation', it is necessary to state that within both the international climate regime and international human rights law, there are institutions that have the capability to play both interpretative and implementing roles. This important point is emphasised all through the chapter and forms the basis for discussing the relevant institutions and processes under the headers of 'interpreters' and 'implementers'. The second is that institutions with responsibilities for implementing energy justice can do so – and in some cases, have been doing so – through a range of legal techniques. A choice of the appropriate regulatory mechanism to adopt in particular circumstances is usually determined by the purpose of the regulatory scheme.[1] Some of these legal techniques, which have appeared in the scholarly literature on regulation, are the creation of tailored regulatory institutions; the imposition of binding targets; and the obligation to issue guidance.[2] Many of the institutions under consideration have relied mainly on the production of guidance and recommendations for both the interpretation and implementation of relevant legal provisions that relate to global energy justice. I will argue for these to be strengthened in places. Some means of strengthening these existing practices include the re-interpretations of both CBDR and human rights obligations through soft law; the setting up of an institution within international climate law to implement the re-interpretation of CBDR; the production of specific guidance and recommendations to existing institutions in order to align their practices with global energy justice; and the creation of targets and indicators to measure and monitor implementation.

[1] See Donald Feaver and Nicola Durrant, 'A Regulatory Analysis of International Climate Change Regulation' (2008) 30(4) Law & Policy 394, 403-404, who for example outline emission reduction targets, joint implementation mechanism, clean development mechanism and carbon markets as specific regulatory schemes within international climate law designed to reduce the incidence of climate change.

[2] Aileen McHarg, 'Regulating for Sustainable Electricity Market Outcomes in Britain: Asking the Law Question' (2013) 30 Environmental and Planning Law Journal 289, 293.

2. International Climate Law Mechanisms

As the CBDR principle has salience within international climate law,[3] it is necessary to consider what institutions and processes exist in that legal regime that can be used to promote global energy justice.

2.1. The Central Significance of the Conference of the Parties

The COP is the most significant organ of the international climate regime because of its preeminent position in that system,[4] though by no means the only institutional organ set up to address climate change as there are other institutions outside international climate law that have roles relevant to climate change response measures.[5] As I noted in the previous chapter, the potential of the COP to render global justice is vast. Much of the discussion that follows on the promotion of energy justice within the international climate regime will revolve round the COP because it is the supreme regulatory and governance body of the international climate treaty system.[6] Being a permanent mechanism that facilitates cooperation between states parties of the UNFCCC,[7] the COP is vested with the wide-ranging mandate of reviewing the implementation of the UNFCCC and of making decisions for its effective implementation as well as the implementation of subsequent agreements negotiated under the framework convention.[8] These broad powers bestow upon the COP the authority over any subject concerning climate change,[9] hence enabling it to contribute to the promotion of global energy justice. A point to note before proceeding further is that when the COP meets with respect to the Kyoto Protocol, it is known as the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP);[10] and when it deliberates over the Paris Agreement, it is known as the Conference of the Parties serving as the meeting of the

[3] See Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 International and Comparative Law Quarterly 493. See also Harald Winkler and Lavanya Rajamani, 'Common but Differentiated Responsibility and Respective Capabilities in a Regime Applicable to All' (2014) 14 Climate Policy 101.

[4] Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press 2004) 398.

[5] See e.g., Timothy Cadman (ed), *Climate Change and Global Policy Regimes: Towards Institutional Legitimacy* (Palgrave Macmillan 2013). See also Katherine Michonski and Michael A. Levi, 'Harnessing International Institutions to Address Climate Change' (2010) Council on Foreign Relations <http://www.jstor.org/stable/resrep00271> accessed 09 September 2023.

[6] UNFCCC, art 7(2). The provisions of Article 7 apply mutatis mutandis to the Kyoto Protocol and the Paris Agreement. See Feaver and Durrant (n 1) 30(4) 394.

[7] Yamin and Depledge (n 4) 399.

[8] UNFCCC, art 7(2). More specific powers of the COP are listed in art 7(2) (a-m) of the UNFCCC.

[9] Yamin and Depledge (n 4) 400.

[10] Kyoto Protocol, art 13(1).

Parties to the Paris Agreement (CMA).[11] In this section, the reference to COP is mainly a reference to the UNFCCC COP, but as the Paris Agreement is the main and latest manifestation of the international climate treaty system,[12] the CMA will be referenced in places in this section.

Owing to its pre-eminent position, the COP is arguably well placed to not only re-interpret the CBDR principle for it to align with the African communitarian approach to global energy justice espoused by this thesis, but also to implement that re-interpretation with the purpose of facilitating the distribution of resources for the development of renewable energy in developing and low-income countries for use in climate change mitigation, energy access, economic development and for realising the SDGs and a broad range of human rights.[13]

2.2. The Conference of the Parties as Interpreter

2.2.1. Decision on Global Energy Justice

The COP could begin by clarifying an official interpretation of CBDR that explicitly and clearly aligns with the African communitarian approach to global energy justice. Clarifying an official interpretation of the principle is a crucial step that needs to be undertaken before discussion turns to implementation. In doing this, the COP will be positioning itself as an agent of global justice, inspired by the African communitarian themes of identity and solidarity. In other words, the interpretation will be demonstrating the virtue that the world is a community where each member identifies with the other's conditions and assists those who require aid. Individual members of the community can still aspire to personal goals in line with moderate African communitarianism, nevertheless the dominant ethos is one of relationality or identity and solidarity.[14] As preambular references to justice in the Paris Agreement imply, the COP already has the potential to promote an African communitarian perspective on global energy

[11] Paris Agreement, art 16(1). See also UNFCCC, 'What are Governing, Process management, Subsidiary, Constituted and Concluded Bodies?' <What are governing, process management, subsidiary, constituted and concluded Bodies? | UNFCCC> accessed 09 September 2023.

[12] See Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017).

[13] See generally OHCHR, 'Renewable Energy and the Right to Development: Realizing Human Rights for Sustainable Development' <https://www.ohchr.org/sites/default/files/2022-05/KMEnergy-EN.pdf> accessed 09 September 2023.

[14] Kwame Gyekye, 'Person and Community in Akan Thought' in Kwasi Wiredu and Kwame Gyekye (eds), *Person and Community: Ghanaian Philosophical Studies 1* (The Council for Research in Values and Philosophy 1992); Thaddeus Metz, 'An African Theory of Social Justice: Relationship as the Ground of Rights, Resources and Recognition' in Camilla Boisen and Matthew C. Murray (eds), *Distributive Justice Debates in Political and Social Thought* (Routledge 2016) 176.

justice.[15] The proposed re-interpretation of the CBDR principle can take the form of a COP decision.

A decision is one of the outputs of a COP meeting.[16] It is a type of soft law.[17] Soft law is often contrasted with hard international law which refers to rules, norms, and practices of a binding nature in international law.[18] Hard law generally encompasses rules and practices distilled from the formal sources of international law contained in Article 38 of the Statute of the International Court of Justice (ICJ).[19] The sources are conventions and treaties between nations which are interpreted in accordance with the Vienna Convention on the Law of Treaties;[20] customs accepted as a general practice among states in the form of law; general principles of law recognised by nations; and judicial decisions and legal writings of qualified and eminent jurists.[21] Viewed from this angle, soft law refers to regulatory instruments that are not legally binding according to the traditional sources of international law.[22] There is nevertheless more to the nature of soft law.[23] For a start, the classification of international regulatory instruments as either hard or soft law can sometimes mask complex questions surrounding both forms of law.[24] Even though soft law is generally taken to mean rules of a non-binding character, it can nevertheless serve as a powerful complement that influences the interpretation and progressive development of hard-law sources of international law.[25] In many instances, it can even serve as an alternative to hard law.[26] In fact, soft law has greatly

[15] Paris Agreement, preambular ref 13.

[16] Others include amendments, annexes, protocols, and the more commonly forms of resolutions, declarations, and 'other actions'. These are usually contained in reports summarising COP meetings. See Yamin and Depledge (n 4) 405. See also Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 86-91.

[17] See generally Alan Boyle, 'The Choice of a Treaty: Hard Law versus Soft Law' in Simon Chesterman, David M. Malone, and Santiago Villapando (eds), *The Oxford Handbook of United Nations Treaties* (Oxford University Press 2019) 102-118.

[18] ibid 102-106.

[19] See Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm Evans (ed), *International Law* (5th edn, Oxford University Press 2018) 89.

[20] See Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018).

[21] Statute of the ICJ, art 38.

[22] Michael Bothe, 'Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?' (1980) 11 Netherlands Yearbook of International Law 65; Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413.

[23] Hanspeter Neuhold, 'The Inadequacy of Law-Making by International Treaties: 'Soft Law' as an Alternative?" in Rüdiger Wolfrum and Volker Roeben (eds), Developments of International Law in Treaty Making (Heidelberg 2010) 40. See also Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law" (1989) 38 International and Comparative Law Quarterly 850.

[24] Francesco Sindico, 'Is the Paris Agreement *Really* Legally Binding?' (*SCELG Policy Brief,* No.03/2015.

[25] See Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007).

[26] Boyle (n 17) 102-118.

influenced the development of many branches of international law. As one legal scholar notes in this context, 'Certain areas of international activity, most notably human rights, environment, trade, and finance, exhibit both the proliferation of non-state actors and the challenge to the accepted modes of international norm creation. One of those challenges is the phenomenon of soft law.'[27] In this light, a distinct connection is drawn between the emergence of international environmental law and the normative influence of soft international law concepts.[28] The prominence of soft law may ultimately be interpreted as an act of 'deformalisation' of international law and a challenge to the traditional process of international law making.[29] From this perspective, soft law may be considered a potent complement to the range of formal sources of law listed in Article 38 of the Statute of the ICJ.[30] A COP decision can in fact exist in its own right and is thus a useful tool for achieving the re-interpretation of CBDR.[31] A COP decision facilitates 'speedier, more responsive standard-setting, and avoid[s] the differentiation of treaty commitments among parties that can result from supplemental agreements.'[32] A COP decision could serve as a framework for changing or altering current international law practices as they relate to global energy justice.

In view of the above, I propose that the COP should adopt a decision that explicitly re-interprets the CBDR principle. The decision should begin by recognising that renewable energy development and use produces ethical issues, most notably, the unfair distribution of renewable energy benefits, disproportionately affecting developing and low-income countries. The decision should equally acknowledge that many of these countries are confronting structural issues that have worsened the unfair distribution of renewable energy benefits. This acknowledgement will be in line with recognition justice which aims to understand the causes of maldistribution. The decision should clearly recognise that the unfair distribution of renewable energy benefits is a global energy justice problem. The proposed decision should specifically acknowledge that many developing countries require sufficient supplies of

[27] See Catherine Redgwell, 'International Soft Law and Globalization' in Barry Barton and others, *Regulating Energy and Natural Resources* (Oxford University Press 2006) 89.
[28] Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 Michigan Journal of International Law 420, 421 and 422.
[29] See Redgwell (n 27).
[30] Boyle and Chinkin (n 25). See also Dupuy (n 28) 421-422.
[31] On the influence of COP decisions regarding questions of justice, see Harro van Asselt, 'Breaking a Taboo: Fossil Fuels at COP26' (*EJIL:Talk!,*26 November 2021) <Breaking a Taboo: Fossil Fuels at COP26 – EJIL: Talk! (ejiltalk.org)> accessed 09 September 2023.
[32] Bodansky, Brunnée, and Rajamani (n 16) 90. See also Jutta Brunnée, 'COPing with Consent: Lawmaking under Multilateral Environmental Agreements' (2002) 15(1) Leiden Journal of International Law 1, 15-31.

renewable energy not just as a means for reducing the incidence of climate change, but also as a resource for tackling energy access issues and for realising human rights whilst meeting other relevant SDGs.[33] The COP decision should further clarify the question of responsibility, deciding who should bear the costs of the redistribution of resources. It should state that costs should fall on developed and high-income countries as they are the well-off members of the international community. They possess vast reserves of financial, technological, and capacity-based resources that could help to facilitate the fair distribution of renewable energy benefits. The decision should equally specify that the governments of developing countries that receive resources should ensure that these are used fairly and justly distributed within their respective countries. This re-interpretation reflects relationality as expressed via identity and solidarity.

One other injustice that a COP decision could address is the problem faced by petroleum-rich developing countries that will lose revenue from oil and gas exploitation as a result of the energy transition. One of the proposed solutions to this problem is a programme that could take the form of financial, technological and trade support for renewable energy development and utilisation,[34] which might be instrumental in convincing those developing countries to leave their fossil fuels in the ground. A COP decision can help to articulate this point distinctly. A step in this regard was taken during COP26 in Glasgow where the outcome document was framed in a manner that still recognised the special situation of countries heavily dependent on fossil fuels for their energy security objectives. That framing had called for unabated coal power and fossil fuel subsidies to be phased down, rather than totally abolished.[35] Fossil fuel subsidies are in place to encourage the continued development and production of energy from conventional energy sources. Similarly, the Glasgow Climate Pact also called for 'targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition.'[36] I argue that the COP should take the further step of prescribing support for hydrocarbon countries as part of the scheme suggested above.

[33] OHCHR, 'Renewable Energy and the Right to Development: Realizing Human Rights for Sustainable Development' (n 13).
[34] See Andreas Goldthau, Laima Eicke, and Silvia Weko, 'The Global Energy Transition and the Global South' in Manfred Hafner and Simone Tagliapietra (eds), *The Geopolitics of the Global Energy Transition* (Springer 2020) 319.
[35] Decision 1/CMA.3, 'Glasgow Climate Pact', 8 March 2022, FCCC/PA/CMA/2021/10/Add.1, art 36.
[36] ibid.

In practice, the COP has appeared to acknowledge some of the elements of the proposed CBDR re-interpretation as outlined above. For example, in the COP decision adopting the Paris Agreement, there is a preambular reference to the 'need to promote universal access to sustainable energy in developing countries, in particular in Africa, through the enhanced deployment of renewable energy.'[37] The COP has also acknowledged that renewable energy could help to address the current global energy crisis and that support towards a clean and just transition was needed.[38] It has equally acknowledged that huge financial resources are required to transition to a low-carbon energy future[39] and has further recognised that developing countries require enhanced financial support from developed countries in strengthening mitigation actions.[40] Yet more needs to be done.[41] The COP should take unequivocal steps in promoting the African communitarian approach to global energy justice. It should acknowledge the problem of unfair distribution of renewable energy benefits and how the issue negatively impacts developing countries. This acknowledgement appears missing in practice. The COP should designate the issue as a global energy justice problem and firmly place responsibility for addressing it on developed countries. If the COP can do this, it will show that *a person is a person because of other persons,* a maxim which characterises African communitarianism.

Proposing that the COP takes steps to re-interpret the CBDR principle is not out of place and in fact mirrors efforts by the UNGA to encourage the ICJ to render an advisory opinion on climate change that will clearly spell out the obligations of states to protect the earth from climate change and the legal consequences for failure so to do.[42] The proposal is also comparable to another request for an advisory opinion on the obligations of states parties to the United Nations Convention on the Law of the Sea (UNCLOS) to mitigate and address the effects of marine pollution caused by climate change. The request was filed by the

[37] Decision 1/CP.21, 'Adoption of the Paris Agreement', 29 January 2016, FCCC/CP/2015/10/Add.1, preambular ref 14.

[38] Decision 1/CP.27, 'Sharm el-Sheikh Implementation Plan', 17 March 2023, FCCC/CP/2022/10/Add.1, paras 12-13.

[39] ibid para 33.

[40] ibid para 37.

[41] For example, Lakshman Guruswamy had argued that international climate law, as constituted when he was writing, was indifferent to the plight of millions living in developing countries who require energy to lead functional lives. See Lakshman Guruswamy, 'Energy Justice and Sustainable Development' (2010) 21 Colorado Journal of International Environmental Law and Policy 231. See also Lakshman Guruswamy, 'Global Energy Justice' in Lakshman Guruswamy and Elizabeth Neville (eds), *International Energy and Poverty: The Emerging Contours* (Routledge 2016) 55.

[42] UNGA, Resolution 77/276 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change', 1 March 2023, A/77/L.58. I will revisit this case in Chapter 6.

Commission of Small Island States on Climate Change and International Law before the International Tribunal for the Law of the Sea (ITLOS).[43] If the ICJ and ITLOS go ahead to make such pronouncements, then it would be instances of global bodies being made to clarify an issue.[44] It would also highlight the roles of these global bodies as facilitators of global justice. This is a situation that equally applies with the COP concerning the proposed CBDR re-interpretation and the ultimate operationalisation of global energy justice.

