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## JUST TRANSITION AS WELLBEING: A CAPABILITY APPROACH FRAMING

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### Abstract

*Since its inclusion in the preamble to the Paris Agreement in 2015, just transition has grown to become one of the most engaged subjects in climate change law and governance. The rationale of just transition proponents is simple: the wholesale socio-economic transition that climate change compels is costly, and those costs must be equitably distributed across society. A closer look at this Rawlsian conceptualization of just transition, however, unearths major flaws, including its faulty essentialization of jobs, emphasis on the means of justice rather than ends, and the localization of an intrinsically global phenomenon—climate change. This article addresses these flaws. Rather than the distributive and procedural emphases of ‘traditional’ just transition discourse, it is shown that a capability approach to just transition, which underlines socio-ecological wellbeing as the ultimate objective of just transition, is a more availing theoretical underpinning for just transition. The article highlights the flaws of distribution-centric just transition, draws examples from just transition policies and laws in Canada, the United States, and Australia, and discusses how recent developments in Europe are more aligned with the capability approach described here. The article concludes with a discourse on how international human rights law is a viable, albeit imperfect, vehicle for a well-being-focused iteration of just transition.*

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## Introduction

Simon Pirani argues that the post-Second World War transition to an oil- and electricity-based global economic system left billions of people without electricity access or with limited access.<sup>1</sup> The transition was not directed at improving lives, rather it entrenched the accumulation of capital, the concentration of wealth and power, and the reproduction and deepening of inequalities and dominant social relations.<sup>2</sup> Pirani proceeded to warn that “[a] future transition that leaves these social relations intact, while switching technologies, will surely not tackle inequalities.”<sup>3</sup> Another era of transition is upon the globe—a transition to a post-carbon global order. Renewable energy systems are becoming more affordable and widespread by the day, electric transportation systems are being expanded, and industrial processes are beginning to leverage cleaner technologies.<sup>4</sup> But how “just” is the transition? As fossil fuel companies move on to what one oil and gas worker refers to as “the next shiny thing,” have communities and workers been left to hold the bag?<sup>5</sup> Will the post-carbon global order herald the next era of global inequality and injustice? These questions embody the research agenda that underpins this article.

The socio-economic and ecological impacts of the transition on communities, workers, and the developmental objectives of states are often referenced in the contestations against transition measures or arguments for cautious transition policy design and implementation. Just transition, as recently developed and promoted in climate change scholarship and law, primarily addresses these adverse impacts of transition measures. Just transition is, however, a contested notion. While

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<sup>1</sup> SIMON PIRANI, *BURNING UP: A GLOBAL HISTORY OF FOSSIL FUEL CONSUMPTION*, 182–83 (Pluto Press 2018).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 183.

<sup>4</sup> International Energy Agency, “Tracking Clean Energy Progress 2023” (July 2023), [www.iea.org/reports/tracking-clean-energy-progress-2023#overview](http://www.iea.org/reports/tracking-clean-energy-progress-2023#overview) [<https://perma.cc/C8RP-PYDS>].

<sup>5</sup> Mychaylo Prystupa, *At COP21, Oil Sands Worker Urges Smooth Transition off Fossil Fuels*, CANADA’S NATIONAL OBSERVER (Dec. 8, 2015), <https://www.nationalobserver.com/2015/12/08/news/cop21-oil-sands-worker-urges-smooth-transition-fossil-fuels> [<https://perma.cc/UL6U-RAAD>].

some definitions are narrowly restricted to the transition of the workforce, others scope the concept more broadly to entail the transition of societies impacted by climate change response measures. The theorization of what justice means within the just transition framework is rare. As noted by Heffron and McCauley, it is often unclear what justice is needed and how the concept of justice is to be applied when used in climate, energy, and environmental justice literature.<sup>6</sup>

The situation becomes even more complicated when it is realized that the varying notions of what is “just” traverse diverse disciplinary constructs. Various stakeholders—labor and trade unions, Environmental Non-governmental Organizations (ENGOs), multilateral environmental organizations, Indigenous and host communities, developed and developing states, multinational corporations, and small and medium scale enterprises—have their own ideas of what is just, even when not explicitly stated.<sup>7</sup> As Fraser points out, the who, what, and how of justice are now “up for grabs” and arguments about justice assume the double guise of queries about the substance and subjects of justice.<sup>8</sup>

In this article, drawing on Amartya Sen’s capability approach to justice, I propose key characteristics of what should be considered just in the context of climate change-focused sustainability transition. I do not attempt the impossible task of proffering a one-size-fits-all definition. While I will be drawing from various theories of justice, I avoid an in-depth abstract theoretical discourse; an endless intellectual maze that could detract from the focus of this article. I only go as deep as it is required for the purposes of the arguments here. The latter parts of the article will consider the history, trends, laws, and policies on just transition in the coal, oil, and gas industries. I conclude with reflections on the human rights dimensions of the just transition discourse.

## **Part I: Defining the ‘Just’ in Just Transition**

### **A. The Origin of Just Transition**

To avoid what Stevis et al. refer to as the ‘de-historicization’ of just transition by scholars and other stakeholders,<sup>9</sup> the attempt to understand what justice in the just transition context means should necessarily begin with what the concept meant at inception. The concept of just transition

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<sup>6</sup> Raphael Heffron & Darren McCauley, *What is the ‘Just Transition’?*, 88 GEOFORUM 74 (2018).

<sup>7</sup> According to Stevis et al., the “growing references to just transition undoubtedly signal a desire to further root social and equity concerns into the climate debate. While this is to be welcomed, it also complicates the task of identifying what just transition stands for, who is behind it, what are the underlying politics, and who it is for. Instead of leading to an alignment of views, the concept’s growing popularity has actually turned it into a contested concept . . .” Dimitris Stevis et al., Introduction: The Genealogy and Contemporary Politics of Just Transitions in EDOUARD MORENA ET AL., *JUST TRANSITIONS: SOCIAL JUSTICE IN THE SHIFT TOWARDS A LOW-CARBON WORLD 4* (Pluto Press 2020).

<sup>8</sup> Nancy Fraser, *Reframing Justice in a Globalizing World*, 36 NEW LEFT REVIEW 69, 72 (2005).

<sup>9</sup> Stevis et al., *supra* note 7, at 5–6.

has evolved into a multi-pronged idea. In their work, Stevis et al. classify this evolution into three phases: the emergence of the concept (1980s–2001), the labor and globalization phase (2001–2013), and the concept’s diffusion beyond unions (2013–the present).<sup>10</sup> While it is arguable that previous transitions have been attended by clamors for justice,<sup>11</sup> the contemporary development of just transition is traced to Tony Mazocchi’s *Superfund for Workers (superfund)*.<sup>12</sup> Mazocchi was a trade unionist who focused on occupational safety and health at the Oil, Chemical and Atomic Workers’ Union (OCAW).<sup>13</sup>

Reframing the job versus environment discourse as an environment and jobs conversation was also on the agenda of other groups like the United Automobile Workers and Environmentalists for Full Employment.<sup>14</sup> The job blackmail that followed, entailing the offshoring (or threat to offshore) of toxic operations by corporations,<sup>15</sup> seems to account, in part, for the case subsequently made for a “superfund for workers” by Mazzocchi and allies.<sup>16</sup> Les Leopold, in his 1995 address at the biennial meeting of the International Joint Commission (IJC) on Great Lakes Water Quality, also emphasized the trend of giant corporations fleeing to low-wage and low-regulatory countries. According to Leopold, “by just threatening to leave, these giants gain enormous leverage over North American public policies . . . pit dislocated workers against environmental advocates” and serve as “a magnet for worker job fears” . . .<sup>17</sup> It was in this speech that the term “just transition” was first used.<sup>18</sup> To appreciate what Leopold considers as just, attention should be paid to what he considers unjust. This includes job insecurity, transboundary job dislocation, loss of identity and decent means of family support, health risks connected to unemployment and dislocation, and unfettered multinational corporate behavior that allows unhinged capital mobility and job

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<sup>10</sup> *Id.* at 9–21.

<sup>11</sup> Swilling gives a summary of long-wave transitional epochs (lasting between 40 to 60 years) as captured in the literature, although he makes the important point that epochs are not singular events or events that occur similarly in multiple places. These epochs have been categorized differently by various scholars. Perez identifies five epochs: the first industrial revolution (from 1771), age of steam and railways (from 1829), age of steel, electricity and heavy engineering (from 1875), age of oil, the automobile and mass production (from 1908), age of information and telecommunications (from 1971). *See* MARK SWILLING, *THE AGE OF SUSTAINABILITY: JUST TRANSITIONS IN A COMPLEX WORLD* 111–12 (Oxon, Routledge, 1<sup>st</sup> ed. 2020). In *The Great Transformation*, Polanyi details some of the social justice issues that attended the first industrial revolution in England. *See* KARL POLANYI, *THE GREAT TRANSFORMATION* 35–44 (Beacon Press 1965).

<sup>12</sup> *See* LES LEOPOLD, *THE MAN WHO HATED WORK AND LOVED LABOUR: THE LIFE AND TIMES OF TONY MAZZOCCHI* (Vermont 2007) for a comprehensive account of the contributions of Tony Mazocchi to the emergence of the just transition concept.

<sup>13</sup> Stevis et al., *supra* note 7, at 9.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.*

<sup>16</sup> Jeremy Brecher, “A Superfund for Workers”, *DOLLARS & SENSE* (1 November 2015), <https://www.dollarsandsense.org/archives/2015/1115brecher.html> [<https://perma.cc/DQ4A-GU43>].

<sup>17</sup> Les Leopold, Oil, Chemical, and Atomic Workers Union, Address to the International Joint Commission, *in* *OUR LAKES, OUR HEALTH, OUR FUTURE: PROCEEDINGS OF THE INTERNATIONAL JOINT COMMISSION’S 1995 BIENNIAL MEETING ON GREAT LAKES WATER QUALITY* at 82 (Sept. 22-25, 1995).

<sup>18</sup> In his speech, Leopold made “a call for a just transition to end the jobs and environment clash.” *Id.* at 81.

blackmail.<sup>19</sup> The proposed components of just transition were, therefore, tailored to address these unjust conditions. Leopold’s vision of just transition includes that:<sup>20</sup>

- i. No worker who loses his or her job during a sunseting transition should suffer a net loss of income.
- ii. Costs should be fairly distributed across society by the establishment of a special fund: a superfund for workers.
- iii. The fund would provide for full wages and benefits until a worker retires or finds a comparable job; up to four years of tuition stipends to attend vocational institutions plus full income while in school; post-educational stipends or subsidies if no jobs at comparable wages are available; and relocation assistance.

While other essentials of justice (e.g., participation and recognition) are deducible from the initial understanding of just transition, more emphasis was placed on the distribution of risks. This is clear in Leopold’s vision and made even clearer in Brian Kohler’s presentation at the same 1995 IJC meeting. Kohler argues that there must be a sense of fairness about who will bear the costs of transitional decisions as “there is a very real danger that even if we are successful in saving the planet we will live in poverty and despair upon it.”<sup>21</sup> The key question that must be answered, according to Kohler, is “who will pay for those changes?”<sup>22</sup> Kohler advocates for a conscious engagement with the question of the “cost-bearer(s)” and proposes a “shared industrial responsibility” approach to “payment.”<sup>23</sup> While there is no known example of this approach, governments have generally taken the idea of just transition payment literally, with monetary allocations being at the center of just transition initiatives.<sup>24</sup>

Importantly, Stevis et al. observe that contrary to recent presumptions of the rootedness of just transition in the climate change and energy transition discourse, the concept developed within

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<sup>19</sup> *Id.* at 82.

<sup>20</sup> *Id.* at 83.

<sup>21</sup> Brian Kohler, National Representative of Health, Safety, and Environment Communication, Energy and Paper Workers Union of Canada, Address to the International Joint Commission, *in* OUR LAKES, OUR HEALTH, OUR FUTURE: PROCEEDINGS OF THE INTERNATIONAL JOINT COMMISSION’S 1995 BIENNIAL MEETING ON GREAT LAKES WATER QUALITY, at 78 (Sept. 22–25, 1995).

<sup>22</sup> *Id.* at 79.

<sup>23</sup> The shared industrial responsibility approach requires that industries that have profited by supplying and utilizing products be held accountable. *See* Kohler, *supra* note 21, at 79–80. Similarly, Leopold proposed the establishment of a multinational fund (which should start as a Canadian–U.S Binational Fund). The fund should be financed through surcharge on the production of substances that are to be eliminated. *See* Leopold, *supra* note 17, at 83.

<sup>24</sup> The European Union Just Transition Mechanism, for example, entails a €30–50 billion just transition fund, a €45 billion dedicated just transition scheme under InvestEU, and the intended mobilization of €25–30 billion public sector loan facility with the European Investment Bank. *See* Euro. (Comm’n “EC”), *The European Green Deal Investment Plan and Just Transition Mechanism Explained* (Jan. 14, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_24](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_24) [<https://perma.cc/8ERS-FZWL>].

another context—the production of toxics and the impacts on workers and the local environment.<sup>25</sup> Just transition's origin raises valid questions about its applicability or the extent of its applicability in a clearly more distinct climate change context. For example, how do the unique features of climate change (e.g., its global nature, non-traceability of causation, varying justice claims, extensiveness of impacts, and scope of required response measures) mandate a rethinking of just transition as it was at inception? These questions are important more so given the claim that just transition has been unmoored from its original berth.<sup>26</sup> At inception, workers were the focus of the just transition movement, the just transition cause was reduced to a job issue, and labor-based solutions were sought. The original conception also dealt with the larger community only in a perfunctory and ill-defined manner, emphasized the distribution of risks and losses, and defined gains narrowly in terms of green jobs. It further emphasized the role of industry as the “payers,” rather than the more recent focus of just transition on States.<sup>27</sup>

The questions of who is owed a just transition, what the payment entails, and how it should be paid are as important as the riper question of who pays.<sup>28</sup> It is assumed under the original conception of just transition that workers are the people owed and payment is adequate if such workers are returned to the financial state they would have been if their jobs had subsisted.<sup>29</sup> The initial understanding also appears to conflate the interest of workers with that of society and seems to assume that the replenishment of jobs and addressing the needs of workers will amount to a resuscitation of host communities.<sup>30</sup> Research, however, shows that the resource industry (particularly oil and gas) is considerably made up of long-distance commuting workers (fly-in fly-

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<sup>25</sup> Stevis et al., *supra* note 7, at 22. However, this should not be taken as meaning that climate change (or global warming) was completely missing from the just transition discourse at inception. For example, Mazzocchi organized the first labour conference on global warming and its impact on workers in 1988. See Vernon Mognensen, *The Man Who Hated Work and Loved Labour: The Life and Times of Tony Mazzocchi* by Les Leopold 12:4 WORKING USA 644, 646 (2009) (reviewing LES LEOPOLD, *THE MAN WHO HATED WORK AND LOVED LABOUR: THE LIFE AND TIMES OF TONY MAZZOCCHI* (2007)).

<sup>26</sup> Stevis et al., *supra* note 7, at 6.

<sup>27</sup> For example, while recognizing the roles of social partners, the ILO Guidelines are overwhelmingly directed at governments. The Guidelines are largely silent on industry's roles. See generally, INT'L LAB. ORG. *Guidelines for a Just Transition towards Environmentally Sustainable Economies and Societies for all* (ILO, 2015) [hereinafter “ILO Guidelines”].