It may be noted that the authority of the COP to pass the proposed decision can be traced to its status as the governing body of the UNFCCC.[45] As noted above, the interpretive function of the COP is derived from its power to implement the UNFCCC and relevant climate change agreements. Already to be noted is the fact that relevant climate change provisions recognise support for developing countries.[46] The COP could rely on different provisions of existing climate instruments to pass the proposed decision. For example, the UNFCCC directs the implementation of the Convention in line with equity and CBDR[47] and that being the case, I argue that the COP has the authority to decide how these should be interpreted, including through a COP decision that establishes clear links with justice, development, and poverty eradication.[48]

I anticipate that advocates of neoliberalism would likely challenge the COP decision I proposed here since it involves a radical redistribution of resources through assistance and aid. Nevertheless, it is time for the COP to look past neoliberal considerations and render a relational form of justice. As I noted in Chapter Three, neoliberalism cannot address the unfair distribution of renewable energy benefits, just as it cannot resolve current global problems.[49] The COP should also overlook self-interest, which usually dominates international climate politics. In this way, the COP will be doing the right thing. It will be wielding international law

[43] ITLOS, 'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law', 12 December 2022 <Request for Advisory Opinion COSIS 12.12.22.pdf (itlos.org)> accessed 09 September 2023.
[44] See Monica Feria-Tinta, 'On the Request for an Advisory Opinion on Climate Change under UNCLOS before the International Tribunal for the Law of the Sea' (2023) 00(0) Journal of International Dispute Settlement 1, 5-13.
[45] UNFCCC, 'What are Governing, Process management, Subsidiary, Constituted and Concluded Bodies?' < What are governing, process management, subsidiary, constituted and concluded Bodies? | UNFCCC> accessed 09 September 2023.
[46] Some of which I discussed in Chapter 4.
[47] UNFCCC, art 3(1).
[48] See generally Yamin and Depledge (n 4) 400-401.
[49] See Cristina Magdaleno, 'Chomsky on COVID-19: The Latest Massive Failure of Neoliberalism' (*EURACTIV,* 25 April 2020) <Chomsky on COVID-19: The latest massive failure of neoliberalism – EURACTIV.com> accessed 09 September 2023.

for a good and just purpose. It will be seen as doing justice to the people in developing countries facing the unfair distribution of renewable energy benefits.

Since the COP adopts its decisions by consensus, there are certain practical ways to get it to render the sort of decision proposed above. For example, developing countries facing the unfair distribution of renewable energy benefits could explore political techniques like diplomacy and negotiation to call for the allocation of resources for renewable energy development. They could utilise diplomacy and negotiations to move the COP to adopt such a decision. Developing nations and other like-minded countries such as the African Group, the Least Developed Countries group, the Alliance of Small Island States and so on have already formed negotiating blocks at previous COPs and have used these groupings to achieve group goals.[50] They could either utilise existing groupings or form new blocs to persuade the COP to deploy African communitarian thinking by promoting identity and solidarity in the distribution of resources to develop renewable energy systems in developing countries.

Furthermore, advocacy groups such as environmental and human rights campaign groups might utilise soft tools like lobbying, negotiation, and other modes of activism to persuade the COP to adopt the above decision. There are many groups already using these tools to achieve their groups' aims and objectives.[51] Many of these organisations conduct and publish research findings on important issues in international law; organise public lectures and workshops to create awareness and influence decision-making on those issues; and participate in international conferences such as the COPs of relevant treaties. While it is sometimes difficult to gauge the results of these efforts, I contend that they are helpful, nonetheless. I argue further that these groups and other relevant parties, like individuals and communities, may utilise these tools to push for a COP decision on energy justice.

2.3. The Conference of the Parties as Implementer

After clarifying an interpretation of the CBDR principle by means of a decision for the purpose of accommodating the African communitarian approach to global energy justice, the COP should oversee the implementation of that decision. The reason is that it makes sense for the COP to adopt a decision and to ensure that that decision is effectively executed and monitored. The COP's function of implementing such a decision is once again in pursuance to

[50] See e.g., Chapter 4 where I discussed the disputations surrounding the CBDR principle.
[51] See Beth Schaefer Caniglia, Robert J. Brulle, and Andrew Szasz, 'Civil Society, Social Movements, and Climate Change' in Riley E. Dunlap and Robert J. Brulle (eds), *Climate Change and Society: Sociological Perspectives* (Oxford University Press 2015) 236.

the pivotal role which it plays within the international climate change regime.[52] Some legal scholars who rely on existing international climate institutions through legal interpretation to promote global energy justice appear to omit the central role which the COP could play in overseeing the implementation of global energy justice. As an illustration of this omission, it has been argued that the rachet-up mechanism of the Paris Agreement (consisting of the nationally determined contributions of parties to the UNFCCC; the enhanced transparency framework; and the global stocktake) could be utilised as an implementation framework to achieve energy justice in the context of sustainable development.[53] Although this argument clearly has merits, it appears to rely heavily on the behaviour of states parties to the UNFCCC to do energy justice. More needs to be done. Therefore, it is necessary to examine how the COP may achieve the implementation of its decision. Indeed, the COP can achieve this objective by utilising a range of legal and regulatory measures that may be targeted at either changing practices or improving on them.[54]

2.3.1. Bespoke Institution on Energy Justice

One of these strategies relates to institutional design and by this means, it is possible for the COP to set up an institution with a mandate on energy justice, broadly defined, but with specific powers to ensure the distribution of resources for the development of renewable energy in developing countries.[55] To my knowledge, the COP has not established such an institution on energy justice in practice. The COP has the power to set up any subsidiary body that it deems expedient for the implementation of the UNFCCC.[56] A subsidiary body with a clearly delineated mandate on energy justice is reasonable because, due to the nature of the COP as an intergovernmental process that consists of a wide array of parties, it would be difficult for it to adequately supervise the distribution of resources for renewable energy development.[57] Therefore, the proposed institution could handle this function. While the COP

[52] Christine Wamsler and others, 'Enabling new Mindsets and Transformative Skills for Negotiating and Activating Climate Action: Lessons from UNFCCC Conference of the Parties' (2020) 112 Environmental Science and Policy 227, 228.
[53] See Margaretha Wewerinke-Singh, 'A Human Rights Approach to Energy: Realizing the Rights of Billions within Ecological Limits' (2021) 31 Review of European, Comparative and International Environmental Law 16, 24.
[54] McHarg (n 2).
[55] See ibid 293-294 who discusses institutional design as a regulatory measure.
[56] UNFCCC, art 7(2)(i).
[57] For a discussion on the composition of the CMA, which serves the Paris Agreement, see Jed Odermatt, 'Article 16: Institutional Provisions' in Geert Van Calster and Leonie Reins (eds), *The Paris Agreement on Climate on Climate Change: A Commentary* (Edward Elgar 2021) 365-366.

decision should specify the developing countries to receive resources for the development of renewable energy, the proposed institution could handle the specifics.

The establishment of new institutions may be associated with potential challenges. One relates to the general reluctance of the COP to establish new bodies with limited membership, which may effectively disfranchise some countries.[58] Another relates to the COP's widespread reliance on existing institutions, even when negotiating new protocols or agreements. For example, the COP itself is not a new institution, as it serves both the Kyoto Protocol (as the CMP) and the Paris Agreement (as the CMA). This general practice has been attributed to the need for the COP to maintain an institutional economy.[59] The question of whether to create new institutions and procedures also came to the fore during the negotiations of the Paris Agreement.[60] As reported, 'The Paris Agreement allows some existing procedures and institutions to serve the Agreement, while allowing the CMA to take decisions on some other issues.'[61] All these highlight the intricacies surrounding institutional design as a regulatory measure, which entails the setting up of new institutions complete with a suite of new human resources and procedures and all the risks related thereto.[62]

Notwithstanding these challenges, there is merit in having bespoke institutions handle specific issues, and the point is re-iterated once again that the COP could adopt this option in implementing the proposed decision on CBDR re-interpretation. The COP has, in fact, sometimes tended to establish bespoke institutions to deal with specific issues, essentially muting anticipated challenges to setting up a new institution on energy justice. For example, during the twenty-sixth COP in Glasgow, the COP set up the Glasgow Committee on Non-Market Approaches to provide state parties to the UNFCCC with opportunities for non-market-based cooperation to implement mitigation and adaptation plans contained in their nationally determined contributions.[63] The establishment of this subsidiary body was championed by developing countries, particularly Bolivia, which has been campaigning for

[58] Yamin and Depledge (n 4) 404.
[59] ibid 398.
[60] Odermatt (n 57) 365-366.
[61] ibid 366.
[62] McHarg (n 2) 293-294.
[63] See Decision 4/CMA.3, 'Work Programme under the Framework for Non-Market Approaches Referred to in Article 6, Paragraph 8, of the Paris Agreement', 8 March 2022, FCCC/PA/CMA/2021/10/Add.1, 4.

years for the incorporation of non-market approaches in the UNFCCC process.[64] Hence it can serve as a template for the proposed energy justice institution.

2.3.2. Financial Mechanism

One point to highlight here is that in some instances, the COP has produced guidance, recommendations, and notes in form of decisions, and directed these at existing institutions as a strategy for achieving desired regulatory goals. International climate law, in many instances, imposes a legal obligation on the COP to produce guidance and strategies on certain aspects of the international climate regime.[65] The obligation to produce guidance and strategies has been identified as a legal technique for realigning regulatory behaviour towards a certain end.[66] This strategy is said to be a 'commitment-forcing mechanism' designed to be definite, clear and certain.[67] In view of this, the COP can issue specific guidance and strategies to existing institutions in order to implement the proposed decision on CBDR re-interpretation. The issuance of such guidance is supported by the relational themes of identity and solidarity.

When it comes to the implementation of the proposed COP decision through existing institutions, the main interest here is the financial mechanism established by the international climate change regime since finance is pivotal to the distribution of resources for the development of renewable energy.[68] Therefore, the COP could issue specific guidance to the multilateral financial institutions operating the UNFCCC Financial Mechanism[69] with the aim of prioritising the renewable energy needs of developing countries through enhanced access to finance. In turn, these countries can then utilise the funding made available to them for developing their renewable energy systems in order to respond to climate change, to tackle energy access issues, to realise human rights, and to achieve the SDGs.[70] Such guidance could

[64] Rosanna Anderson, 'Non-Market Mechanisms Under Article 6.8 of the Paris Agreement: a Transnational Perspective' (2022) 13 (2-3) Transnational Legal Theory 321, 328.
[65] Examples of this are found in many instruments constituting the international climate regime. For example, Article 6(7) of the Paris Agreement obligates the CMA to adopt rules, modalities and procedures for the market-based framework established by Article 6(4) of the agreement.
[66] McHarg (n 2) 300-301.
[67] ibid 300.
[68] Dereje Azemraw Senshaw and Jeong Won Kim, 'Meeting Conditional Targets in Nationally Determined Contributions of Developing Countries: Renewable Energy targets and Required Investment of GGGI Member and Partner Countries' (2018) 116 Energy Policy 433, 440.
[69] UNFCCC, art 11(1) entrusts management of the Financial Mechanism to 'one or more existing international entities.'
[70] See generally OHCHR, 'Renewable Energy and the Right to Development: Realizing Human Rights for Sustainable Development' (n 13).

also mandate the financial institutions to work in synergy with the subsidiary body on global energy justice as proposed above. As a matter of history, when the UNFCCC was negotiated, it was decided that a financial mechanism operated by a multilateral institution should be established. This was said to be a compromise between developing countries that desired the creation of a new financial institution to help manage funding for climate change response measures and developed countries that resisted this move.[71] The COP ultimately entrusted the management of the financial mechanism to the Global Environment Facility (GEF),[72] until 2010 when the Green Climate Fund (GCF)[73] was formed at the sixteenth COP in Cancún to take charge of the financial mechanism.

While the GCF remains the preeminent financial mechanism of the international climate change regime, there is a proliferation of climate finance bodies in recent times.[74] The work of these bodies mainly cuts across climate change mitigation and adaptation.[75] In addition to the GEF and GCF, which are multilateral channels for financing climate actions around the world, there is an increased number of bilateral funding mechanisms.[76] Additionally, the 'range of partners for climate funds now includes regional development banks, a range of international organizations, developing country ministries, trust funds and non-governmental organizations (NGOs).'[77] The proliferation of climate finance bodies could be compared to the proliferation of emissions trading systems.[78] This proliferation is usually justified on the basis that there is a need for polycentricism in tackling climate change.[79] A global problem such as climate change requires a polycentric and diverse approach to governance in tackling it.[80] The result is the emergence of multiple institutions and measures directed at the problem.

The international climate institutions, including the Financial Mechanism, exist to do the bidding of the COP and are structured to follow the principles and provisions of the

[71] Bodansky, Brunnée, and Rajamani (n 16) 145.
[72] GEF, 'Who We Are' <Who We Are | GEF (thegef.org)> accessed 09 September 2023.
[73] GCF, 'About GCF' <About GCF | Green Climate Fund> accessed 09 September 2023.
[74] See Antonio A. Romano and others, *Climate Finance as an Instrument to Promote the Green Growth in Developing Countries* (Springer 2018) 28-29.
[75] Smita Nakhooda and Marigold Norman, 'Climate Finance: Is it Making a Difference?' (*Overseas Development Institute,* December 2014) 14 – 15 <9359.pdf (odi.org)> accessed 09 September 2023.
[76] See Romano and others (n 74) 28.
[77] ibid 29.
[78] See Katja Biedenkopf and Jørgen Wettestad, 'Harnessing the Market: Trading in Carbon Allowances' in Andrew Jordan and others (eds), *Governing Climate Change: Polycentric in Action?* (Cambridge University Press 2018) 232.
[79] Elinor Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' (2010) 20 Global Environmental Change 550.
[80] ibid 552-553.

UNFCCC.[81] As the UNFCCC provides, the Financial Mechanism 'shall function under the guidance of and be accountable to the Conference of the Parties, which shall decide on its policies, programme priorities and eligibility criteria related to the Convention.'[82] Following on from guidance received from the COP, the GCF for instance deploys measures to translate such guidance into action and 'submits annual reports to the COP for its consideration and to receive further guidance.'[83] In practice, the COP has issued multiple pieces of guidance to the GCF with respect to other areas relating to climate change governance. For example, the COP has directed the GCF to ensure that the allocation of resources is balanced between mitigation and adaptation; to adopt a country-driven approach when allocating resources to climate change response measures; and to consider the special situation of climate-vulnerable developing countries when deciding the allocation of funding to adaptation measures, with the guidance also recognising that all developing country parties to the UNFCCC are eligible to receive funding from the GCF.[84]

In other guidance, the COP has explicitly directed the GEF to provide financial resources to developing countries, mainly to the least developed and small island developing states, for a range of purposes.[85] None of these purposes however engages the area of energy, not to mention renewable energy. The COP could therefore issue specific guidance mandating the GCF to prioritise the distribution of resources for renewable energy development in developing countries. Although the climate change instruments stipulate that there should be a balance between adaptation and mitigation,[86] which for instance could determine how climate finance is allocated,[87] a COP guidance or recommendation to the GCF as described above could help to ensure that more attention is focused on renewable energy for the benefit of developing countries, since it is a resource that has many co-benefits. Once again, developing countries with particular challenges concerning the distribution of renewable energy benefits could organise groups and blocks to lobby and negotiate such guidance from the COP. A lot would depend on how well these countries can lobby and negotiate to get the COP to issue such guidance; nevertheless, it is a tactic worth adopting. In negotiating for

[81] GCF, 'Governance' <Governance | Green Climate Fund> accessed 09 September 2023.
[82] UNFCCC, art 11(1).
[83] GCF, 'Governance' (n 81).
[84] Decision 4/CP.19, 'Report of the Green Climate Fund to the Conference of the Parties and Guidance to the Green Climate Fund', 31 January 2014, FCCC/CP/2013/10/Add.1, paras 9(a-c) and 10.
[85] Decision 6/CP.7, 'Additional guidance to an operating entity of the financial mechanism', 21 January 2002, FCCC/CP/2001/13/Add.1, 40, para 1(a-k).
[86] See e.g., Paris Agreement, art 9(4).
[87] GCF, 'About GCF – Balanced Allocation' <About GCF | Green Climate Fund> accessed 09 September 2023.

such guidance, these developing countries could highlight the fact that the COP has a legal duty to produce guidance to the Financial Mechanism.[88] These countries could explore this obligation as a pathway for negotiating such guidance from the COP.

2.3.3. Nationally Determined Contributions

Other than the financial mechanism, the COP can also issue guidance with respect to processes existing within the international climate regime with the objective of ensuring the distribution of resources for the development of renewable energy in developing countries. In the introduction to this chapter, I noted that the international climate change regime has some processes instituted to respond to climate change. I suggest that these processes should be aligned strongly with African communitarianism, with this happening through guidance emanating from the COP. Of particular importance among these processes are communications with respect to the NDCs of states parties to the UNFCCC.[89] It may be recalled that when discussing the entrenchment of the CBDR principle within the international climate law in Chapter Four, I noted that the provision on NDCs was one of the innovative features of the Paris Agreement, constituting a part of the ambition mechanism of that instrument,[90] though the idea of requiring states to submit climate policies began with the fifteenth Conference of the Parties in Copenhagen in 2009.[91] In fact, the NDCs of parties contain domestic climate targets which parties undertake to meet in pursuance to the Paris Agreement climate goal.[92]

Some scholars have suggested that the mechanism regulating parties' NDCs could be a useful process for facilitating equitable outcomes,[93] including energy justice.[94] This is irrespective of the fact that the primary purpose of the NDCs is the provision of avenues for both developed and developing states to demonstrate how their domestic mitigation and adaptation strategies

[88] UNFCCC, art 11(1).
[89] Paris Agreement, art 4.
[90] Paris Agreement, art 4(3). See also Harro van Asselt and Kati Kulovesi, 'Article 13: Enhanced Transparency Framework for Action and Support' in Geert Van Calster and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar 2021) 304.
[91] Francesco Sindico, 'The Copenhagen Accord and the Future of the International Climate Change Regime' (2010) 1(1) Revista Catalana De Dret Ambiental 1, 6.
[92] See Gokul Iyer and others, 'Measuring Progress from Nationally Determined Contributions to Mid-Century Strategies' (2017) 7 Nature Climate Change 871.
[93] See Stellina Jolly and Abhishek Trivedi, 'Principle of CBDR-RC: Its Interpretation and Implementation Through NDCs in the Context of Sustainable Development' (2021) 11(3) Washington Journal of Environmental Law and Policy 309.
[94] Wewerinke-Singh (n 53) 23-24.

align with the climate ambition of the Paris Agreement.[95] Concerning the potential of the NDCs to be an avenue for energy justice, Wewerinke-Singh has made the argument that 'rights-based energy targets and policies aligned with SDG7 [universal access to energy] as well as the goals of the Paris Agreement should be integrated into States' enhanced nationally determined contributions (NDCs) submitted under the Paris Agreement.'[96] With respect to developed states, Wewerinke-Singh further argues that the rights-based energy targets should embody domestic economic strategies and specify how the states intend to address global energy deficits through funding in line with their international legal obligations.[97] Concerning the setting of climate targets and policies, it should be pointed out that these targets are set from the bottom-up, in generally keeping with the predominantly bottom-up approach of governance adopted by the Paris Agreement.[98]

Rather than have domestic rights-based energy targets as discussed above, the question that could crop up is whether the targets could instead be imposed by the COP from the top to the bottom.[99] The setting of legally-binding targets is said to be one of the strategies for achieving desired regulatory outcomes and is said further to constitute 'harder-edged commitments to achieve specific outcomes by a specified date.'[100] Normally, it would fall on the COP, meeting as the CMA, to set these binding targets, since it has the power to regulate the NDCs mechanism in line with its jurisdiction under the Paris Agreement.[101] It is however doubtful whether the setting of legally-binding targets by the COP would be possible in the first place, not only considering that the NDCs are said to be obligations of conduct that only require good-faith effort at implementation, rather than obligations of result which are harder in orientation,[102] but also taking note of the limited success of top-down binding targets elsewhere in the regime in the past.[103] If we can however move past this complication and have a situation where the COP is able to set legally binding targets on energy with respect

[95] Paris Agreement, art 4.
[96] Wewerinke-Singh (n 53) 24.
[97] ibid 24.
[98] See Yann Robiou du Pont and Malte Meinshausen, 'Warming Assessment of the Bottom-Up Paris Agreement Emissions Pledges' (2018) 9 Nature Communications 4810.
[99] For a critical take on some of the weaknesses of the NDCs process, see Olivia Woolley, *Renewable Energy Law* (Hart Publishing 2023) 33-35.
[100] McHarg (n 2) 297.
[101] Paris Agreement, art 4.
[102] See Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (n 3) 497-498.
[103] An example that readily comes to mind is the Kyoto Protocol which had legally binding emission cuts imposed on developed countries.

to parties' NDCs, then it has been argued within regulatory literature that it does not matter whether these targets are legally enforceable or not because targets play a symbolic role, with the objective of ensuring progress towards a policy goal.[104] This idea may be supported by the Paris Agreement itself which encourages developed parties to take the lead by undertaking economy-wide absolute emission reduction targets while encouraging developing parties to move over time towards economy-wide emission reduction or limitation targets.[105] These provisions are couched in non-binding terms, thereby casting doubt on their legal enforceability.

From observation, the COP appears not to have utilised the legal strategy of imposing binding targets, either with respect to energy or other mitigation areas, but has mainly allowed parties to communicate self-imposed targets in line with parameters such as clarity and transparency.[106] Concerning the contents of parties' NDCs, the COP has pointed out that their features are to be mainly determined with reference to the provisions of the Paris Agreement, especially Article 4.[107] Nevertheless, the COP has also expressed its readiness to consider other features of the NDCs in 2024.[108] It is therefore not in doubt that the COP can give elaborate guidance on the operation of the NDCs, including allowing for it to be used as a means of doing global energy justice in relation to the distribution of resources for the development of renewable energy. With respect to the latter, some countries have been stating in their NDCs their renewable energy needs.[109] To strengthen this practice, I suggest that the COP include in future guidance that developing countries should be given priority access to resources to help them develop their renewable energy systems. This could also be complemented by the setting of rights-based energy targets as canvassed in the academic literature.[110] In addition, the COP might consider the idea of imposing legally binding targets on energy with respect to the NDCs. Such an approach would be in alignment with the African communitarian themes of identity and solidarity.

[104] McHarg (n 2) 299-300.
[105] Paris Agreement, art 4(4).
[106] Decision 18/CMA.1, 'Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support referred to in Article 13 of the Paris Agreement', 19 March 2019, FCCC/PA/CMA/2018/3/Add.2.
[107] Decision 4/CMA.1, 'Further Guidance in relation to the Mitigation Section of Decision 1/CP.21', 19 March 2019, FCCC/PA/CMA/2018/3/Add.1, para 19.
[108] ibid.
[109] See UNFCCC, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat', 17 September 2021, FCCC/PA/CMA/2021/8.
[110] See Wewerinke-Singh (n 53) 24.

2.4. Monitoring and Oversight

Implementing the CBDR interpretation canvassed in this thesis will be incomplete if such implementation does not accommodate monitoring and oversight.[111] Consequently, once the COP has clarified the CBDR interpretation in the way proposed in this section, and after it has directed the implementation of that interpretation in the manner outlined above, it could monitor such implementation. It could do this through monitoring mechanisms already existing within the international climate regime, particularly within the Paris Agreement where there exist two innovative monitoring mechanisms, namely the enhanced transparency framework and the global stocktake.

2.4.1. Enhanced Transparency Framework

The Enhanced Transparency Framework (ETF) is a progressive feature of the Paris Agreement,[112] which can be used as a tool for monitoring compliance with the proposed COP decision on CBDR re-interpretation, and any guidance that the COP issues for the implementation of the re-interpretation in question. It could also monitor the activities of any subsidiary body on energy justice if the COP decides to institute one. Together with the global stocktake,[113] the ETF constitutes the oversight mechanisms established by the Paris Agreement.[114] Essentially, the ETF is established for the purpose of building mutual trust and confidence whilst promoting the effective implementation of the Paris climate accord through in-built flexibility that considers the states parties' different capacities and that builds upon collective experience.[115] Importantly, the ETF is structured to be implemented 'in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty' which obviates the placing of undue burden on states parties to the agreement.[116] In this light, the ETF is said to be a mechanism that exerts both peer and public pressure on states as a way of influencing them to respect and fulfil their obligations under the Paris Agreement.[117] As van Asselt and

[111] ibid.
[112] Harald Winkler, Brian Mantlana and Thapelo Letete, 'Transparency of Action and Support in the Paris Agreement' (2017) 17(7) Climate Policy 853.
[113] Marjan Peeters, 'Article 14: The Global Stocktake' in Geert Van Calster and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar 2021) 326.
[114] van Asselt and Kulovesi (n 90) 302.
[115] Paris Agreement, art 13(1).
[116] Paris Agreement, art 13(3).
[117] See Bodansky, Brunnée, and Rajamani (n 16) 242.

other have argued explicitly, '…the transparency framework may help hold Parties accountable for meeting their commitments…'[118]

Furthermore, the ETF is conceived as a framework for action and support. As a framework for action, its aim is to foster an understanding of climate change action in the context of the UNFCCC objects and purposes and includes, among other things, 'clarity and tracking of progress towards achieving Parties' individual nationally determined contributions under article 4… including good practices, priorities, needs and gaps, to inform the global stocktake under Article 14.'[119] As a framework for support, the ETF has the objective of providing clarity on assistance provided and received by relevant individual parties with respect to climate change mitigation and adaptation under relevant provisions of the climate agreement, with the further aim of providing a comprehensive overview of aggregate financial support provided by relevant parties, which will inform the global stocktake proposed under Article 14 of the Paris Agreement.[120] It may equally be noted that the ETF could have the effect of driving countries towards ratcheting up their climate policies as communicated within their NDCs.[121]

Flowing from the above, I argue that the ETF can be used to monitor the implementation of the COP decision, the operation of any subsidiary body established with respect to the COP decision, the operation of the financial mechanism regarding guidance and recommendations issued by the COP on CBDR re-interpretation, and the working of the NDCs in line with global energy justice. On the one side, the requirements placed on developed countries to provide information on financial support to developing countries should be leveraged upon. Those informational requirements have been described as a mandatory obligation,[122] so that they could be an avenue for holding developed countries to account. As already noted, finance plays a crucial role in the distribution of resources to developing countries for renewable energy development,[123] and as will be seen below, it continues to be a recurring issue more generally within the international climate regime. On the other side, developing countries should submit information relating to financial, technological, and capacity-based support needed and received[124] and should link these to their NDCs in relation to renewable energy.

[118] Harro van Asselt and others, 'Putting the 'enhanced transparency framework' into action: Priorities for a Key Pillar of the Paris Agreement' (Stockholm Environment Institute Policy Brief, 2016) 1.
[119] Paris Agreement, art 13(5).
[120] Paris Agreement, art 13(6).
[121] Bodansky, Brunnée and Rajamani (n 16) 242-244.
[122] See ibid 243.
[123] See Senshaw and Kim (n 68) 440.
[124] Paris Agreement, art 13(10).

The ETF provides a technical expert review on the provided information, which is tailored towards achieving action.[125] For instance, the Paris Agreement explicitly provides that, 'For those developing country Parties that need it in the light of their capacities, the review process shall include assistance in identifying capacity-building needs.'[126] More clearly, the agreement provides that:

> The technical expert review under this paragraph shall consist of a consideration of the Party's support provided, as relevant, and its implementation and achievement of its nationally determined contribution. The review shall also identify areas of improvement for the Party, and include a review of the consistency of the information with modalities, procedures and guidelines referred to in paragraph 13 of this Article, taking into account the flexibility accorded to the Party under paragraph 2 of this Article. The review shall pay particular attention to the respective national capabilities and circumstances of developing country Parties.[127]

It may be noted here that the COP has issued elaborate guidance on how this technical review is to function, including on the broader question of how the ETF is to be carried out.[128] This is an indication of the COP's capacity to influence the working of the ETF towards a particular direction.

2.4.2. The Global Stocktake

The Global Stocktake, the first of which will take place in 2023 and every five years thereafter,[129] serves as an assessment and feedback forum through which the CMA examines the 'collective progress towards achieving the purpose of this [Paris] Agreement and its long-term goals… It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support…'[130] As provided by the Paris Agreement:

> The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in

[125] Paris Agreement, art 13(11)(12).
[126] Paris Agreement, art 13(11).
[127] Paris Agreement, art 13(12).
[128] Decision 18/CMA.1 (n 103).
[129] Paris Agreement, art 14(2).
[130] Paris Agreement, art 14(1).

> accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action.[131]

To this end, the global stocktake is a mechanism instituted to help parties know what areas they could improve regarding global climate action. It also helps to highlight gaps in the levels of support that developing countries are encountering in their bid to meet their obligations on the Paris Agreement.[132]

Wewerinke-Singh has argued that the global stocktake is a valuable mechanism for reviewing 'States' collective progress towards a rights-based energy transition aligned with the goals of the Paris Agreement.'[133] This is a justifiable contention. In this way, the global stocktake could be an effective way of bringing together all the tools of implementation in a holistic manner to achieve the African communitarian approach to global energy justice developed in this thesis. Nevertheless, the potential challenge to this contention is that the global stocktake is primarily structured to assess general progress on climate action around the globe. A possible way to overcome this challenge is for developing countries that require resources for renewable energy development to move the COP to use the global stocktake to monitor the implementation of global energy justice. These countries could rely on Article 14(1) of the Paris Agreement which provides that the global stocktake must be carried out in consonance with equity. It has been argued that this provision presents an opportunity to streamline rules of fairness and justice into the stocktaking process.[134] While the notion of equity has not been defined by the Paris Agreement, the reference to the concept in the context of the global stocktake 'leaves the door open for a dialogue on equitable burden sharing, as well as an assessment of whether States are contributing as much as they should, given their responsibilities and capabilities […].'[135] This arguably offers a chance to monitor progress made on achieving global energy justice in the manner envisaged in this thesis.[136]

To summarise the above arguments and findings, the COP must do more to ensure that the problem of unfair distribution of renewable energy benefits is addressed by taking clear and

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[131] Paris Agreement, art 14(3).
[132] UNFCCC, 'Why the Global Stocktake is Important for Climate Action this Decade' <Why the Global Stocktake is Important for Climate Action this Decade | UNFCCC> accessed 09 September 2023.
[133] Wewerinke-Singh (n 53) 24.
[134] Harald Winkler, 'Putting Equity into Practice in the Global Stocktake under the Paris Agreement' (2020) 20(1) Climate Policy 124.
[135] Bodansky, Brunnée and Rajamani (n 16) 245.
[136] ibid.

decisive steps to ensure the distribution of resources for the development of renewable energy in developing countries for use not just for climate change mitigation, but also for other uses outlined all through this thesis. This section has outlined the steps that the COP should adopt to achieve this outcome. It should however be pointed out that there are some risks and limitations that may affect the capacity of the COP to promote the African communitarian approach to global energy justice. Some of these issues are connected to broader questions within international climate law and are relevant when discussing how existing institutions could be utilised to move global energy justice from theory to practice.

2.5. Potential Risks and Limitations

2.5.1. The Problem of Finance

Although developed countries have been at the forefront of providing and mobilising finance for climate action in developing countries in pursuance of their financial obligation, there have been lapses on the part of developed countries.[137] Following on from previous climate negotiations, developed and high-income countries pledged to provide and mobilise the sum of US$100 billion in climate finance from both private and public sources in favour of developing countries by 2020.[138] Yet this commitment has remained largely unfulfilled and unrealised.[139] To buttress this point, in a report published recently by the OECD, it was revealed that developed countries provided and mobilised the total sum of US$79.6 billion in climate finance for the benefit of developing nations in 2019, with this amount being less than the original commitment of US$100 billion.[140] The report further revealed that the already mobilised sum was largely constituted by finance from multilateral institutions, while climate finance from bilateral commitments, as well as from private sources, witnessed a decline in the same year of assessment.[141] Equally worrisome is the revelation that mobilised climate finance has increasingly come in the form of loans, especially those with onerous payback

[137] J. Timmons Roberts and others, 'Rebooting a Failed Promise of Climate Finance' (2021) 11 Nature Climate Change 180.
[138] See Decision 2/CP.15, 'The Copenhagen Accord', 30 March 2010, FCCC/CP/2009/11/Add.1, para 8. See also Decision 1/CP.16, 'The Cancún Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', 15 March 2011, FCCC/CP/2010/Add.1, para 98.
[139] UNFCCC, 'The Climate Finance Question' (*United Nations Climate Change*, 02 November 2021) <The Climate Finance Question | UNFCCC> accessed 09 September 2023. See also Jocelyn Timperley, 'The Broken $100-billion Promise of Climate Finance – And How to Fix It' (*Nature,* 20 October 2021) <The broken $100-billion promise of climate finance — and how to fix it (nature.com)> accessed 09 September 2023.
[140] OECD, *Climate Finance Provided and Mobilised by Developed Countries: Aggregate trends updated with 2019 data, Climate Finance and the USD Billion Goal* (OECD Publishing 2021) 6.
[141] ibid.

terms, from mainly international finance institutions, to developing nations.[142] Without developed nations making finance available, there will likely be fewer financial resources available within the international climate change regime for developing countries to utilise for climate action. This could also affect the distribution of resources for renewable energy development because finance is key to such distribution.