<sup>28</sup> As noted by Newell and Mulvaney, the just transition praxis will have to “centrally address the key political economy questions of ‘who wins, who loses, how and why,’ . . . and who will bear the social costs of decarbonizing energy sources and economies”. See Peter Newell & Dustin Mulvaney, *The political economy of the “just transition”*, 179 GEOGRAPHICAL J. 132, 133. (2013).

<sup>29</sup> Leopold, *supra* note 17, at 83. The Canadian Labour Congress (CLC), for example, noted that “the prime aim of just transition is the continuation of employment without loss of pay, benefits of seniority. Job equity is at least as deserving of preservation as the equity of corporations . . . Where continuation of employment is not possible, just compensation is the next alternative”. Canadian Lab. Cong. *Just Transition for Workers During Environmental Change* (2000), [https://perma.cc/BL78-SQEZ].

<sup>30</sup> See Leopold, *supra* note 17. One explanation for these assumptions is the relative sedentary nature of chemical production industries, the primary context in which just transition emerged. Comparably, long distance commute (either fly-in, fly-out or drive-in, drive-out) is more common in industry resource towns. See generally Kelly Vodden & Heather Hall, *Long Distance Commuting in the Mining and Oil and Gas Sectors: Implications for Rural Regions*, 3 THE EXTRACTIVE INDUS. AND SOC'Y 577, 577–78 (2016). Hence, since workers and their families lived in the communities hosting these industries, the workers and their families belong to the community and the fate of the former affects the latter.

out and drive-in drive-out workers),<sup>31</sup> from whom host communities derive limited financial benefits.<sup>32</sup> It is clear that although a case can be made for the narrow understanding of just in the original framing of just transition, such denotation is not sacrosanct. There are temporal, spatial, sectoral, and identity-based factors that necessarily shape what justice means. While I agree that it is important to capture the historical roots of just transition, I argue that its real transformative and emancipatory potential lies in its adaptation and contextualization.

## **B. Contemporary Understanding of Just Transition**

Current understandings of just transition have been grouped under various categories. Authors of these classifications attempt to capture the positions of just transition movements (e.g. Goddard and Farrelly classify just transition into passive, minimalist, and transformative),<sup>33</sup> and objectives to just transition (e.g. Morena et al. identify status quo, managerial reform, structural reform, and transformative approaches).<sup>34</sup> Other proposed classifications include the forms of just transition policies (e.g. Mertins-Kirkwood differentiates between proactive and reactive just transition policies),<sup>35</sup> and just transition approaches in the labor movement (e.g. Stevis and Felli distinguish between shared solution, differentiated responsibility, and social-ecological approaches).<sup>36</sup> While these classifications do not engage directly with the meaning of justice in the context of just transition, they are underpinned by implicit perceptions of justice. *Table 1* summarizes some of these perceptions. As shown in *Table 1*, these categories are not mutually exclusive. Rather, they share common features and emphases. For example, Goddard and Farrelly's minimalist position is substantially the same as Morena et. al.'s status quo objective (see *Table 1*). They are, however, worthy of separate recognition as they contain variations that contribute to a more comprehensive appreciation of what is considered just in the just transition context.

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<sup>31</sup> PETROLMI & ENFORM, *HR Trends and Insights: Rotating Not Relocating: Alberta's Oil and Gas Rotational Workforce* (2015), <https://s3-ca-central-1.amazonaws.com/petrolmi-media-library/petro-lmi/corporate-website/current/wp-content/uploads/2019/07/30151523/rotational-workforce-report-web-.pdf> [https://perma.cc/5U3H-3YZM].

<sup>32</sup> In a 2007 study, it was found that mobile workers in the Canadian Oil Sands industry spent only 5.6 percent of their annual income in the Wood Buffalo region in Alberta. See Athabasca Region Issues Working Grps., *Report on Mobile Workers in the Wood Buffalo Region of Alberta* (2007), in Vodden & Hall, *supra* note 30, at 578.

<sup>33</sup> George Goddard & Megan Farrelly, *Just Transition Management: Balancing Just Outcomes with Just Processes in Australian Renewable Energy Transitions*, 225 APPLIED ENERGY 110–123 (2018).

<sup>34</sup> Edouard Morena et al., *Mapping Just Transition(s) to a Low-Carbon World*, RSCH. INST. FOR DEVELOPMENT SOC. DEV. 11–15 (2018).

<sup>35</sup> Hadrian Mertins-Kirkwood, *Making Decarbonization Work for Workers: Policies for a Just Transition to a Zero-carbon Economy in Canada*, CANADIAN CTR. FOR POL'Y ALTERNATIVES at 8–11 (2018).

<sup>36</sup> Dimitris Stevis & Romain Felli, *Global Labour Unions and Just Transition to a Green Economy*, 15 INTL' ENV'T AGREEMENTS 29, 36–39 (2015).

**Table 1 – Just Transition and the Perceptions of Justice**

<b>Categories</b>		<b>Perceptions of Justice</b>
<b>Positions</b>	<i>Passive</i>	The expansion of production and protection of jobs; acceptance of transition is dependent on the preservation of jobs in current industries.
	<i>Minimalist</i>	Green capitalism (creation of decent green jobs); retraining and financial support for workers; union representation of workers.
	<i>Transformative</i>	A systemic shift from production for profit to the subordination of production to the needs of humans and the ecosystem.
<b>Objectives</b>	<i>Status Quo</i>	Compensate or provide new job opportunities to affected workers; replace ‘old’ with ‘new’ jobs; Ignores questions of job distribution, access, or negative externalities of ‘new’ jobs.
	<i>Managerial Reform</i>	Worker and workplace centric; Retention of existing economic system; selective reforms on access (e.g., employment, energy); Occupational health and safety (in both old and new jobs); Social dialogue and tripartite negotiation between government, unions, and employers.
	<i>Structural Reform</i>	Inclusive and equitable decision-making process; Collective ownership of new decarbonized system by different stakeholders; Distribution of benefits through the agency of vulnerable groups; Identifies and corrects the inequalities and injustices of the fossil fuel energy system; Emphasizes social power over social dialogue.
	<i>Transformative</i>	An overhaul of economic and political system; Consideration of alternative development pathways different from one based on continuous growth; Dismantling of interlinked systems of oppression (racism, classism, etc.).
<b>Policies</b>	<i>Reactive</i>	Focused on adversely affected workers and communities; Direct financial support to individuals and communities; Minimization of the costs of transition.
	<i>Proactive</i>	Maximization of the long-term benefits of transition; training of new workers for emerging industries (not just displaced workers); Address existing inequities in the workforce; Geographically targeted public spending.



<b>Approaches</b>	<i>Shared Solution</i>	Dialogue and mutual understanding; Just transition as a mutually beneficial process; Reinforce and extend social security measures.
	<i>Differentiated Responsibility</i>	Protection of the vulnerable; Workers’ rights, union’s power, industry’s minimal responsibility, and State’s central duties to intervene and shape the political economy.
	<i>Social-Ecological</i>	Democratic planning and public ownership of remaining fossil fuel supplies; Change in the balance of power.

The understandings of just transition in *Table 1* can also be construed as a spectrum of just transition trajectories. This tiered conception of just transition also presupposes that while more emancipatory modes of just transition (e.g., transformative objectives) are more visionary than basic frames like passive position’, the more holistic agenda of transformative objectives include, at a basic level, the central claims of the passive position. The former still meets the goals of the latter albeit within the context of broader objectives.<sup>37</sup> For example, while a transformative approach challenges a socio-economic system premised on an unending growth model, the interest of and opportunities for workers (to which a status quo approach caters) remain a relevant and valid vision within the more robust transformative vision. Like the initial understanding of just transition, current just transition advocacy by labor organizations and just transition initiatives by governments and industries are mostly aligned with the lower tiers of just transition framings. Morena et al. situate initiatives by the International Labour Organization (ILO) and the International Trade Union Confederation (ITUC), the two leading international institutions on just transition, under the managerial reform approaches, while the just transition initiatives in the German region of Ruhr are put under the status quo category.<sup>38</sup> This categorization is, however, flawed as it attempts to force existing initiatives into singular classifications. For example, rather than being solely aligned with managerial reform, particularly in its emphasis on social dialogue and tripartite consultation, the ILO’s vision of just transition also fits within the status quo

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<sup>37</sup> The Labour Network for Sustainability and Grassroots Policy Project, for example, argue that the transformative and limited labour-oriented views of just transition are not mutually exclusive needs and goals. They, therefore, ask labour to see beyond the worksite and the community and environmental activists to “help bring justice to coal miners losing their pensions, and workers . . . who through no fault of their own are being thrown on the scrap of history, in a world where scrap metal commands a price, but human beings are discarded”. See Labour Network for Sustainability & Strategic Practice, *Just Transition” – Just What Is It?: An Analysis of Language, Strategies, and Projects* (2018), <https://www.labor4sustainability.org/uncategorized/just-transition-just-what-is-it/> [<https://perma.cc/TY46-CR3F>].

<sup>38</sup> Morena et al., *supra* note 34, at 13. Stevis and Felli classify just transition initiatives by international organizations including the ILO and ITUC under the shared solution approach. See Stevis and Felli, *supra* note 36, at 36. Mertins-Kirkwood also argues that labour organizations, generally, advocate for reactive just transition policies. See Mertins-Kirkwood, *supra* note 35, at 11.

category.<sup>39</sup> Again, the ILO Guidelines highlight the need to consider specific gender policies for the promotion of equitable outcomes,<sup>40</sup> an issue Morena et al. consider to be a feature of a structural reform approach. The point here is that it is impractical and unhelpful to situate the understanding of justice within specific stand-alone categories.

Cahill and Allen situate the mainstream definitions of just transition within a “scope” and “social inclusion” framework.<sup>41</sup> While the scope focuses on distributional impacts and intentions, social inclusion deals with recognition and procedural justice.<sup>42</sup> Although the framework’s tiered quadrants are similar to the framings in *Table 1*,<sup>43</sup> its explicit use of well-theorized justice principles—distributive justice, recognition, and procedural justice—allows for a more robust and coherent engagement with the diverse dimensions of just transition.<sup>44</sup> Construed this way, just transition is not restricted to its initial distributional understanding or the currently more popular process-based understanding. It is more. Going even further, McCauley and Heffron in their deconstruction of just transition refer to the distributional component of the concept as entailing capabilities and well-being, risk and responsibility, vulnerability and recognition, while also making a case for the inclusion of restorative justice as a third component (with the second component being procedural justice).<sup>45</sup> While I will come back to the implications of this more theoretically grounded notion of just transition, it is important to recognize arguments made for a more narrow understanding of just transition.

In her case for a narrow understanding of just transition, Eisenberg argues that the diverse understanding of just transition breeds confusion as scholars use “the same emergent term with different meanings.”<sup>46</sup> Further, she points out that the labor-related usage of just transition predates the broad usage and has gained traction, the specificity of the labor-related usage stands out and gives it potency, and a broad understanding of just transition adds nothing to existing models like environmental justice, climate justice and energy justice.<sup>47</sup> Conversely, Heffron argues that climate justice, environmental justice, and energy justice scholars should integrate their various ideas and

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<sup>39</sup> The ILO’s vision of just transition is premised on the four pillars of the Decent Work Agenda – social dialogue, social protection, rights of work and employment. While social dialogue and social protection are key features of the managerial reform approach, rights of work and employment are features of the status quo approach. *See* ILO Guidelines, *supra* note 27, at 4.

<sup>40</sup> *Id.* at 6.

<sup>41</sup> Ben Cahill & Mary Margaret Allen, *Just Transition Concepts and Relevance for Climate Action: A Preliminary Framework*, CTR. FOR STRATEGIC AND INT’L STUD. & CLIMATE INV. FUND at 7 (2020).

<sup>42</sup> *Id.*

<sup>43</sup> Cahill and Allen grouped the definitions of just transition into four quadrants. Quadrant 1 is the most expansive in terms of scope and social inclusion, entailing a broad range of impacts and subjects, seeks to transform existing systems, and includes a broad range of stakeholders while elevating and empowering vulnerable groups. The three other quadrants have varying scopes of impacts, subjects, intention, and social inclusion. *See id.* at 8, 10–11.

<sup>44</sup> *Id.* at 9–10.

<sup>45</sup> Darren McCauley & Raphael Heffron, *Just Transition: Integrating Climate, Energy and Environmental Justice*, 119 ENERGY POL’Y 1, 3–5 (2018).

<sup>46</sup> Ann Eisenberg, *Just Transitions*, 92 SOUTH. CALIF. LAW. REV 273, 286–89 (2019).

<sup>47</sup> *Id.*

approaches into the bigger picture of just transition.<sup>48</sup> In other words, just transition entails a fusion of climate, environmental, energy justice, and more. While Eisenberg is correct that just transition was first deployed by the labor movement, there is no evidence that leaving it anchored to its labor root makes it more potent. In fact, although just transition is presently more popular than it used to be, the perception that it is an invitation to a “fancy funeral” is rife amongst workers.<sup>49</sup>

At a more existential level, Eisenberg’s argument that just transition be limited to the labor context reduces humans to workers and, thereby, discounts other identities borne by individuals by virtue of their interactions in the broader contexts of society and nature. This results not only in the fetishism of deconstructed and isolated identity and caters only to an aspect of a person’s life with the other, but it also leaves out other entities within the broader contexts of society and nature that do not qualify under the jobs framing. Indeed, this appears to be the prevalent approach to just transition in practice. Whereas “frontline communities” are often referenced, they are either an afterthought or portrayed as tributaries of labor.<sup>50</sup> Again, this narrow understanding is similar to the prevalent singular subject framings in other sustainability justice models where environmental justice theorists focus on sites of local harms, climate justice emphasizes intragenerational equity,<sup>51</sup> and energy justice focuses on the energy-poor.<sup>52</sup> As against these narrow framings, Seck argues that climate justice and its search for answers to questions of “who owes what to whom and why in the Anthropocene is dependent on relational insights.”<sup>53</sup> She notes more pointedly that our vision of a worker must transcend the bounded autonomous individual model to effectively bridge the artificial gulf between labor and environment.<sup>54</sup> In her words:

. . . workers are embedded in relationships at work and in family and community, and realize autonomy as a result of relationships that nurture and support the possibility of autonomy. This suggests that a view of the worker as an individual with rights that are

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<sup>48</sup> Raphael Heffron, *The Just Transition to a Low Carbon Economy*, 8 RENEWABLE L. AND POL’Y REV. 39, 40. (2018)

<sup>49</sup> Labour Network for Sustainability & Strategic Practice, *supra* note 37.

<sup>50</sup> The ITUC, for example, states that a just transition will “invest in jobs – decent work opportunities in sectors which reduce emissions and help communities adapt to climate change. . . .” See INT’L TRADE UNION CONFEDERATION (ITUC), *Just Transition – Where Are We Now and What’s Next? – A Guide to National Policies and International Climate Governance*: ITUC Climate Justice Frontline Briefing 6 (2017).