2.5.2. The Problem of Climate Technology Transfer

There are also knotty questions concerning the complex issue of climate technology transfer and intellectual property rights which have proven to be a constant site of bitter contestations between developed and industrialised countries that typically possess the requisite technology (for example renewable energy technology) and developing or least developed countries that need the technology to implement their mitigation and adaptation obligations under the UNFCCC.[143] In the past, the attempts by developing countries to have intellectual property rules regarding the transfer of climate technology waived[144] have been opposed and eventually rebuffed by developed countries based on the main reason that waiving patents on environmentally sound technologies would hamper innovation and altogether disincentivise invention.[145] This is still a live issue.[146] Noteworthy here, but unsurprisingly, is that private entities such as companies that deploy technical know-how in the design and manufacture of the technologies usually align with the position of developed countries on patent waivers.[147] With no access to these technologies, several developing countries will in many cases rely on alternative avenues such as the global trading system which, in the main, appears to embody a historical imbalance of power relations that perpetuates a status quo that is unfavourable to

[142] Liane Schalatek, 'Rising Public Climate Finance Flows only tell part of the Story' (*Climate Funds Update,* 3 December 2018) <Rising public climate finance flows only tell part of the story - Climate Funds Update) accessed 09 September 2023.

[143] See WTO, 'Extracts from Minutes of Meeting of the Council for Trade-Related Aspects of Intellectual Property Rights – Item 11 Intellectual Property, Climate Change and Development,' 11-12 June 2013, IP/C/M/73/Add.1. See also Matthew Rimmer, 'The Paris Agreement: Intellectual Property, Technology Transfer and Climate Change' in Matthew Rimmer (ed), *Intellectual Property and Clean Energy: The Paris Agreement and Climate Justice* (Springer 2018) 33.

[144] See e.g., Ecuador's Communication in WTO, 'Extracts from Minutes of Meeting of the Council for Trade-Related Aspects of Intellectual Property Rights – Item 11 Intellectual Property, Climate Change and Development,' (n 143) para 16.3.

[145] See WTO, 'Extracts from Minutes of Meeting of the Council for Trade-Related Aspects of Intellectual Property Rights – Item 11 Intellectual Property, Climate Change and Development,' (n 143).

[146] Rimmer (143) 34.

[147] Susi Geiger and Nicole Gross, 'Tech Sharing, Not Tech Hoarding: Covid-19, Global Solidarity, and the Failed Responsibility of the Pharmaceutical Industry' (2023) 0(0) Organization.

these developing countries.[148] This is an unfair outcome, as it may be taken as contradicting the central themes of African communitarianism, in particular the values of identity and solidarity.[149] It is nevertheless important to highlight some developments, especially within the intersection between trade and environment, that might be useful to developing countries. An example of this is the recent resolution by some WTO members to establish structured discussions on trade and environment.[150] It has also been suggested that flexibilities such as compulsory licenses afforded by The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) might be more useful than patent waivers when it comes to technology transfer.[151]

The issues presented by climate technology transfer are symptomatic of broader problems in relation to international law. In recent times for example there has been a controversy over the equitable and fair distribution of Covid-19 vaccines to vulnerable developing and low-income countries.[152] The argument has been that a waiver of intellectual property rights on vaccine patents would enhance the fair and equitable distribution of Covid-19 vaccines to mostly developing and poor countries that do not possess the requisite technical know-how to produce those vaccines.[153] This is an argument founded on the ethical values of identity and solidarity. It is also an argument that, as will be seen in this chapter, has also been raised by human rights treaty bodies who have been considering the link between the distribution of vaccines, intellectual property rights and human rights. However, developed and industrialised countries have mainly rejected suggestions that a patent waiver is a proper way to address the issue of inequitable vaccine distribution.[154] This has, however, not prevented scholars from pointing out that states have substantive obligations under international law, especially international human rights law, to cooperate to achieve set goals, including the fair and

[148] See Benjamin K. Sovacool and Michael H. Dworkin, *Global Energy Justice: Problems, Principles, and Practices* (Cambridge University Press 2014) 233-237. See also Chukwumerije Okereke, 'Global Environmental Sustainability and Conceptions of Justice in Multilateral Environmental Regimes (2006) 37 Geoforum 725-738.
[149] See generally Chukwumerije Okereke, *Global Justice and Neoliberal Environmental Governance: Ethics, Sustainable Development and International Co-Operation* (Routledge 2008).
[150] WTO, 'Trade and Environmental Sustainability' <WTO | Trade and environmental sustainability> accessed 09 September 2023.
[151] Bryan Mercurio and Pratyush Nath Upreti, 'From Necessity to Flexibility: A Reflection on the Negotiations for a TRIPS Waiver for Covid-19 Vaccines and Treatments' (2022) World Trade Review 1.
[152] Boniface Chimpango, 'Vaccine Nationalism and Equitable Access to COVID-19 Pharmaceuticals: TRIPS Agreement under Trial (Again)' (2021) 20(3) Journal of International Trade Law and Policy 166.
[153] See WTO, 'Communication from India and South Africa, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19', 2 October 2020, IP/C/W/669.
[154] Sam Meredith, 'Rich Countries are Refusing to Waive the Rights on Covid Vaccines as Global Cases Hit Record Levels' *CNBC* (London 22 April 2021) <Covid: Rich countries are refusing to waive IP rights on vaccines (cnbc.com)> accessed 09 September 2023.

equitable access to vaccines,[155] even as some developed countries have appeared to back down on their initial reluctance to waive patent rules on vaccines.[156]

To emphasise the point again, these risks have the potential of affecting the objective of moving from interpretation to implementation with respect to the operationalisation of global energy justice, nevertheless a consideration of them helps to know what solutions to apply. Some of these difficulties could be overcome through a reliance on implementation mechanisms existing within international human rights law. In the previous chapter, I highlighted the connection between climate change and human rights.[157] I also advanced an interpretation of the duty to cooperate to complement the CBDR re-interpretation proposed in that chapter. The following section will demonstrate how the re-interpretation of the duty to cooperate could be implemented in a mutually supportive way, and in a manner that equally helps to overcome some of the challenges identified above.

3. International Human Rights Law Mechanisms

In this section, I will demonstrate how international human rights law mechanisms can support the operationalisation of the African communitarian approach to global energy justice developed in this thesis. I will do this in several ways.[158] First, I will show how the mechanisms can be used to re-interpret the duty to cooperate in a way that reinforces the above re-interpretation of CBDR. In the previous chapter, I argued for the re-interpretation of the duty to cooperate to support the re-interpretation of CBDR contained in that chapter. I noted that, since developed countries already had a duty to provide international assistance to developing countries to assist them to realise their economic, social, and cultural rights,[159] developed countries should therefore be regarded as having a concomitant duty to distribute

[155] See e.g., Diane Desierto, 'Equitable Covid Vaccine Distribution and Access: Enforcing International Legal Obligations Under Economic, Social, and Cultural Rights and the Right to Development' *EJIL: Talk!* <Equitable COVID Vaccine Distribution and Access: Enforcing International Legal Obligations under Economic, Social, and Cultural Rights and the Right to Development – EJIL: Talk! (ejiltalk.org)> accessed 09 September 2023.

[156] Thomas Kaplan, Sheryl Gay Stolberg and Rebecca Robbins, 'Taking 'Extraordinary Measures,' Biden Backs Suspending Patents on Vaccines' (*The New York Times,* 5 May 2021) <Biden Backs Suspending Patents on Covid Vaccines - The New York Times (nytimes.com)> accessed 09 September 2023.

[157] See John H. Knox, 'Climate Change and Human Rights Law' (2009) 50 Virginia Journal of International Law 163; Ottavio Quirico and Mouloud Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge 2016); Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2018).

[158] See generally Wewerinke-Singh (n 53) 17.

[159] A. Byaruhanga Rukooko, 'Poverty and Human Rights in Africa: Historical Dynamics and the Case for Economic Social and Cultural Rights (2010) 14(1) The International Journal of Human Rights 13, 28.

resources to developing countries for the development of renewable energy.[160] Similarly, I stressed that developing countries had a corresponding duty to ensure that such resources were further distributed equitably and fairly among their populations. This re-interpretation was shown to be in consonance with African communitarianism. The re-interpretation demonstrates how members of the community could identify with one another and how well-off members can express solidarity with those who require assistance.[161] International human rights law mechanisms can be used to reinforce the re-interpretation. Second, I will demonstrate how the mechanisms can be utilised to implement the re-interpretation of the duty to cooperate since implementation ideally follows re-interpretation.[162] Finally, I will illustrate how international human rights law mechanisms can serve as a mutually reinforcing complement to the foregoing discussion on international climate law mechanisms in a way that overcomes some of the challenges identified with the latter.

The international human rights law mechanisms to be considered in this section are mainly human rights treaty bodies and non-treaty bodies and the processes associated with these bodies. Human rights treaty bodies are committees of independent experts empanelled largely to monitor the implementation of the core international human rights treaties.[163] The experts are drawn from states parties to the respective treaties by nomination and election for a renewable term of four years.[164] The experts serve in their personal capacity. There are ten human rights treaty bodies and corresponding treaties[165] including the CESCR[166] which monitors the implementation of the ICESCR and its optional protocol;[167] and the CRC,[168] which monitors the implementation of the Convention on the Rights of the Child and its optional protocols.[169] In terms of mode of operation, the human rights treaty bodies adopt Statements and General Comments that offer interpretations of treaty obligations; they also adopt Concluding Observations where they note 'both positive and negative aspects of the

[160] For similar arguments in relation to health and medicines, see Emily A. Mok, 'International Assistance and Cooperation for Access to Essential Medicines' (2010) 12(1) Health and Human Rights.
[161] Metz (n 14) 176.
[162] See Magdalena Sepúlveda Carmona, 'The Obligations of 'international assistance and cooperation' under the International Covenant on Economic, Social and Cultural Rights. A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8' (2009) 13(1) The International Journal of Human Rights 86.
[163] OHCHR, 'What are the treaty bodies?' <OHCHR | Treaty Bodies> accessed 09 September 2023.
[164] ibid
[165] ibid
[166] OHCHR, 'CESCR' <Committee on Economic, Social and Cultural Rights | OHCHR> accessed 09 September 2023.
[167] ibid.
[168] OHCHR, 'CRC' <Committee on the Rights of the Child | OHCHR> accessed 09 September 2023.
[169] ibid.

relevant states' implementation of treaty obligations in connection with examination of state reports';[170] and, in cases of extension of powers made possible by optional protocols to core human rights treaties, human rights treaty bodies adopt Views on individual complaints, including preliminary measures in emergency cases, whilst pursuing follow-up measures to guarantee implementation of their findings, all of which are nevertheless capable of raising issues such as legitimacy.[171] The present chapter will focus mainly on the human rights treaty bodies whose work directly touches the promotion of global energy justice, but will also make references to other treaty bodies where the need arises. An example of these other treaty bodies are the five human rights treaty bodies that issued a joint statement on climate change.[172] This will be considered in the later part of this chapter. Non-treaty bodies, for their part, do not owe their origin to human rights treaties, even though they also exist to observe and monitor human rights around the world.[173] The main non-treaty body is the HRC, which carries out work directly relevant to promoting global energy justice.

Finally, both human rights treaty- and non-treaty bodies have been argued to have not just the capacity to interpret and implement energy justice,[174] but also to promote economic, social, and cultural rights across borders.[175] In fact, these bodies have already recognised several interpretations of the duty to cooperate that appear to align somewhat with global energy justice. As I will argue in this section, however, these need to be strengthened in many places.

3.1. ***Interpreters***

3.1.1. Human Rights Treaty Bodies

The human rights treaty bodies in focus have helped to advance interpretations of the duty to cooperate through Statements and General Comments in meaningful ways. In relation to the ICESCR, the CESCR has played a prominent role in giving a purposive and dynamic interpretation of the duty that is useful to my African communitarian interpretation of global

[170] Geir Ulfstein, 'The Human Rights Treaty Bodies and Legitimacy Challenges' in Nienke Grossman and others (eds), *Legitimacy and International Courts* (Cambridge University Press 2018) 284.
[171] ibid 284.
[172] OHCHR, 'Five UN Human Rights Treaty Bodies Issue a Joint Statement on Human Rights and Climate Change' (16 September 2019) <OHCHR | Human rights mechanisms addressing climate change> accessed 09 September 2023.
[173] Nigel S. Rodley, 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations' in Hurst Hannum (ed), *Guide to International Human Rights Practice* (University of Pennsylvania 1992) 60.
[174] See Wewerinke-Singh (n 53) 17.
[175] Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013).

energy justice. This is hardly surprising because the CESCR has since its formation devoted considerable attention to extraterritorial obligations, these being the duty to respect, to promote, and to fulfil economic, social, and cultural rights beyond the limits of national borders.[176]

3.1.1.1. The Committee on Economic, Social and Cultural Rights

The CESCR is composed of eighteen independent experts and while the body has the duties of monitoring the implementation of the ICESCR and its optional protocol as well as establishing and maintaining a dialogue between states,[177] its interpretative function as a human rights treaty body has also been duly acknowledged.[178] This is evidenced by the committee's Statements and General Comments. In keeping with the general nature of soft law, the committee's General Comments are not legally binding on states parties to the ICESCR, yet they have great weight and are most times viewed as the most reliable source of interpretation of the ICESCR.[179]

For a start, the CESCR has given a dynamic interpretation of the duty to cooperate under Article 2(1) of the ICESCR as encompassing an obligation on 'those States which are in a position to assist others' to provide international assistance to developing states to enable them to achieve economic, social, and cultural rights.[180] This interpretation has enabled the committee to offer more purposive interpretations on related issues. These interpretations can be distilled mainly from the committee's position on the vital connection between the harmful effects of climate change on the enjoyment of economic, social and cultural rights where the committee first begins by reiterating the argument that the rapid change in the world's climate, caused by humans, could produce adverse impacts on economic, social and cultural rights.[181] It should be pointed out that this position is contained in the Statements of the committee, rather than in its General Comments. From an observation of the committee's database of General Comments, the committee has in fact appeared to offer interpretations

[176] Ashfaq Khalfan, 'Accountability Mechanisms' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013) 393.
[177] OHCHR, 'CESCR' (n 166).
[178] See Matthias Herdegen, 'Interpretation in International Law' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2020) para 3.
[179] See Khalfan (n 172) 300-301 and accompanying notes.
[180] CESCR, General Comment No. 3, 'The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant)', 14 December 1990, E/1991/23, para 14.
[181] CESCR, 'Climate Change and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights', 31 October 2018, E/C.12/2018/1, para 4.

of the ICESCR in the context of climate change through Statements, rather than through General Comments.[182] Remarkably, in the statement on the relationship between climate change and economic, social, and cultural rights, the CESCR identifies renewable energy as an essential resource in the fight against climate change. This recognition is consistent with one of the arguments of this thesis which is that renewable energy can contribute towards climate change mitigation.