<sup>51</sup> Kirsten Jenkins, *Setting Energy Justice apart from the Crowd: Lessons from Environmental and Climate Justice*, 39 ENERGY RSCH. & SOC. SCI 117, 117–21 (2018); Sara L. Seck, *Relational Law and the Reimagining of Tools for Environmental and Climate Justice*, 31 CANADIAN J. OF WOMEN AND THE L. 151, 152 (2019).

<sup>52</sup> See generally Benjamin Sovacool et al., *New Frontiers and Conceptual Frameworks for Energy Justice*, 105 ENERGY POL’Y 677, 677–91 (2017).

<sup>53</sup> Sara L. Seck, *A Relational Analysis of Enterprise Obligations and Carbon Majors for Climate Justice*, 1 OÑATI SOCIO-LEGAL SERIES 254, 257 (2020).

<sup>54</sup> Sarah L. Seck, *Transnational Labour Law and the Environment: Beyond the Bounded Autonomous Worker*, 33 CANADIAN J. OF L. AND SOC’Y 138 (2018); See also Sarah L Seck, *Relational Law and the Reimagining of Tools for Environmental and Climate Justice*, 31 CANADIAN J. OF WOMEN AND THE L. 151, 158 (2019).

detached from family and community and even ecological contexts is misguided; a better view, then, might be of a relational worker constituted by porous boundaries.<sup>55</sup>

A relational approach to construing just transition would necessarily compel a rethinking of the common just transition policy priorities. For one, the replacement of jobs in unsustainable industries (unsustainable jobs) with equally or better paying “green” jobs would cease to be the lynchpin of just transition policies. One primary argument of sustainability and just transition advocates is that unsustainable jobs can be adequately replaced with green jobs. The International Renewable Energy Agency (IRENA), for example, notes that the renewable energy sector employed 11 million people worldwide in 2018, with employment concentrated in China, Brazil, the United States, India, and the European Union.<sup>56</sup> What is unclear is the extent to which these jobs were targeted to replace the unsustainable jobs. In fact, these industries are primarily situated in countries that, with perhaps the exception of the United States, would generally not qualify as fossil-fuel-dependent economies (FFDEs).<sup>57</sup> This is bound to be the case in a global green economy with capitalism as its organizing principle. Unlike the geographical siting of fossil fuel, renewable energy technologies can be produced in any country. This fosters the problem of an unsustainable green economy where states take the “profitable green sector” bait, invest heavily in it, compete for markets, overproduce green technologies, and create a different variant of the sustainability crisis.<sup>58</sup> Returning to the point being made, while the worker is recognized in a relational rendering of just transition, such is recognized as a constituted and embedded being. According to Nedelsky, it is only in this relational context that the capacities of individuals can be fostered, their rights defended, and their well-being protected.<sup>59</sup>

## Part II: A Capability Approach to Just Transition

Just transition must cater to the four essential questions of justice—the why, what, who, and how of justice. To identify these characteristics, I attempt an integrated reading of theories of justice hitherto considered as separate, and at times, conflicting. This is like Schlosberg’s integrated use of different conceptions of justice (distributive, recognition, participation, and capabilities) in conceptualizing environmental justice.<sup>60</sup> In proposing these characteristics, I pay attention to the specific contexts of climate change and the fossil economy.

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<sup>55</sup> Seck, *supra* note 54 at 152.

<sup>56</sup> With the exception of the United States, employment in the renewable energy sector is concentrated in China, Brazil, India, and the European Union, places which are not major fossil fuel producers. See INT’L RENEWABLE ENERGY AGENCY (IRENA) *Renewable Energy and Jobs: Annual Review 2019* 5 (2019).

<sup>57</sup> *Id.*

<sup>58</sup> See generally DUSTIN MULVANEY, *SOLAR POWER: INNOVATION, SUSTAINABILITY, AND ENVIRONMENTAL JUSTICE* (Univ. of Cal. Press 2019).

<sup>59</sup> Jennifer Nedelsky, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 121 (OXFORD PRESS 121 Univ. 2011).

<sup>60</sup> Schlosberg argues that “justice, in political practice, is articulated and understood as a balance of numerous interlinked elements of distribution, recognition, participation, and capability”. See DAVID SCHLOSBERG, *DEFINING ENVIRONMENTAL JUSTICE: THEORIES, MOVEMENTS, AND NATURE*, 12 (OXFORD Univ. PRESS 2009).

The most common justification given for just transition, both in the initial and contemporary iterations of the concept, is that it would be unjust for communities and workers to bear the burden of the transition alone, given that benefits from the fossil industry accrued to “all.”<sup>61</sup> This “distribution” centric notion of just transition fails to question whether the status quo being transitioned from is just. In Canada, Mertins-Kirkwood posits that in 2016 fossil fuel workers were paid an average of \$68 per hour compared to the Canadian average of \$35 per hour.<sup>62</sup> Taking Fort McMurray as a specific example, while the food and accommodation services, made up of 62 percent women and 40 percent immigrants, paid an average of \$30,300 per year, the oil and gas sector, which had about 18 percent immigrants and 20 percent women, received an average of \$141,000.<sup>63</sup> Again, residents of host communities who are more likely to be involved in low-paying supporting sectors are also more at risk of local environmental and health effects of oil and gas operations.<sup>64</sup> Returning fossil fuel workers to the status quo in the Canadian context will therefore entail further perpetuation of previously unjust conditions for non-fossil fuel workers.

### **A. The Objectives of Just Transition**

Rather than engaging the question “why just transition?” solely from the distributive justice perspective, the capability approach is a preferred starting point. I argue that just transition is necessary to guarantee and protect the capabilities for human flourishing and wellbeing. The important just transition question in the FFDE context is: are fossil-fuel-dependent communities capable of flourishing in a post-fossil world? The capability approach shifts the conversation from a resource-centric notion of justice to just outcomes. As Sen argues, “it does make a difference whether we look merely at the means of living rather than directly at the lives that people manage to have.”<sup>65</sup> The capability approach claims that the focus of justice should be to ensure that people

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<sup>61</sup> The Scottish Just Transition Commission (JTC), for example, notes that “the imperative of a just transition is that governments design policies in a way that ensures that the benefits of climate change action are shared widely, while the costs do not unfairly burden those least able to pay, or whose livelihoods are directly or indirectly at risk as the economy shifts and changes”. See Lucidity Solutions, Ltd. *Just Transition Commission Engagement Event Report* (March 2020), <https://www.gov.scot/publications/just-transition-commission-community-engagement/> [<https://perma.cc/M4BF-KGG4>]; GOV'T OF CAN., The Task Force on Just Transition for Canadian Coal Power Workers and Communities, *A Just and Fair Transition for Canadian Coal Power Workers and Communities 1* (2018).

<sup>62</sup> Mertins-Kirkwood, *supra* note 35 at 19.

<sup>63</sup> *Id.*

<sup>64</sup> A 2010 independent study of the Alberta oil sand industry finds that the health status in the host region is worse than the provincial average for reasons including “substance-related disorders, heavy drinking and smoking, sexually transmitted infections, obesity, prevalence of diabetes, and mortality rates due to homicide as well as mortality rates due to motor vehicle collisions.” It further notes that the region has the lowest availability of doctors (in the province). Indicators, which the study refers to as “typical of a boom town”. See Pierre Gosselin et al., *The Royal Society of Canada Expert Panel Report: Environmental and Health Impacts of Canada’s Oil Sands Industry*, ROYAL SOCIETY OF CANADA 216 (2010) (hereinafter “2010 Expert Report”).

<sup>65</sup> AMARTYA SEN, *THE IDEA OF JUSTICE* PRESS 227, 233 (Harv. Univ. Press 2009). According to Sen, “the capability approach focuses on human life, and not just on some detached objects of convenience, such as incomes or

have necessary capabilities to achieve human functioning.<sup>66</sup> Adopting an outcome-oriented capability approach, Nussbaum argues that “whether the society is just is determined by looking at the outcomes it produces, importantly including whether it secures the central capabilities to all citizens.”<sup>67</sup> Capability (also depicted as “entitlement”), Nussbaum further argues, is the main political goal and not functioning itself.<sup>68</sup> In other words, the important thing is that people are able to enjoy what she describes as “requirements of a life with dignity,” although they may choose not to.<sup>69</sup> Nussbaum provides a list of ten “central human capabilities”: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one’s environment.<sup>70</sup>

Sen, who pioneered the capability approach, describes capability as the opportunity and freedom “to achieve valuable combinations of human functionings—what a person is able to do or be.”<sup>71</sup> Unlike Nussbaum, he argued against a predetermined, cemented, absolutely complete, and totally fixed canonical list of capabilities.<sup>72</sup> At the core of Sen’s argument is that a means of well-being (e.g. income, employment, etc.) does not in itself guarantee good living as an end, and for “means” to translate to “end,” attention must be paid to substantive and real opportunities (capabilities) that individuals can exercise the liberty to choose or refuse.<sup>73</sup> Capabilities in this sense are similar to conversion factors, which have been described as “the degree to which a person can transform a resource into a functioning.”<sup>74</sup> Robeyns suggests three types of conversion factors: personal conversion factors (e.g. physical condition and skills), social conversion factors (e.g. public policies and power relations), and environmental conversion factors (e.g. physical and built environments).<sup>75</sup> Sen refers to these conversion factors as “sources of variation” and in addition to

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commodities that a person may possess, which are often taken, especially in economic analysis, to be the main criteria of human success. Indeed, it proposes a serious departure from concentrating on the means of living to the actual opportunities of living”.

<sup>66</sup> Ingrid Robeyns, *The Capability Approach*, STANFORD ENCYCLOPEDIA OF PHIL. (2016),

[https://plato.stanford.edu/entries/capability-](https://plato.stanford.edu/entries/capability-approach/#:~:text=The%20capability%20approach%20is%20a,their%20real%20opportunities%20to%20do)

[approach/#:~:text=The%20capability%20approach%20is%20a,their%20real%20opportunities%20to%20do](https://plato.stanford.edu/entries/capability-approach/#:~:text=The%20capability%20approach%20is%20a,their%20real%20opportunities%20to%20do) [https://perma.cc/8PLH-DQN8].

<sup>67</sup> Martha Nussbaum, *Capabilities, Entitlements, Rights: Supplementation and Critique*, 12 J. OF HUM. DEV. AND CAPABILITIES 23, 34 (2011).

<sup>68</sup> Martha Nussbaum, *Capabilities and Social Justice*, 4 INT’L STUD. REV. 123, 132 (2002); *Id.* at 29.

<sup>69</sup> Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECONOMICS. 33, 40 (2003).

<sup>70</sup> *Id.* at 41–42.

<sup>71</sup> Amartya Sen, *Human Rights and Capabilities*, 6 J. OF HUM. DEV. 151, 153 (2005).

<sup>72</sup> *Id.* at 158.

<sup>73</sup> Sen, *supra* note 65, at 234.

<sup>74</sup> Robeyns, *supra* note 66. The difference between capabilities, functionings and conversion factors is not straight forward. Robeyns, for example, refers to the same social context (social institutions, social and legal norms, environmental factors, etc) as constituting both capabilities and individual conversion factors. *See* Ingrid Robeyns, *The Capability Approach: A Theoretical Survey*, 6 J. OF HUM. DEV. 93, 98 (2005). In another sense, functionings are construed as chosen and actualized capabilities. For example, while good nutrition is a capability (opportunity), until it is chosen and actualized, it does not become a functioning. In this work, I consider capabilities as both a conversion factor (converting means to functionings) and opportunities (which when chosen, functioning is attained).

<sup>75</sup> Robeyns, *supra* note 74 at 99.

Robeyns' three conversion factors, he included "differences in relational perspectives."<sup>76</sup> Although Sen argues against a standardized list of capabilities and functionings, he agrees that "[t]here is often good sense in narrowing the coverage of capabilities for a specific purpose."<sup>77</sup> I agree with Sen that the different use of capabilities, differences in social conditions and priorities, and the necessity of public discussion in identifying appropriate capabilities and functionings make a standardized list approach unhelpful. Yet, there is wisdom in Nussbaum's argument for a minimal, abstract, open-ended, and generally specified list as it is necessary to know the content of a society's conception of basic justice and to avoid the endorsement of a "hopelessly vague" capability goal.<sup>78</sup>

I adopt a broader categorization of capabilities using Robeyns' conversion factors and Sen's sources of variation as identifiers while referencing Nussbaum's "central human capabilities" as examples of the various identifiers. Like Nussbaum rightly notes, Sen has at various times referred to several of her basic capabilities,<sup>79</sup> a point Sen seems to confirm.<sup>80</sup> To be clear, this is not an endorsement of all of Nussbaum's central capabilities and sub-capabilities.<sup>81</sup> Following Sen's admonition, I do not propose these categories of capabilities to be a "grand mausoleum to one fixed and final list of capabilities."<sup>82</sup> These capability categories are directed at identifying what should be the focus of just transition, particularly, for FFDEs. Again, with due regard for the importance of freedom to choose not to convert a capability into functioning, I do not emphasize the distinction between capability and functioning here. I use capabilities both in the potential and actualized sense (functioning).<sup>83</sup> *Table 2* lays out these categories and their examples. In the

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<sup>76</sup> Sen explains this as inter-societal variations which inform relative advantages of persons in different societal settings. For example, the resources needed to participate in the life of the community and fulfill elementary requirements of self-respect differ depending on established patterns of behavior in various societies. *See* Sen, *supra* note 65, at 255–56.

<sup>77</sup> Sen, *supra* note 71, at 159.

<sup>78</sup> Nussbaum, *supra* note 69, at 42–46.

<sup>79</sup> "One cannot read his (Sen's) discussions of health, education, political and civil liberties, and the free choice of occupation without feeling that he agrees totally with my view that these human capabilities should enjoy a strong priority and should be made central by states the world over." *See id.* at 43.

<sup>80</sup> "I have, of course, discussed various lists of capabilities that would seem to demand attention in theories of justice and more generally in social assessment, such as the freedom to be well nourished, to live disease-free lives, to be able to move around, to be educated, to participate in public life, and so on." *See* Sen, *supra* note 71, at 158.

<sup>81</sup> Arguing that Nussbaum's list of central capabilities is not politically liberal and longer than the list of ten, Robeyns notes that sub-capabilities like "having opportunities for choice in matters of reproduction" listed by Nussbaum under the capability of 'bodily integrity', is neither an object of overlapping consensus as a "matter of public justice" nor "respectful of a diverse range of comprehensive views of the good". *See* Ingrid Robeyns, *Capabilitarianism*, 17 J. OF HUM. DEV. AND CAPABILITIES 397, 410–11 (2016).

<sup>82</sup> Sen, *supra* note 71, at 160.