Highlighting the central feature of renewable energy, the committee further notes that, 'A fundamental shift from hydrocarbon to renewable energy sources in the global energy order is urgently required, in order to avoid dangerous anthropogenic interference with the climate system and the significant human rights violations that such interference would cause.'[183] This position acknowledges the energy transition that is imperative to keep climate change in check. The committee's stance on the energy transition is combined with a strident call to end the reliance on fossil fuels, in order to reduce emissions from the land sector while combating deforestation as well as to improve the insulation of buildings and to invest in public transport.[184]

Importantly, the CESCR acknowledges the place of international cooperation in combating climate change and realising human rights. A notable observation is that the committee explicitly interprets international cooperation and assistance from an ethical perspective. This is evident in the call for high-income states to support both mitigation and adaptation efforts in developing states through the transfer of green technologies and financial resources.[185] This is an interpretation that clearly establishes links with African communitarianism, engaging my position that developed states have a duty to distribute resources for the development of renewable energy in developing states. This interpretation by the CESCR is more noteworthy considering that responsibility for fulfilling extraterritorial human rights is normally a

[182] See the UN Treaty Body Database <Treaty bodies Search (ohchr.org)> accessed 09 September 2023.
[183] CESCR, 'Climate Change and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights' (n 181) para 9.
[184] ibid. See also International Human Rights Instruments, 'Statement on Human Rights and Climate Change: Joint Statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, 14 May 2020, HRI/2019/1, para 12.
[185] CESCR, 'Climate Change and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights' (n 181) para 7. See also International Human Rights Instruments (n 184) para 17.

contested subject.[186] While this may be the case, especially if viewed through a neoliberal lens, it is straightforward from an African communitarian perspective because members of the community that are well-off have a duty to assist those that require assistance. The assistance rendered is with the intention of making 'the other better off or even a better person' for their own sake.[187]

The CESCR has extended its dynamic interpretation of international assistance and cooperation to other subject areas. One relates to the global distribution of Covid-19 pandemic vaccines,[188] which evinces concerns relevant to the distribution of resources for the development of renewable energy in developing and low-income countries. Despite international cooperation on science, sustained scientific research and significant financial investments and regulatory support that have enabled the development and production of Covid-19 vaccines in the world, the Committee observes that the problems of availability of these vaccines and their inequitable distribution across the world still remain.[189] Specifically, the unfair distribution of pandemic vaccines manifests as low vaccination rates in mostly developing and low-income countries, in contrast to high vaccination rates witnessed in developed and high-income countries where vaccines have been administered and reserved for the populations of those countries.[190] A case of self-interest is apparent in this situation. The situation is similar to the unfair distribution of renewable energy benefits which manifests as low penetration of renewable energy in mostly developing and low-income countries of the world.

The CESCR statement on Covid-19 vaccines is predicated on the need to highlight the huge potential of vaccines to improve global health and their inequitable distribution up to the time the statement was made;[191] importantly for present purposes, the statement seeks 'to remind States of their obligations under the Covenant [ICESCR] in relation to universal access and affordability of vaccines against COVID-19, particularly with regard to international

[186] Ashfaq Khalfan, 'Division of Responsibility Amongst States' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013) 299. But see the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (adopted 28 September 2011).
[187] Metz (n 14) 177.
[188] CESCR, 'Statement on Universal Affordable Vaccination against Coronavirus Disease (COVID-19), International Cooperation and Intellectual Property', 23 April 2021, E/C.12/2021/1.
[189] ibid para 1.
[190] ibid para 1.
[191] ibid para 2.

cooperation and intellectual property.'[192] On the latter note, the Committee made the case for mainly developed and high-income states to contribute necessary financial and technical resources to global vaccine initiatives such as the Covid-19 Vaccine Global Access (COVAX) Facility for the purpose of facilitating the fair distribution of vaccines to poor and developing countries.[193]

In addition, the CESCR also called on states parties to the ICESCR to ensure that the intellectual property rights legal regime do not hinder or hamper the equitable distribution of vaccines to regions of the world in dire need of these life-saving vaccines.[194] As the CESCR notes in its statement, intellectual property rights are not human rights, but social products with a social function, and therefore should not be used as a means to deprive or block public health measures that would benefit developing countries and therefore undermine the enjoyment of economic, social and cultural rights.[195] The CESCR also extends this call to private entities, even while acknowledging the legitimate expectations of these private bodies to maximise returns on their investments. As the Committee notes in the statement under consideration, '[…] business entities should also refrain from invoking intellectual property rights in a manner that is inconsistent with the right of every person to access a safe and effective vaccine against COVID-19 or the right of States to exercise the flexibilities of the TRIPS Agreement.'[196] The import of the CESCR's position is that both developed states and business entities should encourage the fair distribution of vaccines to vulnerable countries. It is also a critique of neoliberal approaches that essentially elevate profit maximisation over the common good. The committee's position is also relevant in the context of the transfer of climate technologies (such as those used for renewable energy development and utilisation), which I earlier identified as a problem within the international climate regime. On this note, the duty to cooperate has been interpreted as imposing an obligation on developed states to transfer environmentally sound technologies existing in the public domain or privately owned

[192] ibid para 2.
[193] ibid para 6.
[194] ibid para 7.
[195] ibid para 7. See also CESCR, General Comment No. 17 (2005), 'The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he or she is the Author (Article 15, Paragraph 1(c) of the Covenant)', 12 January 2006, E/C.12/GC/17, paras 1-2 and 35.
[196] CESCR, 'Statement on Universal Affordable Vaccination against Coronavirus Disease (COVID-19), International Cooperation and Intellectual Property (n 188) para 8.

to developing countries for use in climate change mitigation.[197] Even when intellectual property rights stand in opposition to this transfer of technology,[198] developed states are said to have the duty to 'remove legal barriers in this connection.'[199] This argument is equally justifiable from an African communitarian lens. The reason is that more prosperous members of the community should aid members of the community that are less prosperous.

3.1.1.2. The Committee on the Rights of the Child

Alongside the CESCR, the CRC has also undertaken work that is potentially relevant to global energy justice. In May 2023, it adopted a draft General Comment on children's rights and the environment with a special focus on climate change.[200] During preparatory work on the General Comment, the CRC issued a concept note which observed that environmental harms such as climate change have a much more negative impact on children than on adults.[201] The note singled out not only children as contributing the least to the rise in global warming, but also 'people living in poverty, minorities, indigenous people, and peasants and other people working in rural areas.'[202] This is a subtle evocation of climate justice which is woven round the central idea that the people who are the least responsible for climate change are the ones who will bear its heaviest burden in terms of impact and remediation.[203] The concept note, amongst other objectives, sought to highlight the value of international cooperation in improving 'legislative, administrative and other measures that States as well as other

[197] Gaetan Verhoosel, 'Beyond the Unsustainable Rhetoric of Sustainable Development: Transferring Environmentally Sound Technologies' (1998) 11 Georgetown International Environmental Law Review 49, 59-60.

[198] Ahmed Abdel-Latif, 'Intellectual Property Rights and the Transfer of Climate Change Technologies: Issues, Challenges, and way Forward' (2015) 15(1) Climate Policy 103; *Cf* Fran Humphries, 'Technology transfer of Aquatic Genetic Resources under the Convention on Biological Diversity and the Nagoya Protocol: Sponging off Patent Law Defences' (2016) 39(1) University of New South Wales Law Journal 234.

[199] See Elisa Morgera and Mara Ntona, 'Linking Small-Scale Fisheries to International Obligations on Marine Technology Transfer' (2018) 93 Marine Policy 295, 299.

[200] This was published on 22 August 2023. See CRC, General Comment No.26 (2023), 'Children's Rights and the Environment, With a Special Focus on Climate Change', 22 August 2023, CRC/C/GC/26.

[201] CRC, 'Concept Note: General Comment on Children's Rights and the Environment with a Special Focus on Climate Change' <OHCHR | Concept note: General comment on children's rights and the environment with a special focus on climate change> accessed 09 September 2023.

[202] ibid.

[203] See Karen Bickerstaff, Gordon Walker, and Harriet Bulkeley, 'Introduction: Making Sense of Energy Justice' in Karen Bickerstaff, Gordon Walker, and Harriet Bulkeley (eds), *Energy Justice in a Changing Climate: Social Equity and Low-Carbon Energy* (Zed Books 2013) 1; Brandon Barclay Derman, *Struggles for Climate Justice: Uneven Geographies and the Politics of Connection* (Palgrave Macmillan 2020); Julia Puaschunder, *Governance and Climate Justice: Global South and Developing Nations* (Palgrave Macmillan 2020).

stakeholders undertake to uphold the rights of the child in the context of the environment and climate change.'[204]

To inform the contents of the general comment, the CRC invited states parties to the Convention on the Rights of the Child and its optional protocols to submit memoranda. Several countries made submissions that were useful in shaping the final General Comment. China for instance called for the committee to 'discuss the relationship between children's rights and environmental protection within the context of sustainable development and stress the key role of poverty elimination and the rights to food and clean water for realization of children's rights.'[205] Cuba on its part submitted that climate change response measures should be underpinned by the CBDR principle, the establishment of an egalitarian international economic order and 'the eradication of irrational patterns of production and consumption, which particularly hit the most vulnerable social sectors, including children.'[206] A contrast can however be seen in the submission of Canada which noted that the CRC lacked the competence to interpret obligations under global environmental treaties relating to climate change,[207] a view echoed by Germany in its submission.[208]

The General Comment that emanated from these consultations contains instructive provisions.[209] For instance, the document commits states under the CRC to indicate how their mitigation measures and actions respect, protect and fulfil children's rights.[210] It enjoins states to 'transparently and explicitly focus on children's rights when preparing, communicating and updating nationally determined contributions.'[211] It notes that the mitigation measures that states execute against climate change should be underpinned by both equity and CBDR.[212] It particularly enjoins developed states to provide finance, technology, and capacity-building to developing states as mitigation measures to assist the most vulnerable

[204] CRC, 'Concept Note: General Comment on Children's Rights and the Environment with a Special Focus on Climate Change' (n 201).
[205] CRC, 'Draft General Comment No 26 on Children's Rights and the Environment with a Special Focus on Climate Change' <OHCHR | Draft general comment No. 26 on children's rights and the environment with a special focus on climate change> accessed 09 September 2023.
[206] ibid.
[207] ibid.
[208] ibid.
[209] See CRC, General Comment No.26 (2023), 'Children's Rights and the Environment, With a Special Focus on Climate Change' (n 200).
[210] ibid para 98(a).
[211] ibid.
[212] ibid para 98(b).

children.[213] On the subject of climate finance, the General Comment enjoins developed states to provide climate finance for enhanced climate action that will uphold children's rights.[214] This is an important provision and on reading it, it is observed that the CRC based its call on existing obligation of states. As the CRC intends, the provision is 'in line with the international climate-related commitments that States have made.'[215] In effect, the CRC is not creating entirely new obligations of states here but reiterating and reinforcing existing ones under international law. What is more instructive is how the CRC creatively re-interprets these obligations in a mutually supportive way with the obligations that already exist within international climate law. The recommendation for states to indicate how their NDCs advance children's rights is a particularly instructive example of this re-interpretation. In conclusion, the draft General Comment offers an insight into how human rights treaty bodies have been invoking concerns of equity and justice in their interpretation of global issues. This demonstrates the fact that the bodies could give far-reaching interpretations of topical issues including those that are associated with the unfair distribution of renewable energy benefits in the international community. This is notwithstanding the opposition to the interpretative competence of these bodies, an issue that is discussed further below as part of challenges to interpretation.

A final example to the above concerns the recent joint statement issued by five human rights treaty bodies on the adverse impacts of climate change on the enjoyment and fulfilment of human rights.[216] After noting, among other things, that states have both territorial and extraterritorial obligations to respect, to protect and to fulfil the human rights enshrined in the constitutive human rights instruments in the context of climate change mitigation and adaptation measures, the committees emphatically state that:

> As part of international assistance and co-operation towards the realization of human rights, *high-income States should also support adaptation and mitigation efforts in developing countries, by facilitating transfer of green technologies, and by contributing to financing climate mitigation and adaptation.* In addition, States must co-operate in good faith in the establishment of global responses addressing climate-related loss and damage suffered by the most vulnerable countries, paying particular attention

[213] ibid para 100.
[214] ibid para 112.
[215] ibid.
[216] OHCHR, 'Five UN Human Rights Treaty Bodies Issue a Joint Statement on Human Rights and Climate Change' (n 172).

> to safeguarding the rights of those who are at particular risk of climate harm and addressing the devastating impact, including on women, children, persons with disabilities and indigenous peoples.[217]

Furthermore, the committees also resolved to continue providing guidance to states on how best they can protect human rights in relation to climate change response measures.[218] This is important as it allows the committees to do work that could ultimately enable the distribution of resources to developing and low-income countries as a way of addressing the unfair distribution of renewable energy benefits.

In summary, the foregoing has demonstrated that human rights treaty bodies have been rendering meaningful interpretations that are closely reflective of global energy justice, not just within the context of climate change but also with respect to other issues that implicate justice and equity. Nevertheless, there is room for improvement and that improvement could come in the form of a clearer and distinct re-interpretation of human rights obligations that directly reflects the African communitarian approach to global energy justice promoted in this thesis. To do this, a committee such as the CESCR could begin by recognising that the unfair distribution of renewable energy benefits will prevent people living in developing countries from fully enjoying human rights. As has been acknowledged in this thesis, energy is essential to the realisation of human rights, whether these relate to economic, social, and cultural rights or to civil and political rights. The CESCR could also note that the problem of unfair distribution of renewable energy benefits is exacerbated by systemic issues in many developing countries. The CESCR has already recognised renewable energy as a resource for climate change mitigation. It could then re-interpret the duty to cooperate as requiring developed states to assist developing states to derive benefits from renewable energy use. The proposed re-interpretation should clearly require developed states to distribute resources for the development of renewable energy in developing countries while the governments of developing countries should ensure the internal distribution of the resources on fair and equitable terms. All these will be in line with African communitarianism.[219]

The human rights treaty bodies all have overarching organisations regulating them. These regulatory organisations could incentivise the treaty bodies to act in the manner suggested

[217] ibid. Emphasis added.
[218] ibid.
[219] Metz (n 14) 176.

above. The United Nation's Economic and Social Council (ECOSOC) for example regulates the activities of a large network of subsidiary bodies including the CESCR.[220] The ECOSOC could thus issue guidance and recommendations to the CESCR to consider the above suggestions on global energy justice.

3.1.2. Non-Treaty Bodies

Non-treaty bodies have also played a part in clarifying an interpretation of human rights obligations that could be useful to global energy justice.

3.1.2.1. The Human Rights Council and Its Special Procedures

This section identifies the HRC as the principal non-treaty body.[221] It is helpful to re-emphasise the point that the HRC is generally distinguishable from human rights treaty bodies because the council and its features, such as its Special Procedures, are variously known as non-treaty procedures, extra-conventional mechanisms or Charter-based mechanisms.[222] This difference in categorisation notwithstanding, the HRC is charged with the monitoring and protection of human rights around the world,[223] a mandate which it prosecutes principally through the activities of its Special Procedures.[224] The HRC's Special Procedures are 'independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective'.[225] The main duties of the Special Procedures include undertaking country visits to investigate compliance with human rights safeguards at the national level; act on individual cases of human rights violations and concerns of a broader nature by sending communications to states which would include reports on such rights violations; contributing to the development of international human rights safeguards and norms; and engaging in public advocacy, raising public awareness of human rights standards, and proffering advice on technical cooperation and partnership.[226] The Special Procedures are the eyes and ears of the

[220] ECOSOC, 'ECOSOC Subsidiary Bodies' <ECOSOC SUBSIDIARY BODIES | Economic and Social Council> accessed 09 September 2023.
[221] Bertrand G. Ramcharan, *The UN Human Rights Council* (Routledge 2011).
[222] Rodley (n 173) 320.
[223] OHCHR, 'Promotion and Protection of Human Rights around the Globe' <OHCHR | HRC | Default title> accessed 09 September 2023.
[224] OHCHR, 'Special Procedures of the Human Rights Council: About Special Procedures' <OHCHR | Special Procedures of the Human Rights Council> accessed 09 September 2023. See also Surya P. Subedi and others, 'The Role of the Special Rapporteurs of the United Nations Human Rights Council in the Development and Promotion of International Human Rights Norms' (2011) 15(2) The International Journal of Human Rights 155, 155.
[225] OHCHR, 'Special Procedures of the Human Rights Council: About Special Procedures' (n 224).
[226] ibid.

HRC and,[227] owing to their important connection with the HRC, have been described as the 'crown jewels' of the council.[228]

As of the time of writing, there are 45 thematic and 14 country mandates.[229] The work of these Rapporteurs vary from the one to the other, but elements of some could help to support the operationalisation of global energy justice. A prominent example is the work of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change.[230] The goal of the Special Rapporteur is to contribute towards international and national efforts in order to address the negative effects of climate change on the enjoyment and realisation of human rights, in a way that also advances the realisation of the 2030 Agenda for Sustainable development.[231] Appointed for a period of three years,[232] beginning on 1 May 2022,[233] the Rapporteur is mandated, among other things, to identify existing challenges, including financial challenges, that hamper states' efforts in promoting and protecting human rights while addressing the negative impacts of climate change, and to make appropriate recommendations; to encourage global cooperation through raising awareness on the human rights affected by climate change of persons living in least developed countries, small island developing states and landlocked developing states; and to foster the exchange of technical assistance, capacity building and international cooperation as a way of supporting national efforts, actions and measures to address the adverse impacts of climate change on the enjoyment and realisation of human rights.[234]

One of the ways the Special Rapporteur discharges his mandate is through an open invitation to states, business enterprises, civil society organisations and non-governmental organisations to submit memoranda for consideration. A recent call by the Rapporteur to these parties to make submissions deals with the effects of loss and damage on human rights in the context of

[227] ibid.
[228] UN, 'Annan Calls on Human Rights Council to Strive for Unity, Avoid Familiar Fault Lines' (*UN News*, 29 November 2006) <Annan calls on Human Rights Council to strive for unity, avoid familiar fault lines | | UN News> accessed 09 September 2023.
[229] OHCHR, 'Special Procedures of the Human Rights Council: About Special Procedures' (n 224).
[230] Mr Ian Fry is the first and current special rapporteur for the promotion of human rights in the context of climate change. He was appointed in March 2022.
[231] HRC, Resolution 48/14, 'Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change,' 13 October 2021, A/HRC/RES/48/14, para 1.
[232] ibid para 2.
[233] OHCHR, 'Special Rapporteur on Climate Change' <OHCHR | Special Rapporteur on climate change> accessed 09 September 2023.
[234] HRC, Resolution 48/14, 'Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change,' (n 231) para 2(b)(e)(g).

climate change.[235] In one of his thematic reports, the Special Rapporteur highlighted the following six thematic areas of focus during his mandate: the promotion and protection of human rights within the context of mitigation, adaptation, and financial actions to address climate change, with particular emphasis on loss and damage; addressing human rights effects of climate change displacement including the legal protection of peoples displaced across international borders; exploring approaches for the enhancement of climate change legislation, supporting climate change litigation and strengthening the principle of intergenerational justice; corporate accountability with regard to human rights and climate change; the protection of human rights through a just transition of workers in industries that contribute to climate change; and exploring the implications of new technologies associated with climate change mitigation on human rights.[236] In another thematic report, the Special Rapporteur examined how human rights could be promoted and protected against the background of climate change.[237] He noted that climate change mitigation actions and measures could affect human rights when they are inadequate to reduce greenhouse gas emissions and when they severely impact the exercise of human rights.[238] An example is when renewable energy projects generate human rights concerns. In fact, the Special Rapporteur singles out hydroelectric dams as constituting one of the most significant impacts on the exercise of human rights.[239] This is helpful in reminding parties that they have a responsibility to ensure that climate change response measures do not generate human rights problems.[240]

With the work of the Special Rapporteur just commencing, there is an opportunity for the Special Rapporteur to actively promote the African communitarian approach to global energy justice. He could do this by firstly instituting a thematic focus on the relationship between energy, climate change and human rights because, as matters stand so far, there is none on the subject yet. This should come as part of his work on the relationship between climate change and human rights. A focus on energy would help to generate attention on the

[235] OHCHR, 'Call for Input ''Promotion and protection of human rights in the context of mitigation, adaptation, and financial actions to address climate change, with particular emphasis on loss and damage' <OHCHR | Call for input "Promotion and protection of human rights in the context of mitigation, adaptation, and financial actions to address climate change, with particular emphasis on loss and damage"> accessed 09 September 2023.
[236] OHCHR, 'Report on Initial Planning and Vision for the Mandate: Summary' <OHCHR | A/50/39: Report on initial planning and vision for the mandate> accessed 09 September 2023.
[237] UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change', 26 July 2022, A/77/226.
[238] ibid para 6.
[239] ibid paras 23-24.
[240] See Damilola S. Olawuyi, 'Advancing Climate Justice in International Law: An Evaluation of the United Nations Human Rights-Based Approach' (2015) 11(1) Florida A & M University Law Review 103.

important subject of energy development, production and use and further serves as an entry point for ethical considerations into human rights protection. The Special Rapporteur could then highlight the crucial importance of addressing the unfair distribution of renewable energy benefits in the international community. This is already one of the fallouts of the global transition to a low-carbon energy future.

Another Special Rapporteur whose work is important is the Independent Expert on Human Rights and International Solidarity.[241] In one of his thematic reports, the Independent Expert considered the nexus between international solidarity and climate change.[242] He identified the CBDR principle as one of the expressions of international solidarity in the response to climate change.[243] He also identified the responsibility of developed countries, from a rights-based international solidarity perspective, to take the lead in reducing the incidence of climate change, including providing financial assistance and other forms of support to developing countries.[244] The report also took on the controversial question as to whether fossil fuels should remain unextracted and left in the ground. It explicitly recognised that fossil fuels are a major contributor to global warming and are strongly linked to the world's economy.[245] The report noted that poorer developing countries which are rich in hydrocarbons and dependent on these for revenue have not been adequately engaged.[246] The report diverged from the dominant neoliberal approach to restricting fossil fuels which assumes that the markets will determine the winners and losers of a divestment from fossil fuel usage.[247] The neoliberal approach is problematic because it can worsen the condition of poor hydrocarbon countries which have to give up fossil fuel exploitation. The problem is exacerbated when these countries rely on fossil fuels 'for revenues, livelihoods and access to electricity and heat, while having less capacity than wealthier States to diversify their economies and switch to renewable energy.'[248] The report noted that support in line with the CBDR principle should inform solutions to the problem, rather than market-based actions.[249] As an expression of a rights-

[241] Professor Obiora C. Okafor is the outgoing mandate holder. He was first appointed in June 2017. See OHCHR, 'Independent Expert on Human Rights and International Solidarity' <Independent Expert on human rights and international solidarity | OHCHR> accessed 09 September 2023.
[242] UNGA, 'Report of the Independent Expert on Human Rights and International Solidarity', 1 April 2020, A/HRC/44/44.
[243] ibid para 8.
[244] ibid para 9.
[245] ibid para 29.
[246] ibid para 31.
[247] ibid para 31.
[248] ibid para 32.
[249] ibid para 34.

based international solidarity and the CBDR principle, the report recommended that wealthy developed and developing states should 'take the lead in reforming their fossil fuel sectors and provide poorer and less adaptable countries with adequate finance and technological substitutes.'[250] This suggestion is reasonable and reflects the argument I made in the section on international climate law mechanisms that hydrocarbon countries could be given resources to develop their renewable energy systems in exchange for foregoing fossil fuel exploitation. The thematic report could have been specific about the finance and technological substitutes and perhaps explicitly included the distribution of resources for renewable energy development in poor hydrocarbon countries. A final noteworthy issue that the report highlighted is the inadequacy of financial and technological support to developing countries for use in climate change mitigation and adaptation.[251] The report clearly noted that the climate finance is 'woefully deficient.' It noted that 'technology transfer channels are fragmented, not transparent and ambiguous in outcome'[252] and further highlighted the disputations surrounding the place of intellectual property rights in the transfer of climate technologies, all of which are problematic from a human rights-based international solidarity perspective.[253]

The work being done by the Independent Expert is clearly valuable, especially his attempts to enshrine international solidarity in states' responses to common global problems. It is instructive that the mandate holder is attempting to spotlight the special situation faced by developing countries amidst these global challenges and how developed and high-income countries can assist in this regard. One suggestion to make here is that the Independent Expert could investigate the nexus between energy and international solidarity which could be a pathway for considering the unfair distribution of renewable energy benefits and making important recommendations thereon.

In summary, the Special Procedures are carrying out important work.[254] They have been recognised as contributing to the interpretation and observance of human rights 'in some of the most difficult circumstances and on some of the most challenging issues.'[255] With respect

[250] ibid para 34.
[251] ibid paras 40-46.
[252] ibid para 44.
[253] ibid paras 45-46.
[254] Ted Piccone, 'The Contribution of UN's Special Procedures to National Level Implementation of Human Rights Norms' (2011) 15(2) The International Journal of Human Rights 206, 207.
[255] See Surya P. Subedi and others (n 224) 155.

to interpretation in particular, the Special Procedures have contributed to the clarification of the normative content of economic, social, and cultural rights and generally developed influential soft law instruments on same.[256] They have also rendered relevant interpretations but could do more to ensure that these are fully aligned with the African communitarian approach to global energy justice. One of the ways to encourage the Special Procedures to do this is for the HRC to make recommendations to the relevant mandate holders to consider the above suggestions. This is possible because the Special Procedures exist under the auspices of the HRC and, while independent, are nevertheless accountable to the HRC in discharging their mandates.[257] The HRC itself reports to the UNGA which can issue guidance to it as a way of encouraging it to consider certain thematic areas.[258]

The capacities of the HRC and the human rights treaty bodies examined above to systematically develop international human rights law through clear and distinct interpretation have attracted criticisms. I will now address those criticisms.

3.1.3. Interpretative Challenges

The interpretative powers of human rights treaty- and non-treaty bodies have come under scrutiny.[259] To this end, it has been argued that the CESCR does not have the legal competence to render an interpretation of the ICESCR that would place a duty on developed countries to provide international assistance, in pursuance to Article 2(1) of the ICESCR.[260] In short, the General Comments of the CESCR are said to be non-binding on states.[261] It would also seem that this same position is taken by some states parties in practice. An example of this can be

[256] Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15(2) The International Journal of Human Rights 299, 300-305.
[257] HRC, 'Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council', 18 June 2007, A/HRC/RES/5/2, art 15.
[258] See UNGA, Resolution 60/251, 'Human Rights Council', 3 April 2006, A/RES/60/251, paras 5(j) and 16.
[259] See Joanna Harrington, 'The Human Rights Committee, Treaty Interpretation, and the Last Word' (*EJIL: Talk!*, 05 August 2015) <The Human Rights Committee, Treaty Interpretation, and the Last Word – EJIL: Talk! (ejiltalk.org)> accessed 09 September 2023. *Cf*. Gabriella Citroni, 'The Human Rights Committee and its Role in Interpreting the International Covenant on Civil and Political Rights vis – à – vis States Parties' (*EJIL: Talk!*, 28 August 2015) <The Human Rights Committee and its Role in Interpreting the International Covenant on Civil and Political Rights vis-à-vis States Parties – EJIL: Talk! (ejiltalk.org)> accessed 09 September 2023.
[260] Rana Moustafa Essawy, 'The Legal Duty to Cooperate amid COVID-19: A Missed Opportunity?' (*EJIL: Talk!*, 22 April 2020) <The Legal Duty to Cooperate amid COVID-19: A Missed Opportunity? – EJIL: Talk! (ejiltalk.org)> accessed 09 September 2023.
[261] See e.g., ibid.

found in the objection raised by both Canada and Germany against the work of the CRC on children and climate change, as mentioned in this chapter.

Despite these criticisms, the interpretative powers of both treaty- and non-treaty bodies continue to be rightly recognised,[262] including by judicial bodies tasked with the adjudication of disputes between states. For example, in the *Ahmadou Sadio Diallo* case,[263] the ICJ noted with respect to the Human Rights Committee, which is charged with monitoring the ICCPR,[264] that:

> … the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, *it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of the treaty*.[265]

The above reasoning can be applied *mutatis mutandis* to the human rights treaty- and non-treaty bodies considered above, including bodies such as the UNFCCC COP examined in the first section of this chapter. With respect to both treaty- and non-treaty bodies, the above judgement of the ICJ is a clear appreciation of their capacity to systematically flesh out the normative implications of economic, social, and cultural rights and give these form and content.[266] Even while these are generally non-binding, especially with respect to the human rights treaty- and non-treaty bodies, their probative value is not in doubt. This clearly validates the arguments which I made above that these institutions could provide clear and distinct re-interpretations of existing obligations to facilitate global energy justice in the manner envisaged by this thesis.

3.2. Implementers

The question that arises next is how the foregoing re-interpretations of the duty to cooperate can be implemented in consonance with global energy justice. Once more, I turn to the monitoring and accountability system established by both human rights treaty- and non-treaty bodies and agree with the argument made by some commentators that these institutions could provide oversight and monitoring functions not just with respect to human rights more

[262] See e.g., Desierto (n 155).
[263] [2007] I.C.J. 653, para 66.
[264] OHCHR, 'Human Rights Committee' <Human Rights Committee | OHCHR> accessed 09 September 2023.
[265] *Ahmadou Sadio Diallo* (n 263) para 66. Emphasis added.
[266] Golay, Mahon and Cismas (n 256) 300-305.

generally,[267] but also with respect to global issues,[268] such as the redress of injustices concerning energy.[269] These institutions have increasingly been involved with subject areas such as climate change and sustainable development,[270] which are relevant to my arguments.[271] It is on account of these developments that I argue that these bodies and processes are useful in monitoring human rights obligations with respect to the distribution of resources for renewable energy development in developing and low-income countries. More work however needs to be done by these institutions in monitoring human rights obligations as they concern global energy justice.

3.2.1. Human Rights Treaty Bodies and Processes

3.2.1.1. Reporting Obligations and the Use of Indicators

It is helpful to begin the discussion by noting that human rights treaty bodies generally derive their powers to monitor human rights compliance from the treaties that establish them.[272] An example of one of such treaties is the ICESCR, which contains an undertaking for states parties to prepare and submit regular status and progress reports on measures that they have taken, and the progress that they have made, in realising the economic, social and cultural rights contained in the covenant.[273] These reports are to be submitted to the Secretary-General of the United Nations who will then transmit them to ECOSOC for deliberation and consequent assessment.[274] Since 1985, the CESCR has been carrying out the monitoring functions assigned to the ECOSOC by the ICESCR.[275] After examining the report of a state party, the CESCR makes recommendations to that state party in the form of 'concluding observations.'[276] The concluding observation is structured as follows: introduction, positive aspects, principal

[267] Langford and others (175).
[268] See e.g., Benjamin Mason Meier and Yuna Kim, 'Human Rights Accountability through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation' (2015) 26(1) Duke Journal of Comparative and International Law 139.
[269] Wewerinke-Singh (n 53) 16.
[270] Spyridon Aktypis, Emmanuel Decaux and Bronwen Leroy, 'Systemic Integration between Climate Change and Human Rights at the United Nations?' in Ottavio Quirico and Mouloud Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge 2016) 221.
[271] OHCHR, 'Human Rights Mechanisms Addressing Climate Change: OHCHR and Climate Change' <OHCHR | Human rights mechanisms addressing climate change> accessed 09 September 2023.
[272] Helen Keller and Geir Ulfstein, 'Introduction' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (Cambridge University Press 2012) 1-2.
[273] ICESCR, art 16(1). Individuals can also submit claims of rights violations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) – see OP-ICESCR, art 2.
[274] ICESCR, art 16(2)(a).
[275] ECOSOC resolution 1985/17, 28 May 1985, para a.
[276] OHCHR, 'Introduction to the Committee' <OHCHR | Introduction to the Committee> accessed 09 September 2023.

subjects of concern and suggestions and recommendations.[277] Similar monitoring procedures are also adopted by other human rights treaty bodies. Concerning the legal status of these Concluding Observations, Khalfan has remarked that they are not legally binding just as the committee's General Comments but, as with the fluid nature of soft law, nevertheless have the capability to influence state behaviour and ignite public discussion on human rights compliance, even more so when non-state actors like non-governmental organisations 'use them as a source of legitimacy to argue for particular reforms.'[278]

Through their monitoring powers, human rights treaty bodies could strengthen the operationalisation of the African communitarian approach to global energy justice. They can do this by monitoring how states have discharged their duty to cooperate, particularly in the context of climate change. However, this is an area where human rights treaty bodies appear to have been less effective. They could for example publish guidelines on the use of indicators for measuring progress on international cooperation with respect to energy. Inspiration for this can be gained from the Joint United Nations Programme on HIV/AIDS (UNAIDS), which has developed a series of indicators from UN declarations on AIDS to measure how countries are responding to the HIV/AIDS pandemic.[279] Human rights treaty bodies have the power to impose such guidelines because some of their objectives include monitoring whether the treaty norms are being applied by states parties and assessing how implementation and enforcement could be improved.[280]

3.2.2. Non-Treaty Bodies and Processes

As noted above, the HRC is the main non-treaty human rights mechanism charged with the universal protection and monitoring of human rights and fundamental freedoms,[281] including the redress of situations of gross and systematic violations of human rights around the globe,[282] all of which it does mainly through the Universal Periodic Review (UPR) process and its Special Procedures.[283] In the preceding section on interpretation, I noted that the Special Procedures could be useful in interpreting human rights obligations in consonance with the African