<sup>83</sup> Robeyns' argues that there are good reasons to focus on capabilities and functionings (and not just functionings) including the lack of agency of certain individuals (e.g., infants and the cognitively disabled), the nature of humans to make mistakes in the process of making choices, and institutional welfare programmes. *See* Robeyns, *supra* note 81, at 401–02. *See also* INGRID ROBEYNS, WELLBEING, FREEDOM AND SOCIAL JUSTICE: THE CAPABILITY APPROACH RE-EXAMINED, 107–12 (Open Book Publishers 2017).

tradition of the capability approach, these categories must be considered comprehensively, in a mutually supportive manner.<sup>84</sup>

**Table 2 – Categories of Capabilities**

Categories of Capabilities	Examples
Personal	Life; Bodily health; Adequate nourishment; Adequate shelter; Bodily integrity; Freedom of movement; Thinking and reason; Education; Freedom of Expression, Conscience and religion; Property rights; Right to seek employment and the ability to work
Social	Meaningful political participation; Freedom of Association; Adequate public healthcare; Adequate educational arrangements; Safety
Environmental	Living with concern and in relation with other species; Healthy climate; Appropriate built environment
Relational	Family and friendship; Respect for culture; Community relationships; Tolerance and empathy; Self-respect; Non-discrimination; Non-humiliation

*Table 2* is a blend of measurable tangibles and intangibles (e.g., bodily health and empathy), and internal and external (e.g., bodily integrity and educational arrangement) capabilities. Commenting on her list of capabilities which combines tangibles and intangibles, Nussbaum points out that anything worth measuring in human quality of life is difficult to measure and expresses the expectation that those who suffer from deprivation would help find ways to describe and quantify their predicament.<sup>85</sup> While it is important that measurable capabilities should be measured, one must be careful not to force the immeasurable into quantitative frames. For example, whereas relational capabilities (e.g., friendship, empathy) can be described, we cannot put a number on them. This is even more true when viewing capabilities from an Indigenous viewpoint; a viewpoint that places a premium on non-physical and non-quantifiable realities.<sup>86</sup> In addition, although the capability approach has traditionally paid more attention to personal capabilities, the importance of external capabilities (social and relational) has been emphasized.<sup>87</sup> The connection between

<sup>84</sup> Sen argues that the capability concerned with is the ability to achieve “various combinations of functionings” as against individual capabilities/functionings. *See* Sen, *supra* note 65, at 233.

<sup>85</sup> Nussbaum, *supra* note 68, at 135.

<sup>86</sup> For example, Lavallée notes that “[t]he relational nature of Indigenous epistemology acknowledges the interconnectedness of the physical, mental, emotional, and spiritual aspects of individuals with all living things and with the earth, the star world, and the universe. Indigenous epistemology is fluid, nonlinear, and relational. Many Indigenous ways of knowing accept both the physical and the nonphysical realms as reality. In accepting the nonphysical, one must accept that reality cannot always be quantified.” *See* Lynn Lavallée, *Practical Application of an Indigenous Research Framework and Two Qualitative Indigenous Research Methods: Sharing Circles and Anishinabe Symbol-Based Reflection*, 8 INT’L J. OF QUALITATIVE METHODS 21, 23 (2009).

<sup>87</sup> Sen points out that “in valuing a person’s ability to take part in the life of the society, there is an implicit valuation of the life of the society itself, and that is an important enough aspect of the capability perspective”. *See* Sen, *supra* note 65, at 246. *See also* James Foster & Christopher Handy, *External Capabilities*, 8 OPHI Working Papers 1–19



these capabilities must be re-emphasized. Sen gives the example of greater female education and employment reducing fertility rates, which in the long run can reduce pressure on the climate.<sup>88</sup> Another point worth making about *Table 2* is the connection between the categories of capabilities and their examples to human rights. This linkage is well explored in the literature.<sup>89</sup> Vizard et al. point out that the capability approach and human rights directly focus on the concepts of dignity and freedom,<sup>90</sup> Sen notes that the idea of capability can help to understand the “opportunity aspect of freedom and human rights,”<sup>91</sup> and Nussbaum argues that her capabilities list stresses many rights emphasized in the human rights movement.<sup>92</sup> Indeed, the provisions of the International Bill of Human Rights touch on various capability examples in *Table 2*.<sup>93</sup>

I now return to the point earlier made that the capability approach provides a starting point to answering the “why just transition?” question more persuasively and comprehensively. While just transition is commonly framed as a “job loss,” “job gain,” “income loss,” and “income gain,” issue, a closer look at the arguments made by fossil fuel communities and workers shows that their concerns are more capability based. I have reproduced some quotes from stakeholders to highlight this point.

We hope we’re seeing the end of fossil fuels for the good of everybody. But how are we going to provide for our families? . . . We’re going to need some kind of transition. We’ve

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(2008); Claudio D’Amato, *Collectivist Capabilitarianism*, 21 J. OF HUM. DEV. AND CAPABILITIES 105, 105–20 (2020).

<sup>88</sup> Sen, *supra* note 65, at 249.

<sup>89</sup> See generally Sen, *supra* note 71; Nussbaum, *supra* note 69; Polly Vizard et al., *Introduction: The Capability Approach and Human Rights 12*: J. OF HUM. DEV. AND CAPABILITIES 1–22 (2011); Cesar Gonzalez-Canton et al., *Exploring the Link Between Human Rights, the Capability Approach and Corporate Responsibility*, 160 J. OF BUS. ETHICS 865, 865–79 (2019).

<sup>90</sup> Vizard et al., *supra* note 89 at 1–2.

<sup>91</sup> Sen, *supra* note 71, at 153. Sen, however, points out that the capability approach is limited as it does not adequately deal with the process dimensions of human rights. *Id.* at 155–56. Criticizing this view, Nussbaum argues that the bifurcation between opportunities and process is difficult to understand as many of the things people need to live a life worthy of human dignity is process based. See Nussbaum, *supra* note 67, at 28. On another note, Barclay argues that the language of capability fails to adequately incorporate the importance of equality and the notion that every government treats all people as having equal status. See Linda Barclay, *The Importance of Equal Respect: What Capabilities Approach Can and Should Learn from Human Rights Law*, 64 STUDIES, POL. STUD. 385–400. (2016)

<sup>92</sup> Nussbaum, *supra* note 67, at 23.

<sup>93</sup> The 1948 Universal Declaration on Human Rights, 1966 International Covenant on Civil and Political Rights, and the 1966 International Covenant on Economic, Social and Cultural Rights which make up the International Bill (alongside their optional protocols) have an array of relevant provisions. They include the rights to equality, dignity, life, and security (Universal Declaration of Human Rights (UNDHR) (Dec. 10, 1948), G.A. Res. 2200A(XXI)) at arts. 1–3); property rights, means of subsistence, employment, physical and mental health, education, and taking part in cultural life (International Covenant on Economic, Social and Cultural Rights (ICESCR) (Dec. 16, 1966) 993 UNTS 3 at arts. 1, 6, 7, 12, 13 and 15); and liberty of movement, privacy, freedom of thought, conscience, religion, opinion and association (International Covenant on Civil and Political Rights (ICCPR) (Dec. 16, 1966), 999 U.N.T.S. 171 at arts. 1, 6, 7, 12, 13, 15).

moved out there, we've invested in that industry—and when it ends, we're going to be left holding the bag . . . Our employers will move on to the next shiny thing they see and make another billion dollars—but where are our workers going to go?<sup>94</sup>

I come from a small community outside Estevan and if the mining industry is removed, I would have to travel to Regina or Saskatoon to get basic services.<sup>95</sup>

Our population keeps getting old and we can't afford to lose any more families. Young families don't want to stay in our community anymore because there are fewer jobs.<sup>96</sup>

Family, community, family support, and basic services are the central themes of the above concerns. While reference was made to jobs, it was made in the context of what jobs could help do—provision for families and preservation of community. A capability-based framing changes both the questions and answers posited in just transition discourse. The provision of replacement jobs ceases to be an end. The question becomes whether jobs are necessary to meet capability demands and the extent to which these jobs meet such demands. Here, it is not satisfactory that jobs only carry the appellation “green,” they must be capability-enriching overall. That a replacement job could lead to a reduction in emissions (e.g., solar farm or hydroelectricity dam) is not satisfactory; equally important is its effect on community integration and ecological integrity. Again, capability framing takes us back to pre-transition periods and compels us to ask questions, including why the host communities of fossil fuel extraction projects are often bereft of personal, social, environmental, and relational capabilities (as reflected in the 2010 Expert Report) despite the availability of jobs.<sup>97</sup> Beyond the jobs, it is even more important to guard against the repeat of these deprivations post-transition. The metric for adjudging that a transition is just should not be the extent to which the status quo is not disrupted (e.g., jobs are retained or replaced, or remuneration levels are maintained), but how the well-being of a community is guaranteed. The realization of combined capabilities and enrichment of well-being should be the central objective of just transition.

The capacity approach, the categories and examples in *Table 2*, also provide a different perspective to the “what” of just transition. As already shown, the contemporary demands of the labor-led just transition movement are essentially similar to Leopold's vision of just transition: fair distribution of cost, workers should not suffer a net loss of income, access to comparable jobs, re-education, and financial support to provide for full wages and benefits.<sup>98</sup> Through the lenses of the capability approach, however, these demands are means and not ends, and the satisfaction of these demands does not in itself qualify as justice. For example, Indigenous communities (e.g. the

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<sup>94</sup> Mychaylo Prystupa, *At COP21, Oil Sands Worker Urges Smooth Transition off Fossil Fuels*, CANADA'S NAT'L OBSERVER (Dec. 8, 2015).

<sup>95</sup> GOV'T OF CAN., The Task Force on Just Transition for Canadian Coal Power Workers and Communities, *What We Heard from Canadian Coal Power Workers and Communities* 18 (2019) (quoting a resident of the Estevan area, Saskatoon, Canada).

<sup>96</sup> *Id.* (quoting a resident of Trenton, Nova Scotia, Canada).

<sup>97</sup> 2010 *Expert Report*, *supra* note 64.

<sup>98</sup> Leopold, *supra* note 17, at 80–83.

Chipewyan Prairie First Nation, Fort McKay Indian Settlement, Fort McMurray #468 First Nation, and Mikisew Cree First Nation) in the Regional Municipality of Wood Buffalo (where the Canadian oil sands are substantially located) have been found to enjoy higher incomes and lower unemployment rates relative to other Indigenous and non-Indigenous communities in Canada.<sup>99</sup> There is, however, a dissonance between this prosperity of means and the impoverishment of Indigenous land, distortion of Indigenous peoples' relationship with the land, interference with spiritual practices, and loss of knowledge of the place. The Indigenous communities have also suffered community fragmentation, language loss, encroachment of treaty and Constitutional rights (e.g. rights to hunt, fish and gather), disruption of biodiversity balance, water contamination, air pollution, and the prevalence of respiratory illnesses and "high rates of rare cancer."<sup>100</sup> The adverse effects of oil sands operations on Indigenous communities inform Huseman's and Short's description of the operations as "industrial genocide."<sup>101</sup>

While the argument could be made that touted green projects would have less adverse environmental effects, when compared to, for example, the Alberta oil patch, the point remains that income does not in itself translate to well-being. This reinforces the point above that just transition should focus on ends and not only means. This does not mean that a resource conversation is not relevant. It is true that while higher income (both for the state and individuals) does not translate to well-being, FFDEs rely overwhelmingly on income from fossil fuel to fund basic welfare projects, even though the adequacy and appropriateness of the welfare initiatives is debatable.<sup>102</sup> Indeed, an apt justification for just transition is the potential loss of resources that

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<sup>99</sup> See Mark Milke & Lennie Kaplan, *Canada's Oil Sands and Local First Nations: A Snapshot*, CANADIAN ENERGY, CTR. 2–3 (2020).

<sup>100</sup> See Clinton Westman & Tara Joly, *Oil Sands Extraction in Alberta, Canada: A Review of Impacts and Processes Concerning Indigenous Peoples*, 47 HUMAN ECOLOGY 233 (2019).

<sup>101</sup> Jennifer Huseman & Damien Short, *A Slow Industrial Genocide: Tar Sands and the Indigenous Peoples of Northern Alberta*, 16 INT'L J. OF HUMAN RIGHTS 216, 216–37 (2012).

<sup>102</sup> FFDEs often base their budgets on projected income from the energy sector. For example, the Government of Alberta proposed a \$56.8 billion budget in 2019 with about \$50 billion projected revenue based considerably on an anticipated 38 percent increase in energy royalties. Also, the drop in the price of oil has been cited as one of the reasons for cuts in spending in areas including post-secondary education and transfers to Alberta cities. See Janet French, *Alberta Budget 2019: Cities, Universities, Civil Servants Feel the Fiscal Pain*, EDMONTON J. (Oct. 25, 2019), <https://edmontonjournal.com/news/local-news/2019-alberta-budget-will-have-2-8-per-cent-spending-cut-programs-eliminated> [<https://perma.cc/997W-N2LT>]; Sammy Hudes, *Alberta Budget Banks on Critical Revenue Boosts Despite Market 'Volatility', Rising Debt*, CALGARY HERALD (Feb. 28, 2020), <https://calgaryherald.com/news/politics/alberta-budget-banks-on-critical-revenue-boosts-despite-market-volatility-rising-debt> [<https://perma.cc/UR6J-HGW9>]. Nigeria is another example. The country based its budget on an anticipated oil price of \$57 per barrel but had to revise to \$30, affecting the capacity of government to spend on critical public needs and its salary and pension commitment. See Ruth Olurounbi, *Nigeria Dangerously Exposed to Oil Crash*, PETROLEUM ECONOMIST (Mar. 24, 2020), <https://www.petroleum-economist.com/articles/politics-economics/africa/2020/nigeria-dangerously-exposed-to-oil-crash#:~:text=Finance%20minister%20Zainab%20Ahmed%20says,25pc%20cut%20in%20annual%20expenditure.&text=In%20the%20long%20term%2C%20present,unsustainable%20with%20current%20oil%20prices> [<https://perma.cc/M8Z9-FJND>].

can be converted into functionings. A capability framing, however, shifts the focus from the availability of resources as an end in itself and corrects the notion that just transition programs and frameworks that focus on the provision of resources have met the objective of justice. The integrated and comprehensive focus of the capability approach allows for a more expansive approach to what the substance of justice in the just transition context should be. It is not just about the availability of resources or meeting work-related demands but also about attending to existing injustices to the environment, people, and culture, and ensuring that sustainability initiatives do not re-invent such injustices. I propose this as another characteristic of just transition.

## **B. The Subjects of Just Transition**

Individuals, communities, corporations, and States are key stakeholders in FFDEs. While it is less contestable that these are indeed relevant just transition stakeholders and/or right-holders, the weighting of stakeholders (who should be prioritized) and how to cater to the individual constituents of broadly categorized stakeholders (e.g., how do we unbundle and cater to specific justice demands of the relevant demographics of communities or workforce) are more complex and essential justice questions. Robins et al., writing on just transition in the United Kingdom, are of the view that just transition impacts an interlocking array of citizens (workers, communities, consumers, and citizens) “in terms of the distributional and participative aspects of the transition.”<sup>103</sup> While it is correct that the implications of just transition are far-reaching, Robins et al.’s position takes workers (and work) as the beginning of their analysis, with “other” categories of stakeholders only at the receiving end of “spill-over effects.”<sup>104</sup> The importance of the “global” and an appreciation for the international nature of energy-intensive industries (particularly the fossil fuel sector) vis-à-vis the global dimension of climate change are also not evident in Robin et al.’s framing. There can be no adequate answer to the question of who just transition should focus on without paying attention to just transition’s global dimension.