[277] OHCHR, 'Rules of Procedure and Working Methods' <OHCHR | Rules of procedure and working methods> accessed 09 September 2023.
[278] Khalfan (n 176) 394.
[279] See UNAIDS, *Global AIDS Monitoring 2022: Indicators and Questions for Monitoring Progress on the 2021 Political Declaration on HIV and Aids* (UNAIDS 2022).
[280] OHCHR, 'Introduction to the Committee' (n 272).
[281] UNGA, Resolution 60/251, 'Human Rights Council' (n 254) para 2.
[282] ibid para 3.
[283] Rodley (n 173) 320-355.

communitarian approach to global energy justice. While I discussed the capacity of these Special Procedures to monitor human rights observance, I will focus on UPR in this section, which has been described as 'an unprecedented universal peer-review mechanism in which states are the ones in charge of scrutinizing each other on the human rights situation under their jurisdiction.'[284]

3.2.2.1. Universal Periodic Review

The UPR was established by the UNGA concurrently with the HRC in 2006[285] and provides 'an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights.'[286] When the UPR properly began to function in 2008, it was hailed as a new direction for global human rights monitoring and compliance, mainly because of its form of scrutiny which applied without discrimination to all countries participating in the process.[287] The UPR is conducted in cycles and is based on documents distilled from the following sources:

> 1)Information provided by the State under review, which can take the form of a "national report"; 2) information contained in the reports of independent human rights experts and groups, known as the Special Procedures, human rights treaty bodies, and other UN entities; 3) information from other stakeholders including national human rights institutions and non-governmental organisations.[288]

The UPR process has increasingly addressed climate change.[289] According to the OHCHR, there have been 114 recommendations on climate change between 2008 (when the UPR started functioning) and 2018.[290] An internet search on the theme of climate change in the UPR process, which I conducted using the Universal Human Rights Index, yielded a total of 586 recommendations and observations.[291] The Universal Human Rights Index has a

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[284] Pilar Elizalde, 'A Horizontal Pathway to Impact? An Assessment of the Universal Periodic Review at 10' in Alison Brysk and Michael Stohl (eds), *Contesting Human Rights* (Edward Elgar 2019) 83.
[285] See UNGA, Resolution 60/251, 'Human Rights Council' (n 258) para 5(e).
[286] OHCHR, 'Basic Facts about the UPR' <OHCHR | UPR | Basic facts about the UPR> accessed 09 September 2023.
[287] Hilary Charlesworth and Emma Larking, 'Introduction: The Regulatory Power of the Universal Periodic Review' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review*: *Rituals and Ritualism* (Cambridge University Press 2015) 2.
[288] OHCHR, 'Basic Facts about the UPR' (n 286).
[289] OHCHR, 'Human Rights Mechanisms Addressing Climate Change: OHCHR and Climate Change' <OHCHR | Human rights mechanisms addressing climate change> accessed 09 September 2023.
[290] ibid.
[291] OHCHR, 'Universal Human Rights Index <UNIVERSAL HUMAN RIGHTS INDEX - Human Rights Recommendations (ohchr.org)> accessed 09 September 2023.

comprehensive overview of references to climate change made by the UPR, special procedures and treaty bodies.[292] Some of the recommendations include Pakistan's recommendation to Samoa to 'seek international assistance and support in mitigating the adverse impacts of climate change and the COVID-19 pandemic'[293] and India's recommendation to Saint Vincent and the Grenadines to 'continue to take efforts to secure support and assistance from the international community in pursuing climate change adaptation and mitigation plans'.[294]

Nevertheless, there have been very scant references to the connection between energy and human rights, not even in the context of climate change, much less in the context of justice and equity.[295] As a regulatory mechanism capable of influencing state behaviour,[296] the UPR has the potential to monitor the implementation of global energy justice. To begin with, there should be an increased focus on the connection between energy, climate change and human rights and these should be viewed from an ethical perspective. This entails that the UPR should be alive to the problems arising from renewable energy development and use such as the unfair distribution of renewable energy benefits and further promote the philosophical ideal of relationality as expressed through identity and solidarity. In practical terms, developing states can report on their human rights compliance and include how they require financial, technological, and other resources for renewable energy development. They should also show how any received assistance will be fairly distributed among their populations. On their part, developed states can report on how their NDCs under the international climate regime contains evidence of rights-based distribution of resources for the development of renewable energy in developing states.[297]

3.2.3. Challenges Associated with Implementation

There are potential challenges associated with the capacity of both human rights treaty- and non-treaty institutions to monitor human rights obligations relevant to an African communitarian interpretation of global energy justice. These challenges largely engage broader concerns about the effectiveness of these institutions in ensuring human rights monitoring and

[292] OHCHR, 'Human Rights Mechanisms Addressing Climate Change: OHCHR and Climate Change' (n 285).
[293] UNGA, 'Report of the Working Group on the Universal Periodic Review: Samoa', 28 February – 1 April 2022, A/HRC/49/7, para 106.35.
[294] UNGA, 'Report of the Working Group on the Universal Periodic Review: Saint Vincent and the Grenadines', 28 February – 1 April 2022, A/HRC/49/10, para 81.65.
[295] Wewerinke-Singh (n 53) 23.
[296] See Charlesworth and Larking (n 283) 7.
[297] See Wewerinke-Singh (n 53) 23.

compliance. For a start, the state reporting system, whereby states submit reports to relevant UN treaty bodies for assessment, has been criticised as being susceptible to manipulation, since it gives states the leeway to avoid their legal obligations under international human rights law.[298] The fact that the system essentially operates on the basis of self-reporting and good faith, almost akin to self-regulation,[299] makes it a peculiar tool for monitoring an important subject like human rights.[300] It should however be noted that this is also a common feature in other branches of international law such as international environmental law.

Interlinked to the above are the problems of states failing to submit reports on time or at all, submitting reports of poor quality, failing to follow established reporting guidelines when submitting reports, and hesitating to utilise the reporting process as a means of disclosing particular challenges.[301] Even with moves for reform of the system being made,[302] these problems remain well and alive since they appear to engage the core of the system.[303] These problems have not escaped the notice of these bodies. To take the problem of non-reporting states and long-overdue reports for example, the CESCR recently remarked that this was a serious problem.[304] To resolve the problem, the committee has decided to continually engage the uncooperative states with a view to encouraging them to submit their reports.[305]

The reluctance of states to participate in the reporting process is one problem that is especially problematic to the UPR. There however appears to be in-built procedures which could facilitate compliance. In this regard, the HRC has been empowered to take several actions when a state under review fails to cooperate with the UPR process.[306] The HRC could call on the recalcitrant state under review to resume its cooperation with the UPR mechanism; it may request the President of the HRC to take all appropriate measures to get

[298] Scott Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 130.
[299] See Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012).
[300] Leckie (n 298) 130-131.
[301] ibid 131.
[302] OHCHR, 'Effective Implementation of International Human Rights Instruments: Development of the Human Rights Treaty System' <OHCHR | Effective implementation of international human rights instruments: Development of the human rights treaty system> accessed 09 September 2023. See also Christen Broecker, 'The Reform of the United Nations' Human Rights Treaty Bodies' (2014) 18(16) American Society of International Law.
[303] Leckie (n 298) 130-131.
[304] CESCR, Sixty-ninth session/Seventieth session, E/2022/22, E/C.12/2021/3, paras 42-43.
[305] ibid para 45.
[306] HRC, Decision OM/7/101 'Decision Adopted by the Human Rights Council at its Seventh Organizational Meeting,' 4 April 2013, A/HRC/OM/71.

the state under review to recommence its cooperation with the UPR mechanism; and as a means of monitoring compliance, it may ask the President of the HRC to submit a report to the HRC on his or her efforts to bring back the uncooperative state to the UPR mechanism.[307] Ultimately, it has been remarked that the UPR is able to generate peer and public pressure that can positively influence states' behaviour.[308] This is said to be mainly because of the active participation of NGOs in the UPR process and the argument that the 'bilateral nature of UPR recommendations creates a much higher pressure on states to live up to their commitments than in the case of recommendations by nongovernmental experts' as present in human rights treaty bodies.[309] Moreover, the tool of 'naming and shaming' may be able to secure compliance with human rights norms through the UPR process.[310] In summary, therefore, the reporting system and peer review process at the centre of human rights monitoring by both human rights treaty- and non-treaty bodies may be associated with challenges. Nevertheless, these challenges are not fatal. These institutions can still establish human rights standards and monitor those standards.

There are two ancillary points to make before bringing this chapter to a close. The first is that the activities of human rights treaty- and non-treaty institutions via interpretation and monitoring might help to influence the work of the UNFCCC COP and processes. For instance, it has been suggested that the Global Stocktake should consider information on human rights and climate change generated by human rights treaty- and non-treaty bodies.[311] There has also been a suggestion for the COP to adopt a more inclusive approach by encouraging the robust participation of indigenous peoples, young people, women, and other civil society representatives in its meetings and negotiations.[312] These suggestions reflect an integrated approach to climate policy that considers the role of human rights in the fight against climate change. They also exemplify the increased linkages between institutions

[307] ibid.
[308] Valentina Carraro, 'Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies (2019) 63 International Studies Quarterly 1079, 1090.
[309] ibid 1090.
[310] Rochelle Terman and Erik Voeten, 'The Relational Politics of Shame: Evidence from the Universal Periodic Review' (2018) 13 The Review of International Organizations 1. *Cf* Elvira Domínguez-Redondo, 'The Universal Periodic Review – Is there Life Beyond naming and Shaming in Human Rights Implementation?' (2012) New Zealand Law Review 673.
[311] Sébastien Duyck and Yves B. Lador, 'Human Rights and International Climate Politics – Human Rights into Climate Actions After Paris: Opportunities for the UNFCCC, the Human Rights Institutions and the G-20' (2016) 13 <https://ssrn.com/abstract=2904985> accessed 09 September 2023.
[312] UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change', 26 July 2022, A/77/226, paras 77-80.

existing in the fields of international climate law and international human rights law.[313] The second point is that consistent state practice on the intersection between energy, climate change, human rights, ethics, and justice may crystallise into customary international law on global energy justice.[314] This is however a possible question for future research that should consider all the complexities and difficulties surrounding the question.

4. Conclusion

The ambition of the present chapter was to demonstrate how the re-interpretations of CBDR and the duty to cooperate proposed in Chapter Four could be implemented in a way that operationalises the African communitarian approach to global energy justice developed in this thesis. The chapter began by identifying the COP as occupying a unique role within the international climate regime. Owing to the prominence of the institution, I proposed that the COP should overlook considerations founded on neoliberalism and self-interest and embrace African communitarianism. In this light, I proposed that the COP should pass a decision that clearly re-interprets the CBDR principle. The re-interpretation is premised on the understanding that the unfair distribution of renewable energy benefits in the international community is a global energy justice problem and calls for developed states to distribute resources for the development of renewable energy in developing countries. This would enable the people living in those countries to use renewable energy for a range of purposes. If the COP were to pass such a decision, it would help people living in developing countries to enjoy greater communion with other members of the international community. It would also exemplify the dictum that a *person is a person because of other persons*. However, the COP should not stop at passing a decision.

The chapter discussed some of the ways that the COP could implement its decision. It noted that the COP could utilise a range of legal strategies to achieve its aim. One of these strategies concerned the possible establishment of a subsidiary body on energy justice. Equally, the chapter noted that the COP could issue guidance to existing institutions and processes within the international climate change regime to promote its decision on energy justice. It was noted that this was already happening with similar issues connected with energy justice but with

[313] Andrea Schapper and Markus Lederer, 'Introduction: Human Rights and Climate Change: Mapping Institutional Inter-linkages' (2014) 27(4) Cambridge Review of International Affairs 666, 672-674.
[314] See International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries(2018) <Draft conclusions on identification of customary international law, with commentaries, 2018 (un.org)> accessed 09 September 2023.

suggestions for improvement. The chapter also discussed how monitoring mechanisms such as the ETF and the Global Stocktake could be used to monitor compliance. In the chapter, I also noted that there could be risks associated with a sole reliance on international climate law which were however surmountable.

The chapter thereafter considered how mechanisms and processes existing within international human rights law could play a mutually reinforcing role and observed that both human rights treaty- and non-treaty bodies and the processes associated with them could help to re-interpret the duty to cooperate and monitor this re-interpretation in alignment with global energy justice. In terms of re-interpretation for example, these institutions have been rendering meaningful interpretations aligning with global energy justice. Nevertheless, the chapter pointed out that these could be strengthened. For example, the CESCR and the Special Procedures could offer distinct re-interpretations of the duty to cooperate that firmly align with the African communitarian approach to global energy justice. These institutions are uniquely placed to do so owing to their central responsibilities in interpreting and monitoring the protection and observance of human rights around the world.[315] In terms of implementation, there is scope for improvement. The reporting system should clearly incorporate global energy justice using indicators. More specifically, monitoring mechanisms such as UPR should incorporate relationality and serve as an avenue for the fair and just distribution of resources to developing countries.

In the next chapter, I will draw the curtain on this thesis by summarising my key arguments, offering some recommendations, and reflecting on the significance of this study.

[315] Annalisa Savaresi, 'UN Human Rights Bodies and the UN Special Rapporteur on Human Rights and Climate Change: All Hands on Deck' (2023) 4(1) Yearbook of International Disaster Law Online.

Chapter 6
Conclusion

1. Introduction

In this concluding chapter I will begin by summarising the key arguments made in this thesis, re-emphasising the main points made in each chapter. I will then offer some recommendations, which will identify tools and strategies for achieving the energy justice outcomes advocated in the thesis. I will thereafter bring the thesis to a close by reflecting on the significance of the research, including its potential to produce change in the world. Conducting research into the myriad issues that have arisen in connection with renewable energy development is not just an academic pursuit; it is also intended to address issues in real time and effectuate change. To enable the people in developing countries to live harmoniously with the rest of the international community is the kind of real-world change that this research seeks to achieve.

2. Summing Up

Summing up the chapters of this thesis helps to track not only my main arguments but also helps to understand my motivations for embarking upon the research in the first place. Thus, in Chapter One, I framed an overarching research question. The question asked how best global energy justice could be conceptualised and operationalised in a way that addresses the injustices that have been generated by renewable energy development and deployment. The background to this question is that the development and utilisation of renewable energy has rapidly increased around the world. This development is propelled by the energy transition and the range of benefits obtainable from renewable energy use. The main benefit of renewable energy is its use as a tool for climate change mitigation. Other secondary benefits include energy access, energy security, and economic development. Furthermore, renewable energy use could facilitate the realisation of the SDGs[1] and a range of human rights, such as those contained in the ICESCR.[2]

Yet, as I noted, injustices have arisen in connection with renewable energy development and use. Some of these include the unfair distribution of renewable energy benefits across the

[1] UNGA, Resolution 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development', 25 September 2015, UN Doc A/RES/70/1.
[2] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

international community which is negatively affecting mainly developing and low-income countries; the mitigation costs to be borne by developing countries with considerable reserves of hydrocarbons and the related loss of livelihoods occasioned by the energy transition; and the adverse human, environmental and social impacts generated by renewable energy projects. These injustices, as I argued, should be addressed in line with energy justice.

Reflecting the global nature of the injustices, I highlighted the place of global energy justice in serving as a framing concept. I derived my understanding of global energy justice from a precept of African philosophy known as African communitarianism.[3] The main reason for this choice is that African communitarianism is more suitable than the dominant Western philosophical ideas and therefore better able to conceptualise the renewable energy issues as injustices. This, as I explained in a subsequent chapter, is due to the emphasis which African communitarianism places on the value of relationality (or identity and solidarity), rather than prizing individualism or atomism. To further highlight the means of promoting this conceptual framing, I highlighted the role of public international law which has the potential to be a force for good, even though it has been wielded in the past for immoral purposes. Flowing from these discussions, I formulated two main aims for the research, both of which are embedded in the overarching research question. The first aim seeks to present an African communitarian approach to global energy justice and the second is to demonstrate how public international law could systematically operationalise this conception of global energy justice.

In Chapter Two, I discussed at length the benefits of renewable energy and the injustices associated with renewable energy development. The aim was to provide further grounds for the adoption of energy justice. I then selected the unfair distribution of renewable energy benefits as the main injustice to address. The reason is that this injustice appears particularly troubling from an ethical perspective. As I argued, addressing this injustice could address various structural problems being encountered by many developing and low-income countries. The unfair distribution of renewable energy benefits arises from the inequitable development of renewable energy in the international community. As I noted, developed countries have mainly had their renewable energy systems flourish because they possess the financial, technological, and other capacity-based resources crucial to renewable energy

[3] Kwame Gyekye, 'Person and Community in Akan Thought' in Kwasi Wiredu and Kwame Gyekye (eds), *Person and Community: Ghanaian Philosophical Studies 1* (The Council for Research in Values and Philosophy 1992); Thaddeus Metz, 'An African Theory of Social Justice: Relationship as the Ground of Rights, Resources and Recognition' in Camilla Boisen and Matthew C. Murray (eds), *Distributive Justice Debates in Political and Social Thought* (Routledge 2016) 176.

development. In contrast, the opposite is the case with developing countries. The result of this inequity is that the benefits of renewable energy are not being fairly distributed to developing countries. Additionally, many of these developing countries have been plagued by structural problems such as poverty, diseases, energy access issues, low literacy levels, low life expectancy levels, and have generally scored poorly on the Human Development Index.[4] These structural issues, as I noted, have exacerbated the issue of unfair distribution of renewable energy benefits. In order to address this problem of maldistribution, I argued that these developing countries require assistance to develop their renewable energy systems and that that assistance could take the form of transfer of resources like finance, technology, and other capacity-based support for renewable energy development. As this problem of maldistribution is linked to the redistribution of resources, which is a contentious prescription at the international level, I signposted the need to advance a theoretical framework that could provide a justifiable and sound conceptual grounding for such redistribution. That theoretical framework is supplied by the concept of energy justice.

In Chapter Three, I discussed energy justice in detail. I developed and proposed a conception of global energy justice to underpin my key arguments in the research. I began by highlighting and discussing the two main rationales for the adoption of energy justice as a theoretical framework. The first is normative and is based on the idea that energy justice is interested in things that should matter when the subject of energy is being discussed. In this way, energy justice looks at the big questions the answers to which serve or fulfil an ethical need. The second rationale follows the normative function of energy justice, and it is pragmatic in the sense that, after energy justice identifies and conceptualises an issue that ought to be addressed, it further calls for that issue to be addressed. One question which I anticipated and answered was the question of alternatives to energy justice. I answered this by highlighting that energy justice is an alternative to the status quo dominated by individualistic Western philosophical ideas such as neoliberalism, which are unsuitable for addressing the unfair distribution of renewable energy benefits in the international community.

Noting that the concept of energy justice does not lend itself to easy definition because justice itself is a contested and multi-faceted idea, I proposed a two-step methodology. The first engages the identification of three dimensions of justice namely, distributive, recognition, and

[4] UNDP, 'Human Development Index' <Human Development Index | Human Development Reports (undp.org)> accessed 09 September 2023.

global justice. The global justice dimension is particularly relevant because of the global nature of the renewable energy injustices. The second step involves the adoption of African communitarianism as the idea of justice to underpin the identified dimensions of justice. It was recognised in that chapter that African communitarianism is a broad philosophy that has been interpreted in different ways. The interpretation which I adopted is the moderate form of the ethical theory. Notwithstanding the criticisms that have been levelled against this interpretation, I argued that it is still a justifiable and theoretically sound grounding for addressing the renewable energy injustices, given that it prizes the values of relationality or identity and solidarity which are absent in the dominant Western philosophical ideas that mainly promote individualism. Relationality prizes harmonious relationships which are necessary for addressing global problems such as the unfair distribution of renewable energy benefits.

From the two-step methodology, I developed the African communitarian approach to global energy justice. This conception of global energy justice conceives the unfair distribution of renewable energy benefits as a global energy justice problem that mainly affects developing countries. It proposes that developed countries, which are the well-off in the international community, should assist developing countries, which are the less well-off, to overcome the injustice that has characterised the distribution of renewable energy benefits in the international community. This should be done through the transfer of resources to developing countries for renewable energy development. As I also argued, developing countries on their part should equally ensure that the resources are further distributed fairly among the people.

In Chapter Four, I argued that public international law is an important tool for the promotion of the African communitarian approach to global energy which I developed in Chapter Three. By operationalising this conception of global energy justice, international law could address renewable energy injustices in a way that advances identity and solidarity. By this means, international law could be wielded for a morally and ethically sound purpose. This would be in contrast to the use of international law for immoral purposes such as colonialism, which gave birth to ideas such as TWAIL. Yet, as I noted, recasting international law in this manner would not be a straightforward process because promoting global energy justice would not only require changing existing practices, but also instituting new ones. This makes the operationalisation of global energy justice a difficult task. Adding to this difficulty is the nature of global energy governance. Here, we are looking at the fact that energy is essentially perceived as a domestic affair. Notions such as sovereignty over natural resources and energy

security add to the complexity, further complicating measures to address the unfair distribution of renewable energy benefits. Furthermore, the absence of a permanent and global decision-making institution on energy has meant the absence of a central institution that would have made operationalisation a comparatively simpler undertaking. To compound the situation, there are ideological factors like the expected opposition to any plans to redistribute resources and notions such as neoliberalism and self-interest that characterise the global order.

These issues led me to argue for the adoption of legal interpretation as a strategic tool for overcoming or lessening the impacts of the problems. I emphasised the point that the use of legal interpretation did not create entirely new legal obligations. To this end, I canvassed for the re-interpretation of the CBDR principle within international climate law and the duty to cooperate under international human rights law. I chose these two concepts because of their relationship with the moderate form of African communitarianism. As I noted, African communitarianism can equally enrich these concepts and lend them a theoretical sound foundation. Before re-interpreting both concepts, I reiterated the point that the unfair distribution of renewable energy benefits should first be acknowledged as a global energy justice problem that is negatively affecting mainly developing countries. Therefore, I argued for the CBDR principle to be re-interpreted to facilitate the distribution of resources from developed countries to developing countries for the development of renewable energy. To complement this re-interpretation, I further canvassed that the duty to cooperate should also be re-interpreted as requiring developed countries to distribute resources to developing countries for renewable energy development. I also argued that developing countries should ensure that the resources are further distributed fairly among the people. As I argued, these re-interpretations could help to advance relationality in the international community.

In Chapter Five, I demonstrated how institutions existing within international climate law and international human rights law could assist in re-interpreting the CBDR principle and the duty to cooperate along the lines argued in Chapter Four as well as how they could help to implement those re-interpretations. The institutions in question could adopt a range of legal techniques to promote global energy justice such as creating bespoke regulatory institutions, imposing binding targets, and producing relevant guidance.[5] In practice, these institutions have

[5] See Aileen McHarg, 'Regulating for Sustainable Electricity Market Outcomes in Britain: Asking the Law Question' (2013) 30 Environmental and Planning Law Journal 289, 293.

been carrying out relevant work on global energy justice, using some of the above legal techniques. Nevertheless, I argued for the strengthening of these existing practices.

For example, within the international climate regime, I identified the COP as occupying a vantage position to promote global energy justice. The COP could clarify an official interpretation of CBDR through a decision, which is a form of soft law. Such a decision should note that the unfair distribution of renewable energy benefits is a global energy justice problem that is negatively impacting developing countries and it should require developed countries to assist developing countries to overcome this problem through the transfer of financial, technological, and capacity-based resources for renewable energy development. Further, I argued that the COP could set up a new regulatory institution on energy justice to implement the proposed decision on global energy justice. Alternatively, it could rely on existing UNFCCC mechanisms and processes to implement its re-interpretation of CBDR. For instance, it could issue specific pieces of guidance to the financial mechanism under the UNFCCC to prioritise renewable energy development in developing countries through enhanced access to fund and capital. It could also produce guidance to recalibrate certain UNFCCC processes in line with its decision. One of these relates to communications concerning NDCs of states parties. Regarding the NDCs, the COP could consider the setting of legally binding targets on energy that align with the African communitarian approach to global energy justice, although it must note the potential pitfalls of target setting. Finally, I noted that the COP could utilise the ETF and the Global Stocktake to monitor the implementation of its decision as it concerns CBDR re-interpretation.

Similarly, I demonstrated how both human rights treaty- and non-treaty bodies could re-interpret the duty to cooperate and implement that re-interpretation, in a manner that supports the UNFCCC bodies in re-interpreting and implementing the CBDR principle. While noting that these human rights institutions have already been carrying out work relevant to global energy justice, I called for more clarity and boldness in advancing relationality as it relates to addressing the unfair distribution of renewable energy benefits. To this end, I argued for the CESCR to recognise that the unfair distribution of renewable energy benefits is preventing people living in developing countries from fully enjoying human rights, and to re-interpret the duty to cooperate as requiring developed states to correct this problem through the distribution of resources to developing countries. Non-treaty bodies such as the HRC and its Special Procedures could also follow a similar line, such as emphasising the importance of correcting the imbalance in the distribution of renewable energy benefits. There are existing

mechanisms to monitor these proposed re-interpretations. For example, I argued that human rights treaty bodies could utilise existing reporting obligations of states to examine how states have discharged their duty to cooperate, particularly in the context of climate change. I also argued that these institutions could publish guidelines on the use of indicators for measuring progress on international cooperation concerning energy. Non-treaty bodies, such as the HRC, could monitor the implementation of global energy justice through the UPR. I ended the chapter by discussing how the activities of these human rights institutions could help to influence the work of UNFCCC bodies which could be beneficial to the promotion of global energy justice. I also highlighted how a consistent state practice on energy, climate change, human rights and justice could develop into customary international law on global energy justice, although I noted that this was an area where further legal research is needed.

3. Looking Ahead

The above summaries outline how African communitarianism could inform an understanding of global energy justice and how international law could systematically promote this approach to global energy justice in order to address the renewable energy injustices identified and discussed in the thesis. There may, however, be instances in which gaps emerge in the implementation of this conception of global energy justice. While I anticipated some of these gaps and proposed ways to address them in chapter five, some gaps may prove problematic. For example, there is the possibility that the COP could decline to adopt a decision re-interpreting the CBDR principle based on the argument that such a re-interpretation lies outside its objects and purposes. Even when it renders such a re-interpretation, it may fail to implement it by refusing to set up an implementing institution or providing guidance to existing UNFCCC mechanisms. Regarding the human rights institutions, I noted in chapter five that the ECOSOC, a UN organisation overseeing a vast network of human rights institutions, could incentivise the CESCR to re-interpret the duty to cooperate. Nevertheless, there is an unresolved question about what would happen if the ECOSOC declined to exercise its power or if the CESCR refused such a directive if given.

Further research could usefully investigate how these gaps in regulation and policy may be addressed through the deployment of additional tools. For example, one of the most promising reinforcement tools that could be explored is litigation. Litigation can be seen as a regulatory device which may be deployed in a strategic manner to incentivise behaviour and address emergent interpretative and implementation gaps regarding the operationalisation of

the African communitarian approach to global energy justice developed in this thesis. It is important to understand this kind of strategic litigation as another means of re-orientating behaviour towards a desired direction.[6] The key feature that sets litigation apart from other legal techniques is the recruitment of judicial and quasi-judicial institutions like courts and tribunals as regulators.[7] Litigation in this way can help to 'address gaps in the regulatory structure and stimulate regulatory activity.'[8] Where the lawmaking institution or the politically appointed regulator has failed to discharge its statutory duties,[9] the courts may be moved to incentivise the regulator to action.[10] Future legal research could consider how litigation at both international and domestic levels could be used to fill emergent gaps in the implementation of global energy justice.

The role of political techniques such as diplomacy, negotiation, and lobbying, is also worth exploring further. In the previous chapter, I discussed how relevant parties could utilise these political tools to overcome likely challenges in implementing the African communitarian approach to global energy justice. Using these tools to address emergent gaps may be justified when the reinforcement tool of litigation is less desirable. For example, if a state is firmly against the redistribution of resources, it may exploit ways to circumvent a court decision that mandates it to do so. A claimant might be successful at the domestic level in an action for judicial review; nevertheless, this success might be short-lived if the legislature decides to make the decision-maker's authority beyond legal challenge. There is also the problem of costs associated with litigation, which might disenfranchise claimants and deprive them of their ability to utilise litigation to advance global energy justice. Individuals may also lack legal standing to bring some cases at the international level. Some international human rights institutions can receive complaints from individuals concerning human rights violations. For example, some human rights treaty bodies can receive individual communications that allege violations of their constituent treaties.[11] Nevertheless, it is the case that many international judicial and quasi-judicial institutions can only hear cases from states and, to some extent,

[6] McHarg (n 5) fn 27.
[7] ibid.
[8] W. Kip Viscusi, 'Overview' in W. Kip Viscusi (ed), *Regulation Through Litigation* (Brookings Institution Press 2002) 3.
[9] Kelli Hayes, 'Sue and Settle: Forcing Government Regulation Through Litigation' (2015) 40(1) University of Dayton Law Review 105, 107.
[10] Brigitte Haar, 'Regulation Through Litigation – Collective Redress in Need of a New Balance Between Individual Rights and Regulatory Objectives in Europe' (2018) 19(1) Theoretical Inquiries in Law 203, 204-205.
[11] OHCHR, 'Individual Communications: Human Rights Treaty Bodies' <Individual Communications | OHCHR> accessed 09 September 2023.

public-interest organisations. This is the case, for example, with the ICJ and tribunals such as ITLOS. Therefore, future legal and interdisciplinary research is needed to investigate how political techniques potentially interact with litigation strategies and international and domestic law in advancing global energy justice.

4. Reflecting on the Significance of the Research and Drawing the Curtains

In this thesis, I have demonstrated how an African communitarian perspective on global energy justice could provide not just a distinct approach, but also a justifiable basis for conceptualising and addressing the injustices that have arisen in connection with renewable energy development. As I noted in chapter one, the bulk of the existing academic literature on global energy justice is currently dominated by ideas drawn from Western philosophy. Whether these ideas relate to Kantian ethics or Rawlsian intimations of justice, they are mainly characterised by individualism. In the context of the energy transition, where injustices that affect the international community have arisen, individualism has been shown to be ill-suited in catering to these global problems. The same can also be said of neoliberal ideas of addressing energy injustices. I demonstrated how it is immoral to subject the distribution of material outcomes such as renewable energy benefits to self-interest, efficiency, and profit maximisation. Such a distribution would lead to unfair outcomes.

One point to re-emphasise here is that the moderate form of African communitarianism that I adopted in this thesis makes an allowance for individuals to determine their own conception of the good life. It recognises that individuals have distinct traits that permit them to pursue goals of their choice without being subjugated to communal interests.[12] This feature prevents African communitarianism from being used to justify not only the taking away of human rights but also the elevation of communal interests over individual interests. By emphasising the key theme of relationality, African communitarianism prizes the value of harmonious or communal relationships, recognising that individuals, rather than communities, are the objects of these forms of relationships.[13] This point deserves emphasis to enable scholars intending to adopt the philosophy for research purposes to know the form of the philosophy to utilise in the pursuit of their research goals.

[12] Gyekye (n 3) 114.
[13] Metz (n 3) 176.

More scholars are now beginning to redirect their attention towards non-Western theorisations of energy justice. Even more significant is the fact that the emerging scholarship on energy justice is increasingly being inclusive in terms of accommodating energy justice scholars from the Global South. This was not the case a decade ago when energy justice began to emerge as a discipline for conceptualising and addressing issues characterising the energy sector. There is a need for a redoubling of these efforts in order to liberalise the scholarly field completely and loosen the hold which both Western scholars and concepts have on it. It is against this background that the contribution of this study to the academic field might be appreciated. Written by a scholar from the Global South and based on a non-Western philosophical perspective, the study will hopefully be a reference for future academic contributions on energy justice. I hope that the study will inspire legal researchers from the Global South to adopt more of these non-Western philosophical values for the conceptualisation of the problems that continue to arise in connection with the energy transition.

A further point to make here is that the present research might be viewed as continuing the flourishing academic practice of linking moral and political philosophy on the one hand, with international law on the other hand. This is a dialogue long championed by scholars who argue that a cross-fertilisation of ideas in both disciplines might help to produce just and fair results. From observation, the dominant theories on the moral and political philosophy spectrum have been mainly Western in form, with many of the authors from the Global North. My adoption of African communitarianism turns the searchlight on an under-appreciated non-Western moral and ethical theory. The hope is that this will enrich the important dialogue that has begun between these two disciplines.

Beyond the academic ambition of this thesis lies the goal of effecting real change in the real world. The principal reason for proposing and adopting the tool of legal interpretation as an operationalisation strategy is to make this task easier. Developing countries have for long been on the margins of development, plagued by several ills such as poverty, diseases, low literacy levels, energy access issues, high infant mortality rates, and low life expectancy. They are now confronted with the unfair distribution of renewable energy benefits as an additional injustice, a resolution of which could hold the key for resolving the other ills. I hope that the arguments and recommendations in this thesis will not only help to spotlight all the renewable energy injustices that have risen in recent times, but also specifically help to address the unfair distribution of renewable energy benefits.

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