Applied ideally, a capability approach requires equal attention to the capability and functioning needs of everyone.<sup>105</sup> This is because every individual is deemed to have an inherent entitlement to these capabilities and unlike a utilitarian framework, utility to the many cannot justify the deprivation of one. But like Quintavalla and Heine argue in the human rights context, scarcity of resources forces the prioritization of rights (and right-holders) despite the acclaimed universality and indivisibility of human rights.<sup>106</sup> Further drawing a parallel between capabilities/functionings and human rights, the non-absoluteness of some human rights on the basis of derogations like public health and safety, public morality, and national security is an acknowledgment of the

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<sup>103</sup> Nick Robins et al., *Investing in a Just Transition in the UK: How Investors can Integrate Social Impact and Place-based Financing into Climate Strategies*, LONDON: GRANTHAM RSCH. INST. ON CLIMATE CHANGE AND THE ENV'T & THE LONDON SCH. OF ECON. AND SCIENCE 9 POL. SCI. (2019).

<sup>104</sup> *Id.* at 2.

<sup>105</sup> Sen points out that this is not a claim for equality of capability. See Sen, *supra* note 65, at 265, 295–98.

<sup>106</sup> Alberto Quintavalla & Klaus Heine, *Priorities and Human Rights*, 23 INT’L J. OF HUM. RTS. 679, 681–83 (2019).

difficulty of guaranteeing every right for everyone at every time.<sup>107</sup> Addressing this problem, Nussbaum argues that where trade-offs must be made, “we ought to say that this is a tragic situation in which minimal justice cannot be done, and we should get to work to produce a future in which all citizens can enjoy all the capabilities.”<sup>108</sup> In making this point, Nussbaum ignores instances where capabilities are antithetical. During the COVID-19 pandemic, bodily health and the freedoms to move freely, assemble, and associate were not mutually compatible capabilities, and to protect public health (particularly the aged and other vulnerable people) these freedoms had to be curtailed and, in some cases, temporarily suspended. The point is that in an imperfect world, there are times when rights and interests need to be weighed and prioritized. The more important question is, in those instances, what should determine priority. In the just transition context, should workers be automatically prioritized given the actual or potential loss of jobs? Does the interest of communities with cultures and social structures built around the industries rank lower? What would be the position of individuals in host communities who have historically gotten the shorter end of the stick during the boom season of the fossil industry?

Fraser argues that assumptions cannot be made on who counts as a subject of justice, unlike in the previous Westphalian era.<sup>109</sup> Accordingly, “we must ask: given the clash of rival views of the bounds of justice, how should we decide whose interests ought to count?”<sup>110</sup> In attempting to answer this question, Fraser rejects various approaches including the political membership view, which emphasizes belonging (e.g. shared nationality or culture); the humanist principle, which recognizes all of humankind as the focus of justice; and the all-affected-principle, which focuses on the extent to which people stand in causal relationships to themselves.<sup>111</sup> She goes on to propose an all-subjected principle, which posits that “all those who are jointly subject to a given governance structure have moral standing as subjects of justice in relation to it.”<sup>112</sup> While I agree with the flaws identified by Fraser—the political membership view’s fixation on the Westphalian state, the one-size-fits-all approach of the humanist principle, and the all-affected principle’s failure to attend to “the constitutive force of social mediations,”<sup>113</sup> I argue that Fraser’s all-subjected-principle has flaws which limit its application here. The principle has an ill-defined scope. It assumes that governance structures can be easily defined. For example, issues like climate finance and technologies involve multiple multilateral bodies including the UNFCCC, World Bank, World Trade Organization, and many other non-state bodies. Again, it is difficult to locate the locus of responsibility for an issue like climate change, which, at once, qualifies as a local, national,

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<sup>107</sup> See generally Brian Bird, *Are All Charter Rights and Freedoms Really Non-Absolute?* 40 DALHOUSIE L. J. 107, 107–21 (2017).

<sup>108</sup> Nussbaum, *supra* note 67, at 27.

<sup>109</sup> Nancy Fraser, *Who Counts? Dilemmas of Justice in a Postwestphalian World*, 41 ANTIPODE 281, 283 (2019).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 287–92.

<sup>112</sup> *Id.* at 292–93.

<sup>113</sup> In respect of her criticism of the all-affected principle, Fraser argues that the principle is “disturbingly objectivistic” and that “by reducing the question of the “who” to the question of who is affected by whom, affectedness treats it as a simple matter of empirical fact, which could be settled by social science.” *Id.* at 292.

regional, and global issue. Further, although Fraser rejects a Westphalian construct, her principle seems to focus on formal governance structures, while failing to recognize informal structures.<sup>114</sup>

A repurposed Rawlsian theory of justice could assist in answering the question of the ‘who’ in the just transition.<sup>115</sup> Rawls popularized the idea that the fundamental idea of justice is fairness.<sup>116</sup> This idea revolves around two principles: the equal right of everybody to the most extensive scheme of equal basic liberties and the arrangement of social and economic inequalities such that they are to everyone’s advantage and attached to positions opened to all.<sup>117</sup> The second principle is of relevance here. Under his difference principle,<sup>118</sup> Rawls differentiated between a perfectly just scheme, where the expectations of the least-advantaged are maximized, a just one where the expectations of people better-off contribute to the welfare of the more unfortunate, and an unjust scheme, which depends on excessive higher expectations and violations of other principles of justice (e.g. equality of opportunity).<sup>119</sup> Consistent with the perfectly just scheme, he argued that “social and economic inequalities are to be arranged so that they are . . . to the greatest expected benefit of the least advantaged.”<sup>120</sup> Rawls’ lexical difference principle, which he suggests might be irrelevant in actual cases, is nevertheless also important. The principle states that in a basic structure, “first, maximize the welfare of the worst representative man; second . . . maximize the welfare of the second worst-off representative man, and so on until the last case . . .”<sup>121</sup>

Inherent in Rawl’s lexical difference principle and the chain connection thesis is that we are connected and benefits for the disadvantaged need not be a zero-sum game. In a manner of speaking, a rising tide can raise all boats, but the starting point must be the most imperiled and not the most advantaged. As Rawls put it, “it seems plausible that if the least advantaged benefit so do others in between.”<sup>122</sup> Again, this framing has implications for the refocusing of just transition. Do we focus on facilitating industries or does the analysis begin with meeting the needs of the most vulnerable in society? It is more likely for policies that are designed to meet these needs to impact other strata of the society (including businesses) than for benefits from initiatives that bolster the privileged (e.g., companies) to trickle down to the most vulnerable. Oil and Gas companies might divest from fossil fuel and reinvest in renewables, but the new investment will not necessarily be

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<sup>114</sup> For more on informal governance, see Sarah Ayres, *Assessing the Impacts of Informal Governance on Political Innovation*, 19 PUB. MGMT. REV. 90–107 (2017).

<sup>115</sup> Rawls’ theory of justice is considered transcendental, institution-centric, designed to operate as a political theory at the level of the society’s ‘basic structure’, and is considered inapplicable at the international level since there is no ‘global’ government. See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 10–14 (Harv. Univ. Press 2001). Sen notes that the Rawlsian theory focuses on just institutions, instead of “relying on “just societies” that may try to rely on both effective institutions and on actual behavioural features.” See Sen, *supra* note 65, at 67. While these are features that seemingly make Rawlsian theory incompatible with other justice approaches (e.g., capability), an unbundling and selective usage of some of its principles is relevant here.

<sup>116</sup> See generally John Rawls, *Justice as Fairness*, 67 REVIEW PHIL. REV. 164–94 (1958).

<sup>117</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 53 (Harv. Univ. Press 1999).

<sup>118</sup> Rawls frames the difference principle as an egalitarian conception “in the sense that unless there is a distribution that makes both persons better, an equal distribution is to be preferred.” *Id.* at 65–66.

<sup>119</sup> *Id.* at 68.

<sup>120</sup> *Id.* at 72.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 71.

domiciled in previous host communities.<sup>123</sup> Even when it is, it is not guaranteed to benefit the most vulnerable.<sup>124</sup> Leopold raised a similar point in 1993, where he pointed at the capital mobility of multinational companies.<sup>125</sup> The point was reiterated by Ken Smith in 2015, who lamented that while the employers move to “the next shiny thing,” the workers have nowhere to go.<sup>126</sup>

The above informs another characteristic of just transition—it focuses on the most vulnerable. How, then, is vulnerability defined and the ‘most vulnerable’ people identified in the just transition context? Fineman proposes an empirical rather than a normative notion of vulnerability. Under Fineman’s framing, we are vulnerable because we are embodied beings who are constantly susceptible to positive and negative changes over the course of life, and dependent on “social institutions and relationships throughout life.”<sup>127</sup> Resilience is another essential component of Fineman’s conception of vulnerability. She argues that resilience is based on resources (material, social, etc.) through which individuals respond to vulnerability and it is measured by the ability to “survive or recover from harm or setbacks that inevitably occur over the life course.”<sup>128</sup> While Fineman represents her vulnerability concept as not being synonymous with weakness, disadvantage, or impermissible discrimination, the sum of her proposed elements—vulnerability, dependence, and resilience—leads to a conclusion that weaknesses and disadvantages in respect of which people are not resilient and for which support systems are lacking are primary indicators of vulnerability.<sup>129</sup> Further, this socially embedded notion of vulnerability is not complete. Harris suggests a complementary concept of ecological vulnerability.<sup>130</sup> Ecological vulnerability recognizes the embeddedness of humans in and reliance of humans on the “complex relations of

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<sup>123</sup> Swilling refers to the outcome of an unjust transition as a case of an armed lifeboat which will emerge from a technocratic conception of sustainability which aims to address the sustainability problem without reducing the powers and wealth of the affluent, on the terms that “serve the elites, while poverty is allowed to persist”. See Swilling, *supra* note 11 at 4. For example, BP’s announcement to slash its oil and gas production by 40 percent and increase investment in low-carbon technology by ten times resulted in its share price increasing by 7 percent. See Jordan Davidson, *BP to cut Oil and Gas Production 40%, Invest 10x More in Green Energy*, ECOWATCH (Aug. 5, 2020), <https://www.ecowatch.com/bp-green-energy-investment-2646892538.html?rebelltitem=2#rebelltitem2> [<https://perma.cc/897V-ZS2T>]. Its energy transition plan, however, seems silent on how to address the effect of its transition on communities and workers. See BP, *Advancing the Energy Transition* (2018), <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/sustainability/group-reports/bp-advancing-the-energy-transition.pdf>.

<sup>124</sup> *Id.*

<sup>125</sup> Leopold, *supra* note 17, at 82.

<sup>126</sup> Prystupa, *supra* note 94.

<sup>127</sup> Martha Fineman, *Vulnerability and Social Justice*, 53 VALPARAISO U. L. REV. 341, 358 (2019).

<sup>128</sup> *Id.* at 363.

<sup>129</sup> *Id.* at 342.

<sup>130</sup> See generally Angela Harris, *Vulnerability and Power in the Age of the Anthropocene*, 6 WASH. & LEE J. ENERGY, CLIMATE, AND ENV’T, 98–161 (2014).

‘interbeing’ with nonhuman and nonliving systems.”<sup>131</sup> This interdependence on trans-human systems, she argues, is a source of resilience and vulnerability.<sup>132</sup>

A combination of Fineman and Harris’s work grounds another characteristic of just transition - social and ecological disadvantages with respect to which resilience is compromised or limited are minimum determinants of vulnerabilities to be prioritized. *Table 2* is useful in determining the social disadvantages. Addressing ecological disadvantages is also crucial. The restoration of ecosystems to the fullest extent possible is an essential element of the just transition discourse. Injustice will not be fully addressed until such restoration occurs.<sup>133</sup> While there is intrinsic value in restoring nature for nature’s sake, human socio-cultural wellbeing is also predicated on ecosystem restoration. The Indigenous Environmental Network (IEN), for example, notes that “just transition is food sovereignty” which includes “a restorative framework for Indigenous-based policy reform in hunting, fishing and gathering rights.”<sup>134</sup>

Beyond the local, social and ecological vulnerabilities must be addressed at the global context. While the energy transition must occur at pace and a substantial proportion of unexplored fossils must be left underground, there is a remaining carbon budget which is essential to filling the transition gap. What are the considerations and justifications for determining how this budget is distributed? There are multiple reasons why just transition cannot be confined as a domestic concern. Climate change is the quintessential global problem, which is primarily globally addressed. A key part of the climate change problem are the emissions from the fossil fuel industry, which is itself essentially global.<sup>135</sup> Also, the ‘global’ is inherent in the notion of ecological vulnerability. As noted by Harris, the complex ecosystems of which human lives are part “operate on various levels of scale, from the local to the global.”<sup>136</sup> At the global level, there is also an intersection between social and ecological vulnerability. For example, resource states like OPEC countries due to possible loss of resources (arguably to fund the attainment of capabilities like social welfare, education, etc., which would induce social vulnerabilities) inhibit ambitious climate commitments that could forestall further ecological vulnerabilities. The point is that for the

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<sup>131</sup> *Id.* at 115.

<sup>132</sup> *Id.* at 126.

<sup>133</sup> Restoration of ecosystems is not a frontline component of mainstream just transition Guidelines or policies. For example, while the ILO Just Transition Guidelines made a passing reference to “restoration of natural resources”, it is not part of its nine key policy areas. Contrariwise, the Indigenous Environmental Network (IEN) made the necessity of the “full restoration of ecosystems” one of the central pieces of its just transition principles. *See*, INDIGENOUS ENV’T NETWORK (IEN) *Indigenous Principles of just Transition* (Oct. 2017), <http://www.ienearth.org/wp-content/uploads/2017/10/IENJustTransitionPrinciples.pdf> [<https://perma.cc/V6P3-MWKR>] [hereinafter “IEN”].

<sup>134</sup> *Id.*

<sup>135</sup> Illustrating this point, Sinn notes that the “decisions to pollute or not to pollute the climate aren’t independent of one another, but are linked directly to other such decisions through the global market for fossil fuels . . . The CO<sub>2</sub> that we emit into the atmosphere came out of the ground as carbon, and we bought it on the world market for carbon. If the Germans buy and burn less coal, crude oil, or natural gas, the Chinese, say, will be able to buy and burn more.” *See* Hans-Werner Sinn, *The Green Paradox: A Supply-side Approach to Global Warming* 127–28 (Mass. Inst. Tech. Press 2012).

<sup>136</sup> Harris, *supra* note 130, at 127.



transition to be truly ‘just,’ subjects of justice must also be identified at the global level. As in the case of ‘local’ just transition, a key consideration in determining such subjects should be the extent to which they are socially and ecologically vulnerable. This is a departure from models which emphasize economically efficient extraction<sup>137</sup> or greater past extraction.<sup>138</sup> The justice principle determining the subjects of justice is in many ways determinant of the vision of just transition that will be pursued. For example, if a multinational oil company commits to cutting thousands of jobs or shutting certain production facilities in its transition to ‘low-carbon,’<sup>139</sup> it matters where the shuttered and created jobs and facilities are located and who will be affected.

### C. Just Processes and Just Transition

Having addressed the ‘what’, ‘why’, and ‘who’ of justice in the context of just transition, I now turn to the question of ‘how’. As shown above, the central feature of the contemporary understanding of just transition is the emphasis on procedural justice. According to the ILO Guidelines for Just Transition, ‘social dialogue’ is an integral part of the just transition institutional framework.<sup>140</sup> Such ‘social dialogue’ entails the involvement of government, workers, and industry (tripartism), formalization of dialogue mechanisms, forging of consensus on sustainability transition pathways, and the active participation of “members,” and collective bargaining and agreements.<sup>141</sup> I will not rehash the argument on the inappropriateness of a tripartite approach to social dialogue rather than a more multipartite approach. A more consequential issue is the constitution of the ‘players’ under either approach.

The identification of the ‘right’ participants is the first challenge of any meaningful discourse process. This is, in part, because who is invited to the table, arguably, influences what is discussed

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<sup>137</sup> See Christophe McGlade & Paul Ekins, *The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2°C*, 517 NATURE 187 (2015).

<sup>138</sup> See generally, Sivan Kartha et al., *Whose Carbon is Burnable? Equity Consideration in the Allocation of a “Right to Extract,”* 150 CLIMATIC CHANGE 117–29 (2018).

<sup>139</sup> While it has been framed as part of a low-carbon transition move, Royal Dutch Shell announced a cut of about 9000 jobs as a cost-cutting decision. The BP also announced that 10,000 employees from “its global workforce of 70,000” will be released. What is unclear, however, is the places where these cuts would occur, the principles determining such cuts, and whether this results in actual emission cut (that jobs are slashed does not mean production would decline). See Jillian Ambrose, *Shell to cut up to 9000 jobs as COVID-19 Accelerates Green Drive*, THE GUARDIAN (Sept. 30, 2020), <https://www.theguardian.com/business/2020/sep/30/shell-to-cut-up-to-9000-jobs-on-back-of-covid-19-crisis> [<https://perma.cc/5TQH-D7DC>].

<sup>140</sup> ILO Guidelines, *supra* note 27, at para. 13.

<sup>141</sup> ILO Guidelines, *supra* note 27, at paras. 17–18. The UNFCCC also notes that the “mechanisms of social dialogue, including tripartism and collective bargaining, serve as effective tools for the design of policies at all levels. Social dialogue can contribute to just transition by building on the commitment of workers and employers to joint action.” See UNFCCC, Secretariat of the U.N. Framework Convention on Climate Change (UNFCCC) *Just Transition of the Workforce, and the Creation of Decent Work and Quality Jobs* 25. (Oct. 26, 2016), <https://unfccc.int/sites/default/files/resource/Just%20transition.pdf> [<https://perma.cc/8XEY-4US5>]. See also Anabella Rosemberg, *Building a Just transition: The linkages Between Climate Change and Employment*, 2 INT’L J. OF RESEARCH LAB. RSCH. 143–44 (2010).

there.<sup>142</sup> Another challenge is determining if and to what extent a discourse process is informational, consensus-building, or consent-obtaining. Organized labor's preferred model is the building of consensus.<sup>143</sup> The consensus-building model is, however, built on compromises of negotiating position.<sup>144</sup> While consensus-building is a mainstream principle in the tripartite framing of social dialogue, engaging with rights-holders might warrant a form of dialogue predicated on obtaining consent. This is particularly evident in the Indigenous context. At the minimum, there is an expectation under international law that Indigenous peoples be consulted to obtain their free, prior, and informed consent (FPIC) before the adoption and implementation of legislative or administrative measures that may affect them.<sup>145</sup>

The notion of recognition is crucial to identifying the 'right' stakeholders and affording them appropriate powers in a process of social dialogue. Agyeman, in his work on just sustainability, argues that in multicultural and intercultural societies, recognition is an essential dimension of justice.<sup>146</sup> While there are different schools of 'justice as recognition,'<sup>147</sup> Fraser's status subordination and participatory parity framing is more opposite here. Fraser argues that misrecognition and social subordination arise when some actors are constituted as inferior, excluded, wholly other, or invisible.<sup>148</sup> To be misrecognized, she continues, is to be "denied the status of a full partner in social interaction, as a consequence of institutionalized patterns of cultural

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<sup>142</sup> Arguably, the prominence of the labour movement in advocating for just transition in both the domestic and international spheres is considerably responsible for the jobs-centric notion of just transition. For example, Stevis et al. note that the lobbying of the labour movement was considerably responsible for the inclusion of the just transition language in Paris Agreement, which has "contributed to further anchor the concept within the union movement." See Stevis et al., *supra* note 8, at 19.

<sup>143</sup> ILO Guidelines, *supra* note 27, at princ. 17(a).

<sup>144</sup> Describing the agreements reached to close the Centralia Coal Plant in Washington State, United States, Galgoczi notes that "the deal (between the state government, trade unions, employer, and ENGOs) was a significant compromise between a number of organizations with competing interests". Bela Galgoczi, *Just Transition Towards Environmentally Sustainable Economies and Societies for All*, INT'L LAB. ORG., BUREAU FOR WORKERS' ACTIVITIES 7 (2018). It includes a staggered closure arrangement for 2020 and 2025 which would allow 40 percent of the workforce to reach retirement before the closure. See *id.*

<sup>145</sup> U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) G.A. Res. 61/295 (Sept. 13, 2007), at art. 19. Art. 32(2) of UNDRIP requires States to consult with Indigenous peoples to obtain their FPIC before approving any project affecting their lands, territories, and other resources. *Id.* at art. 32(2). A literal interpretation of this provision, given that it refers to 'approval of projects' might, however, disapply it to instances where a government refuses a project an Indigenous community desires to proceed. The broader wording of art. 19 reasonably deals with this problem. Further affirming the relevance of FPIC to just transition, the IEN notes that just transition "requires the need . . . to create policies that harmonize the duty to consult . . . with the terms of [FPIC]." IEN, *supra* note 133.

<sup>146</sup> JULIAN AGYEMAN, *INTRODUCING JUST SUSTAINABILITIES: POLICY, PLANNING AND PRACTICE* 39 (Zed Books, 2013). Schlosberg points out that injustice and unjust distribution is in part due to "a lack of recognition of group difference." See Schlosberg, *supra* note 60, at 16. Iris Young, whom Schlosberg drew substantially from, argues that "where social group differences exist and some groups are privileged while others are oppressed, social justice requires explicitly acknowledging and attending to those group differences in order to undermine oppression." See IRIS YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 3 (Princeton Univ. Press 2011).

<sup>147</sup> Schlosberg identifies two broad schools of the theory of recognition—the psychology-oriented interpretation of writers like Alex Honneth and Charles Taylor (they emphasize the need for reciprocal and intersubjective recognition, which self-worth is predicated on), and status-based recognition advocated by writers like Iris Young and Nancy Fraser (although with major differences). See Schlosberg, *supra* note 60, at 17–20.

<sup>148</sup> Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 113 (2000).

value that constitute one as comparatively unworthy of respect or esteem.”<sup>149</sup> For social dialogue to be just, we must consciously confront and overcome subordination. To be clear, overcoming subordination is not akin to the subordination of previously dominant parties. Rather, it is about making visible the previously invisible. For example, when workers are mentioned in the just transition context, the interests of oil and gas workers are preeminent, recognition-based participation requires equal attention to workers in non-oil and informal dependent sectors. This constitutes another characteristic of just transition, social dialogue must be recognition-based, the status of parties and the real implications of class dichotomy must be critically analyzed and addressed, and parity-impeding norms and institutional structures must be removed.

While Fraser criticizes the identity model of the recognition framework as reifying groups and valorizing group specificity,<sup>150</sup> she appreciates instances where “hitherto underacknowledged distinctiveness” needs to be taken into account.<sup>151</sup> Sustainability transition is one of such instances. Here, gender, place, age, disability, and culture are key identity factors as they inform varying forms and degrees of vulnerabilities and access to resources to effectively engage in social discourse.<sup>152</sup> In what they have described as the marketization-recognition tension, Ciplet and Harrison have shown how sustainability transition initiatives fail to recognize and respect distinct identities, and ecological services are commodified without regard for the impacts on the rights of socially marginalized communities.<sup>153</sup> They also highlight the verification-recognition tension, where the use of ‘standardized’ forms of verification fails to recognize norms, values, rights, and alternative forms of knowledge.<sup>154</sup> These tensions, they argue, produce sustainable misrecognition (bold and timely sustainability; limited recognition of diverse rights and values), unsustainable

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<sup>149</sup> *Id.* at 113–14.

<sup>150</sup> *Id.* at 112, 116.

<sup>151</sup> *Id.* at 115.

<sup>152</sup> The example of the Alberta oil patch where the labour force is overwhelmingly made up of ‘white’ males has already been referenced. *See* Mertins-Kirkwood, *supra* note 35. An oil and gas labour-movement-centric just transition process inevitably represent the interest of its dominant constituents (white men) leaving out the essential voices of women who experience the effects of the transition differently whether as participants of other sectors or given their frontal involvement in families. The World Bank, for example, notes that women are more likely to be impacted by coal mine closure programs in terms of loss of direct jobs, increased domestic responsibilities, and increase in intra-house tensions and violence. *See* WBG, *Managing Coal Mine Closure: Achieving a Just Transition for All* 36 (2018). Age is another example. The workforce is not monolithic, it is made up of individuals of different age-groups—persons close to retirement, mid-career persons, and early professionals. The dominant age demographic in a company could impact on negotiating positions and ultimate concessions. An age-demographic often not represented or deemed relevant are the underage, who are left in the conflicting positions of losing future job opportunities (intergenerational unemployment) and greater proneness to future extreme climate events. *See* O. Sartor, *Implementing Coal Transitions: Insight from Case Studies of Major Coal-consuming Economies*, U.N. OFF. FOR DISASTER RISK REDUCTION, INT’L DAY FOR RISK REDUCTION & CLIMATE STRATEGIES 30 (2018). Also fundamental to effective discourse are place-based peculiarities. The diverse results of the transition in Ruhr and Lusatia exemplify this need.

<sup>153</sup> David Ciplet & Jill Harrison, *Transition Tensions: Mapping Conflicts in Movements for a Just and Sustainable Transition*, 29 ENV’T POL. 435, 444–45 (2020).

<sup>154</sup> *Id.*

recognition (inadequate and delayed sustainability; strong recognition of rights and values), and unsustainable misrecognition (inadequate and delayed sustainability; limited recognition of rights and values).<sup>155</sup> Contrariwise, a balanced recognition and sustainability mix would result in just transition—where sustainability gains are accompanied by strong recognition of diverse forms of rights and values,<sup>156</sup> particularly those of marginalized and vulnerable people. This, I argue, is another key characteristic of just transition.

On the question of whether social dialogue should be simply informational, consensus-building focused, or consent-seeking in the just transition processes, I argue that there is no one-size-fits-all answer. Arnstein, in 1969, proposed eight tiers of public participation (which she agrees are way more in the real world) citizen participation ladder includes manipulation, therapy, information, consultation, placation, partnership, delegated power, and citizenship control.<sup>157</sup> While information is at what she describes as the “levels of tokenism,” citizenship control is the ultimate level of participation where decision-making power is transferred to the people.<sup>158</sup> As Arnstein also recognized, this ladder description of participation is an oversimplification of a more complex reality. Rather than this model, I construe information, consensus, and consent more like tools in a toolbox that could be used singularly or jointly depending on the circumstance. In certain instances, participation needs to be mutually and respectfully informational (e.g., indigenous people conveying distinct cultural information to industry and/or government or government disseminating commissioned studies). Elsewhere, consensus building is essential (e.g., questions surrounding processes that would not undermine ecological integrity, rights, and/or core values). In other instances, consent must be sought and obtained, particularly where rights and/or the interests of the vulnerable and marginalized are at stake. This toolbox understanding of what social dialogue should aim for is another crucial characteristic of just transition.

**Table 3 – ‘Just’ Characteristics of Just Transition**

<b><i>Objectives</i></b>	<ul style="list-style-type: none"> <li>a. The realization of combined capabilities and enrichment of human and ecological well being is the central objective of just transition.</li> <li>b. Fossil-fuel-dependent communities must have sufficient resources to guarantee the realization of combined capabilities and well-being.</li> <li>c. Just transition includes ensuring that existing injustices to the environment, culture, and people are redressed and that sustainability initiatives do not re-invent previous injustices.</li> </ul>
<b><i>Subjects</i></b>	<ul style="list-style-type: none"> <li>d. Just transition priorities are the most vulnerable.</li> <li>e. Vulnerability includes social and ecological vulnerability.</li> <li>f. Socially and ecologically vulnerable subjects must be both locally and globally scoped.</li> </ul>

<sup>155</sup> *Id.* at 445.

<sup>156</sup> *Id.* at 446.

<sup>157</sup> Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216, 217 (1969).

<sup>158</sup> *Id.* at 217, 223. See also Patrick Bishop & Glyn Davis, *Mapping Public Participation in Policy Choices*, 61 AUSTRALIAN J. PUB. ADMIN. 14, 16 (2002).

<i>Process</i>	<ul style="list-style-type: none"> <li>g. A multipartite approach should be taken to identify participants for social dialogue.</li> <li>h. Social dialogue should aim to achieve participatory parity and parity-impeding norms and structures should be identified and removed.</li> <li>i. Sustainability processes must entail a strong recognition of diverse forms of rights, holders of rights, and values and identities, particularly those of marginalized and vulnerable people. The scope, mode, and pace of transition must be diversity-sensitive but also responsive to the urgency of far-reaching climate actions.</li> <li>j. A toolbox approach should be taken to determine the aim of a social dialogue process (information, consensus, and/or consent).</li> </ul>
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In this part, I have focused on deconstructing and describing the qualifier ‘just.’ While this inevitably redefines the nature, direction, and scope of the concept of sustainability transition which it qualifies, I do not dwell on what sustainability transition means here. It is, however, important to note that the just characteristics proposed here are consistent with the adopted description of sustainability as the sustenance of life support systems, nature, and communities. Compared to the just transition framings in *Table 1*, the proposed just characteristics are more holistic and seek to weave both human needs and natural demands into an inextricable web. The characteristics in *Table 3* are neither entirely novel nor exhaustive. While the characteristics can be found in various scholarly and policy materials, they are rarely brought together in the way I have done, more so, with the capability approach as a pivot. In parts 4 and 5, I explore separately how just transition has been approached in the oil and gas, and coal sectors in different parts of the world. But more immediate is the need to attend to arguments challenging the relevance of the just transition discourse. This is the focus of the next section.

### Part III: Addressing the Injustice of the Starting Point<sup>159</sup>

While I have critiqued and re-conceptualized just transition above, questions remain about the validity of the foundational assumptions of just transition including that it is possible to ensure both a just and timely transition and that communities and peoples who depend on the exploration of fossil fuels have legitimate claims to compensatory measures. On the issue of a just and timely transition, Müller argues that there have been no successful rapid just transition examples because “rapid [j]ust [t]ransition is not a set of policy proposals at all—it is an *empty set*.”<sup>160</sup> He concludes that denial of the need to make hard choices between ‘quality jobs’ and protecting the climate and

<sup>159</sup> The phrase ‘injustice of the starting point’ is credited to Sara Seck, who in her review of this article, used the term to describe the problématique of the starting point of mainstream just transition discourse and the exclusion of communities that have suffered the effects of climate change caused by the fossil fuel industry from both the just transition discourse.

<sup>160</sup> Tazio Müller, “*As Time Goes By ...*”: *The Hidden Pitfalls of the “Just Transition” Narrative*, JUST TRANSITION RSCH. COLLABORATIVE (June 14, 2018), <https://medium.com/just-transitions/mueller-fc3f434025cc> [<https://perma.cc/K5RG-5J9V>].

the implicit construction of an ethical equivalence (between jobs and the climate) have resulted in a time-wasting just transition discourse.<sup>161</sup> Another argument is that if just transition were to have any credence, its primary focus should be persons and communities vulnerable to or impacted by climate change caused by emissions from fossil fuel industries; rather than communities and workers who have benefited over time from such industries.

Rather than being anti-just transition, I construe the above arguments as simply highlighting the problems of a narrowly scoped just transition narrative. Starting with Müller's argument, the point has already been made here that a job-centric notion of just transition, among other things, fails to appreciate that while indeed the green economy affords plentiful opportunities, this does not in itself translate to substitute jobs or equally privileged alternative opportunities for fossil fuel workers. It is in this sense that I agree with Müller that the pursuit of a job-centric just transition could be a waste of time or worse still bolster the justification for the continued existence of the fossil industries. The narrative, however, changes when the focus of just transition is capabilities and well-being, as shown in *Tables 2* and *3*, rather than just jobs. In this sense, rather than talking about the trade-off of the well-beings of people and the climate, we are compelled to do the hard work of taking the well-being of people and the climate as mutually enhancing.<sup>162</sup> Again, a beyond jobs just transition framework as proposed in this article exposes the injustice inherent in pathways even when they put the world on track to meet global climate targets. Agyeman admonishes that just sustainability both requires guiding against wasting human potential and denying capacity, as well as preserving ecological potential.<sup>163</sup> In his words, “. . . human inequality (the loss of human potential) is as detrimental to our future as the loss of environmental potential.”<sup>164</sup> This is no false equivalence. In the same way that sacrificing intergenerational and ecological equity on the altar of intragenerational equity cannot and should not be permitted, there is no justification for trading off intragenerational equity for intergenerational and ecological equity. *Table 3* not only shows that intergenerational, intragenerational, and ecological integrity can be achieved in an integrated manner, but that they are mutually integral to the attainment of wholesome just transition. The bottom line is that low carbon transition, whether it is the implementation of policies like fossil fuel subsidy reforms and divestments or green technologies, have considerable justice implications which if not frontally dealt with will create new forms of injustice or perpetuate existing inequities. Just transition (and the JTIA framework), broadly defined, is meant to ensure that transitions are justice-compliant.

The point on the unjust exclusion of persons at risk of climate change from the just transition conversation is again not a wholesale indictment of just transition, but a criticism as to scope.

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<sup>161</sup> *Id.*

<sup>162</sup> While Rosemberg took a very worker-focused approach in her response to Müller, she made a point similar to mine. She argues that “history . . . has shown that neither people nor the planet wins when they are played against each other . . . . I cannot cope with the idea that as humans we cannot come up with a better answer to a real dilemma”. See Anabella Rosemberg, *The hidden Pitfalls of the Just Transition Narrative: A Response*, JUST TRANSITION RSCH. COLLABORATIVE (June 26, 2018), <https://medium.com/just-transitions/the-hidden-pitfalls-of-the-just-transition-narrative-a-response-39c4ed0c0624> [<https://perma.cc/X74Q-3E3N>].

<sup>163</sup> See AGYEMAN, *supra* note 146, at 7.

<sup>164</sup> *Id.*

Historical responsibility, as one of the key principles of climate change governance, mandates that those who are responsible for climate change and its impact take the lead in addressing both the cause and consequences of climate change. This principle necessarily translates into the responsibility of the global fossil fuel industry to contribute to addressing climate risks and vulnerabilities across the world. Recognizing climate vulnerabilities, however, does not make less legitimate more traditional just transition claims on the effects of the transition on communities and people in FFDEs. There are numerous angles to this. One, to contend that FFDEs have less claim to interventions aimed at addressing the consequences of the transition is to take a scapegoat approach which takes FFDEs as wrongdoers and the rest of the world as victims. This is not only misguided and incorrect but is also needlessly divisive. One might even be compelled to respond to proponents of the scapegoat approach that “let the one who has never sinned throw the first stone.”<sup>165</sup> Civilization, as we know it, and the lifestyle it commands including how we live, commute, eat, and engage in other basic functions of life, is built on and still overwhelmingly powered by energy from fossil fuels.<sup>166</sup> To varying extent, we have all derived benefits from the exploration and combustion of fossil fuels. Hence, if equity considerations and incentives can be justifiably factored into demand-side climate policies (e.g., carbon pricing and targeted refunds) with respect to the consumers of fossil fuels, communities and people on the supply side do not have less claim to equity considerations.

Taken further, even if the scapegoat argument were to be correct, an indiscriminate use of the transition ‘whip’ risks inflicting even greater harm on demographics within FFDEs; communities which have either been marginalized in the fossil economy or outrightly harmed by the fossil economy. The Fort McMurray example earlier referenced in this article is again useful here. The primary beneficiaries of the explored oil from the tar sands are the oil companies and oil workers who are considerably from outside the host community. Whereas an impact-blind transition would be of consequence to these companies and workers, it is arguable that they are more resilient than people in the service sector who are more likely to be permanently resident in Fort McMurray, less mobile and financially secure, and mostly women and or immigrants. In fact, it is more likely that in an impact-blind transitional framework, the rich will get richer and the poor, poorer.

The purpose of just transition is neither the sustenance of the fossil fuel industry nor the retention or provision of substitute jobs and palliatives to fossil fuel workers. Rather, it is to ensure that the transition from the fossil fuel based socio-economic system serves the end of well-being both within and outside FFDEs. In this wise, just transition is justified less by the notion that benefits and costs of the transition should be equitably shared. Rather, it is justified by the fact that the transition has potential adverse and positive implications for well-being, and there is a need for deliberateness in ensuring that the most vulnerable are protected from the adverse effects and

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<sup>165</sup> *John 8:7* (New Living Translation).

<sup>166</sup> See generally VACLAV SMIL, *ENERGY AND CIVILIZATION: A HISTORY* 296–384 (Mass. Inst. Tech. Press 2017).

positioned to benefit from the positives. I have extensively quoted from the 2020 Production Gap Report to highlight the connection between just transition discourse and well-being:

The COVID-19 pandemic has given us a peek into the potential inequity of this transition. The fossil fuel industry has been hit hard by the recent global economic disruption, which came on the heels of an expansion in oil supply that was already pushing down oil prices. This has resulted in painful social costs across the world, and particularly in developing countries. In Nigeria, lost oil revenue has driven a 25% cut to government spending, forcing the country deeper into debt to pay for its pandemic response and public health costs. Iraq's salaries and social benefits—even more dependent on oil revenues—have been significantly reduced as well. And Ecuador's public sector has been severely affected by the combined impact of the pandemic and collapse of oil revenue, which has impaired its ability to manage the COVID-19 crisis.<sup>167</sup>

Determining whether the starting point of a just transition analysis is just is dependent on the starting assumptions, which will in turn determine the what and who of the transition. The narrower the starting assumptions are (e.g., focusing on workers and jobs as Eisenberg argues), the higher the likelihood of persons who do not come within the narrow remit are left out, invariably making just transition policies and approach unjust. A broader perspective (as proposed here), however, infuses justice considerations into the starting point of a just transition analysis, which would also potentially impact the making and implementation of just transition policies.

#### **Part IV: Just Transition in Fossil Fuel Host Communities**

There is no shortage of literature on just sustainability transition in coal communities and the coal mining industry. They, however, focus mostly on a political-economy analysis of transition trends and the conditions for successful or unsuccessful transition. Common examples of coal transition include the closure of coal mines in Ruhr and Lusatia (Germany), the Appalachian region (United States), La Trobe Valley (Australia), and coal phase-out in Poland, Canada, and the United Kingdom.<sup>168</sup> While I will draw from these political-economy analyses, I pay more attention to the

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<sup>167</sup> See STOCKHOLM ENV'T INST. (SEI) et al., *The Production Gap Report: 2020 Special Report 29* (2020), <http://productiongap.org/2020report/>.

<sup>168</sup> See generally Philip Lewin, "Coal is Not Just a Job, It's a Way of Life": *The Cultural Politics of Coal Production in Central Appalachia*, 66 PROBLEMS, SOC. PROBS. 51–68 (2019); Julia Haggerty et al., *Planning for the Local Impacts of Coal Facility Closure: Emerging Strategies in the U.S. West*, 57 POLICY RES. POL'Y 69–80 (2018); Hanna Bosca & Josephine Gillespie, *The Coal Story: Generational Coal Mining Communities and Strategies of Energy Transition in Australia*, 120 ENERGY PO'YL. 734–40 (2018); Lauren Vriens, *The End of Coal: Alberta's Coal Phase-out*, INT'L INST. FOR SUSTAINABLE DEV. (2018); Mike Foden et al., *The State of the Coalfields: Economic and Social Conditions in the Former Mining Communities of England, Scotland and Wales*, CTR. FOR REG'L ECON. AND SOC. RSCH. (2014); Hanna Brauers et al., *Coal Transition in Germany: Learning from Past*



laws and policies that undergird the phase-outs, the extent to which they did or did not cater to just transition concerns, and whether they align with the characteristics in *Table 3*. This approach is necessary as the analysis of just transition legal frameworks is rare in the literature. While practices are crucial and soft laws (e.g., the ILO Guidelines) are important, the codification of just transition in law takes just transition beyond being a selective sustainability transition add-on and potentially helps to reassure host communities of the commitment of governments to ensuring that sustainability transitions are just.

Unlike the relative newness of the transition discourse in oil and gas, the need to transition from coal has become more evident over the years (largely for non-climate reasons).<sup>169</sup> While western countries were historically the largest producers of coal, countries in the ‘global south’ are, however, increasingly replacing developed countries as major producers of coal.<sup>170</sup> One of the implications of this trend is the continuation of the rebound of the global coal demand and usage in 2018, as developing countries increasingly rely on it to fuel development.<sup>171</sup> In 2019, coal accounted for about 40 percent of electricity generation and above 40 percent of carbon dioxide emissions from the energy sector.<sup>172</sup> This is important, as it often means that coal-producing countries, exporters and non-exporters alike, have energy systems coupled to the production of coal.<sup>173</sup> Hence, the energy supply-demand dichotomy is less clear with respect to coal, as there is

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*Transitions to Build Phase-out Pathways*, U.N. OFF. FOR DISASTER RISK REDUCTION, INT’L DAY OF DISASTER RISK REDUCTION (2018); Aleksander Szpor & Konstancja Ziokowska, *The Transformation of the Polish Coal Sector: GSI Report*, U.N. OFF. FOR DISASTER RISK REDUCTION, INT’L DAY OF DISASTER RISK REDUCTION (2018).

<sup>169</sup> The World Bank identifies mine mechanization, government policies and competition from other fuels in downstream energy demand markets as the main drivers of transition from coal. See WBG, *supra* note 152, at 13, 18–21.

<sup>170</sup> The World Bank points out that with the movement of global coal production from West to East, Asia is likely to be most impacted from future transition from coal. For example, the United Kingdom and Germany in 1960 were jointly responsible for 20 percent of global coal production (394 million tons of coal). In 2016, they produced less than ten million tons. See WBG, *supra* note 152, at 14. China, India, and Indonesia make up three of the top five largest producers of coal in 2019 with China (3693 MT) and India (769 MT) ranking first and second. See INT’L ENERGY AGENCY (IEA) *World Total Coal Production 1971–2020* (July 29, 2021) <https://www.iea.org/data-and-statistics/charts/world-total-coal-production-1971-2020>. In 2019, Indonesia displaced Australia as the largest exporter of coal. INT’L ENERGY AGENCY (IEA) *Coal Information Overview* (July 2020), <https://www.iea.org/reports/coal-information-overview>.

<sup>171</sup> INT’L ENERGY AGENCY (IEA), *Coal 2022: Analysis and Forecasts to 2025* (December 2022), <https://www.iea.org/reports/coal-2022> [<https://perma.cc/TCS4-HP9H>]. There has, however, been a steep decline in the demand for coal due to the outbreak of the COVID-19 pandemic in 2020. The IEA projects that the global coal demand will fall by about 8 percent in 2020. While the decline would be worldwide, the rate of decline would differ. For example, while China (highest consumer of coal) will decline by about 5%, the United States and the European Union will experience 25 percent and 20 percent decline respectively. See INT’L ENERGY AGENCY (IEA) *Global Energy Review 2021: Assessing the effects of economic recoveries on global energy demand and CO2 emissions in 2021*,” (April 2021), <https://www.iea.org/reports/global-energy-review-2021> [<https://perma.cc/45D6-CJY9>].

<sup>172</sup> IEA, *Coal 2019 – Analysis and Forecast to 2024*, <https://iea.blob.core.windows.net/assets/96956778-90de-465e-85bb-21c860aba509/MRScoal2019.pdf> [<https://perma.cc/C57V-753W>], 168.

<sup>173</sup> Poland and Germany are good examples of coupled coal production and local energy systems. See Brauers et al., *supra* note 168; Szpor & Ziokowska, *supra* note 168.

a higher likelihood that a transition would not just affect local host communities but also larger regions that depend on locally produced coal for cheap electricity.<sup>174</sup> The transition from coal is further complicated by the geographical isolation, mono-industry economy, lack of higher grade qualifications and education, and, essentially, the coal-based identities and culture of coal communities.<sup>175</sup> Caldecott et al., in their study of the transition of six coal jurisdictions, conclude that in the longer term, transition left regions with high dependency ratios, low educational attainment, low wages, wage stagnation, and environmental problems related to site remediation.<sup>176</sup> Common proposals to address these attending challenges include improving connectedness with metropolitan areas, diversifying economies and attracting new industries, and catering to soft location and culture reorientation factors like the establishment of educational and research institutions and transformation of former industrial sites into cultural landmarks.<sup>177</sup> These proposals are in addition to the more general just transition recommendations like the replacement and stabilization of revenue streams for coal communities and workers and the retraining of workers.<sup>178</sup> Further, given the recognition that abrupt transitions are often unjust, transitions should entail long-term, wide-reaching, and inclusive planning which should begin early.<sup>179</sup>

Policies to transition from coal have, except in a few cases, often failed to address the socio-economic and cultural concerns of coal communities. Caldecott et al. find that policy responses were, in most cases, developed and implemented either too late, or post-closure, and coherent visions and strategies for the replacement of employment and income were lacking.<sup>180</sup> Similarly, Schindler notes that only two G20 members (Canada and Germany) include substantial just transition actions in their coal phase-out plans.<sup>181</sup> In appraising the Canadian just transition content, Schindler referenced the Pan-Canadian Framework on Clean Growth and Climate Change (PCF)

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<sup>174</sup> The Canadian task force on Just Transition notes that electricity rates may increase, and supply may become unreliable, when energy systems transition from coal to other fuels. See The Task Force on Just Transition for Canadian Coal Power Workers and Communities, *supra* note 95, at 15.

<sup>175</sup> Ben Caldecott et al., *Lessons from Previous Coal Transitions – High-Level Summary for Decision-Makers*, U.N. OFF. FOR DISASTER RISK REDUCTION, INT'L DAY OF DISASTER RISK REDUCTION AND CLIMATE STRATEGIES 15 (2017); WBG, *supra* note 152, at 15; Lewin, *supra* note 168, at 56–60; Bosca & Gillespie, *supra* note 168, at 736–40; Foden et al., *supra* note 168, at 20–21, 35–37.

<sup>176</sup> Caldecott, *supra* note 175, at 8.

<sup>177</sup> See Pao-Yu Oei et al., *Lessons from Germany's Hard Coal Mining Phase-out: Policies and Transition from 1950 to 2018*, 20 CLIMATE POL'Y 963, 972–74 (2020).

<sup>178</sup> Haggerty et al., *supra* note 168, at 72–73; Alta. Fed'n of Lab. (AFL) & Coal Transition Coalition, *Getting it Right: A Just Transition Strategy for Alberta's Coal Workers* 21–25 (2017) [hereinafter “AFL & Coal Transition Coalition”]; Sanya Carley et al., *Adaptation, Culture, and the Energy Transition in American Coal Country*, 37 ENERGY RSCH. & SOC. SCI. 133, 138 (2018); Brauers et al., *supra* note 168, at 31.

<sup>179</sup> Haggerty et al., *supra* note 168, at 78; AFL & Coal Transition Coalition, *supra* note 178, at 26; Caldecott et al., *supra* note 175, at 14–15.

<sup>180</sup> Caldecott et al., *supra* note 175, at 21.

<sup>181</sup> Eleven of the G20 countries have no reported government action, while seven have some government action. See Hannah Schindler, *Managing the Phase-out of Coal: A Comparison of Actions in G20 Countries*, CLIMATE TRANSPARENCY 15–24 (2019). It is, however, noteworthy that the just transition outcome of Germany's (ongoing) transition from coal is at best mixed. For example, while a region like Lusatia still reels from socio-economic difficulties attending the transition, the Ruhr area has had a better experience. See Hannah Brauers et al., *Coal Transition in Germany*, IDDRI AND CLIMATE STRATEGIES 24 (2018).

and the constitution of the just transition task force.<sup>182</sup> While a cursory reference is made to a just and fair transition in the PCF, its focus on investing in clean technology solutions is generally framed as predicated on market dynamics and technological possibilities, but it fails to consider the effect of the transition on individuals and societies, especially communities dependent with interest in the fossil fuel industry.<sup>183</sup> The Greenhouse Gas Pollution Pricing Act (GPPA), which makes the carbon pricing component of the PCF legally enforceable, while containing provisions that are arguably meant to lessen the burden of the carbon-pricing mechanism on eligible Canadians (e.g. rebates and exemptions),<sup>184</sup> and thus fails to directly incorporate just transition measures.<sup>185</sup>

The 2012 Regulations for the reduction of CO<sub>2</sub> emissions from coal-fired generation of electricity are the most direct enforceable legal instrument on coal transition in Canada.<sup>186</sup> The Regulations commit to the phasing out of coal-powered electricity generating units in 2030, exempting emissions which are captured, transported, and stored in accordance with federal or provincial law.<sup>187</sup> It is noteworthy that phase-out efforts have focused more on the generation of electricity from coal than the production (and exportation) of coal. Hence, while the use of coal in electricity generation decreased by 24.7 million tonnes (Mt) between 2008 and 2018 in Canada, the production of coal has only decreased by about nine Mt around the same period (2009 - 2019).<sup>188</sup> Here, a distinction should be made between thermal coal used in electricity generation and metallurgical coal used in the making of iron and steel. While metallurgical coal made up 95 percent of Canada's total coal exports in 2019,<sup>189</sup> thermal coal is mostly used within the country to generate 7.4 percent of its electricity. Rather than describe current policies as pertaining to coal phase-out writ large, they are more narrowly focused on thermal coal. This is the focus of the 2012 coal phase-out Regulations. This also means that Canadian thermal coal communities will

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<sup>182</sup> Schindler, *supra* note 181, at 16.

<sup>183</sup> GOV'T OF CAN. *Pan-Canadian Framework on Clean Growth and Climate Change*, 37–44 (2016).

<sup>184</sup> The GPPA mandates the Minister to distribute the net number of charges collected under the Act from a province or area to such province, prescribed persons or a combination of both. *See The Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, ss 165(2), 17(2)(iii)(iii.1), 36. The Act, further, does not apply to farmers, fishers (in respect of qualifying farming fuel) and any other prescribed person. *See id.*

<sup>185</sup> Canada's more recent Strengthened Climate Plan referred to the work of the Just Transition Task Force. Further to the task force's work, the government has launched the Canada Coal Transition Initiative entailing a \$35 million fund to support skills development and economic diversification in Canada's coal regions, a \$150 million infrastructure fund, and a Canada Training Benefit of up to \$5000 for every Canadian to gain new skills. ENV'T AND CLIMATE CHANGE, GOV'T OF CAN., *A healthy Environment and a Healthy Economy: Canada's Strengthened Climate Plan to Create Jobs and Support People, Communities and the Planet* at 49–50 [hereinafter "Strengthened Climate Plan"].

<sup>186</sup> *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167. (Can.)

<sup>187</sup> *Id.* at 3.

<sup>188</sup> Gov't of Can. *Coal Facts* (May 30, 2023), <https://www.nrcan.gc.ca/science-data/data-analysis/energy-data-analysis/energy-facts/coal-facts/20071> [<https://perma.cc/2KVA-XSAT>].

<sup>189</sup> *Id.*

experience the disruption from the phase-out of coal as against communities where metallurgical coal is mined. The disparate fates of these communities are premised on the determination of which coal is dirtier, with the contested conclusion that metallurgical coal emits less carbon.<sup>190</sup>

Alberta, which produces most of Canada's thermal coal, has some of the most concrete just transition programs in the country. The program includes a coal community transition fund and a support scheme for affected Albertans.<sup>191</sup> The coal community transition fund offers one-off funding to municipalities and First Nations affected by the coal phase-out in Alberta's electricity system.<sup>192</sup> While eligible projects include those that would build economic development capacity and aid the transition to long-term economic stability, projects including major infrastructure and land acquisition are excluded.<sup>193</sup> The project website shows that applications for the fund closed on November 30, 2017.<sup>194</sup> Under the Alberta Coal Workforce Transition Program, Albertans are construed as employees who have worked in an affected coal-fired power plant or mine for at least one year immediately prior to a layoff notice effective January 2, 2018, or later.<sup>195</sup> The program includes a re-employment bridge, retirement bridge, relocation assistance, tuition voucher, onsite and offsite employment services, First Nations employment training, and workforce adjustment service.<sup>196</sup> Although Alberta's coal transition plan is more aligned with the traditional framing of just transition which focuses on providing financial support and training to workers, it goes further in attempting to directly address the transition concerns of host communities. It, however, falls short in various ways. As with many other transition plans, the Albertan plan is more focused on coal workers than coal communities. It fails to recognize or attend to the impact of coal mine and plant closures on other dependent economic sectors of the communities. Given the far-reaching and long-lasting implications of coal transition, the coal community transition initiative did not just begin too late (2015), its duration was very short (application ended in 2017, while successful applicants were announced in 2018).<sup>197</sup>

Further, while putting the onus on communities to trigger the province's intervention potentially makes such intervention more place-specific, the need for a more regional approach is

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<sup>190</sup> Greenpeace, *Steeling the Future: The Truth Behind Australian Metallurgical Coal Exports* 5 (2017), <https://www.greenpeace.org.au/wp/wp-content/uploads/2017/06/280517-GPAP-Steeling-the-Future-Report-LR.pdf> [<https://perma.cc/Z5GG-UXXH>].

<sup>191</sup> Gov't of Alta. *Phasing Out Emissions from Coal*, <https://www.alberta.ca/climate-coal-electricity.aspx#toc-1> [<https://perma.cc/GA3T-M9WZ>]. (last visited Oct. 26, 2023)

<sup>192</sup> Gov't of Alta, *Coal Community Transition Fund*, <https://www.alberta.ca/coal-community-transition-fund> [<https://perma.cc/J23F-AFAZ>] (last visited Nov 13th).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Gov't of Alta. *Support for Albertans affected by Coal Phase-out*, <https://www.alberta.ca/support-for-coal-workers.aspx> [<https://perma.cc/QR2B-X4YZ>] (last visited Oct. 26, 2023).

<sup>196</sup> *Id.*

<sup>197</sup> In respect of their case studies, Caldecott et al. point out that "many of the transitions identified in the case studies that began decades ago are still ongoing (e.g., in Spain) or have only recently ended in terms of mining (UK). Only the Limburg region—a transition that began in 1965—can in a sense be said to have finished its 'transition' . . . ." See Caldecott et al., *supra* note 175, at 7–8.

emphasized in the literature.<sup>198</sup> This necessarily requires a more direct involvement of the provincial, and indeed federal, government in recognizing the intersection of socio-economic systems within and outside the province, conducting a cumulative assessment of the impacts of the coal transition and designing a comprehensive just transition plan. This is not a case for a wholly top-down approach to just transition policy design. But a bottom-up approach is not the same as a bottom-only approach. Rather, it entails the consideration of realities at the local level as construed by the various classes of people in different places affected by the coal transition, identifies issues that are best addressed together, while recognizing that there are also peculiarities that must be catered to on a place-by-place basis. Again, not embarking upon infrastructure-related projects and the purchase of property makes it more difficult to develop soft location and cultural regenerating facilities in the communities. Also, while identifying factors like age and indigeneity feature to some extent in Alberta's plan, other essential factors like gender and disability were absent. While allowing communities to trigger the process, generic requirements to access supports fail to take into consideration the unequal and distinct capacities of the communities (e.g., some have more know-how and experience in accessing developmental funding than others).

Coal transition in other jurisdictions mirrors the Alberta-Canada example in their ad-hoc non-legislated forms, focus on workers, and emphasis on the allocation of funds rather than ensuring well-being outcomes. Poland, for example, rolled out its most comprehensive coal restructuring program in 1998. Like the Albertan example, the social mitigation component of the program included the mining social package (MSP) for mine workers and new entitlements for mining communes.<sup>199</sup> The MSP is like the Albertan workforce transition program in various ways including the provisions for retirement transition, redundancy payment, welfare allowance, and retraining courses. The Polish redundancy payment was, however, designed as what is described as a "golden handshake" which entails a one-off unconditional payment of a sum of 24 months of a miner's average salary.<sup>200</sup> The idea was that with such a lump sum, miners would invest in and begin new ventures. While this component was very popular among the miners, it was found that only a few miners invested the money and the economic situation of the families worsened after leaving their jobs.<sup>201</sup>

The community intervention component of the Polish program was designed fundamentally differently from the Albertan community transition plan. Mining communes were allowed to create new enterprises with the mining companies. The Mining Law implemented in 1998 and the Tax Law of 1997, respectively, allowed the free transfer of properties from companies to communes

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<sup>198</sup> For example, the successful transition of the Ruhr area is, in part, attributed to "the polycentric coordination of national, state and regional policy making, and the majority of policy focus and support dedicated to industries and sectors other than the coal and steel industries." See Brauers et al., *supra* note 168, at 26.

<sup>199</sup> Szpor & Ziokowska, *supra* note 168, at 12.

<sup>200</sup> *Id.* at 14.

<sup>201</sup> *Id.* at 15.

and the passage of property by companies in lieu of debts owed to the communes. The communes also got a higher percentage of transferred personal income tax and were offered preferential loans to increase economic activity in their communes.<sup>202</sup> While some communes were unable to access the government's preferential loans as they lacked the know-how and real estate previously owned by mining companies was not deployed to initiate economic activities, there were positive examples of communes that used the acquired properties to create new ventures and establish educational and research hubs.<sup>203</sup> Although the Polish national government was centrally involved in coordinating the transition, the policy was primarily locally implemented. As noted elsewhere, "a wider regional policy . . . rather than a local, commune-based intervention, could have a bigger potential for alleviating the negative social consequences . . ."<sup>204</sup> On the whole, the Polish approach led to impoverishment, dissolution of social bonds, and the disintegration of group identity.<sup>205</sup>

Patterns similar to the Albertan and Polish examples can be observed in other coal jurisdictions including Australia, the United Kingdom, and South Africa.<sup>206</sup> The closure of Australia's most carbon-intensive coal-reliant power station (Hazelwood) in the Latrobe Valley was different from the Albertan and Polish examples in that it was not triggered through government policies but by its French multinational owner (Engie) due to commercial reasons.<sup>207</sup> The closure has, however, been described as sudden hence "violating a core procedural tenet of just transition," and devoid of any *ex ante* just transition policy at the federal and state levels.<sup>208</sup> The Latrobe transition has been considered relatively successful given the unprecedented ex-post interventions of the Australian and Victoria State governments.<sup>209</sup> Stand-out features of the ex-post interventions include the tripartite Worker Transfer Scheme Partnership Agreement between the State government, energy companies, and workers, the establishment of an economic growth zone

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<sup>202</sup> *Id.* at 16.

<sup>203</sup> *Id.* at 17.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* See also Jan Baran et al., *Coal Transition in Poland: Options for a Fair and Feasible Transition for the Polish Coal Sector*, U.N. OFF. FOR DISASTER RISK REDUCTION, INT'L DAY OF DISASTER RISK REDUCTION & CLIMATE STRATEGIES, 27–32 (2018).

<sup>206</sup> Eskom's (South Africa's state-owned utility company) plan to close five of its coal fired power stations is projected to result in job losses, declining revenues for local governments, and spiral economic effects on local economies. Initiatives including the National Employment Vulnerability Assessment, Sector Job Resilience plans, and the Stakeholder Dialogue on Pathways for a Just Transition are some of the responses of the South African government. See Claudia Strambo et al., *The End of Coal? Planning a "Just Transition" in South Africa*, STOCKHOLM INSTITUTE, ENV'T INST. 4, 9–10 (2019).

<sup>207</sup> *Hazelwood Power Station in Australia to Close at the End of March 2017*, ENGIE (Nov. 3, 2016) <https://www.engie.com/en/journalists/press-releases/hazelwood-power-station-australia> [<https://perma.cc/6RN7-XDSP>].

<sup>208</sup> Fergus Green, *Australia: Caught Between a 'Just Transition' and 'No Transition'*, FOUNDATION FOR EUROPEAN PROGRESSIVE STUDIES – POLICY BRIEF 4 (2019). See also John Wiseman et al., *Prospects for a "Just Transition" away from Coal-fired Power Generation in Australia: Learning from the Closure of the Hazelwood Power Station*, AUSTRALIAN NAT'L UNIV., CTR. FOR CLIMATE ECON. AND POL. (2017).

<sup>209</sup> The interventions include AU\$43 million package from the federal government to support local infrastructure, as part of the labour market structural adjustment program and regional jobs and investment package; and AU\$266 million package by the State government to fund infrastructural projects, and schemes to help coal/electricity sector workers and other economic interventions for the Latrobe valley. See Wiseman et al., *supra* note 208, at 19–20.

(including multiple local government areas), and the establishment of a dedicated agency of government—the Latrobe Valley Authority—to manage the transition.<sup>210</sup> The use of an Agreement (instead of legislation) while only applicable to a narrowly defined set of individuals (Latrobe workers), arguably provides an opportunity to litigate any breach of the agreement, thereby providing additional protection to the government.<sup>211</sup> However, there is no similar agreement between the government and the community. In her appraisal of the policy sub-structure of the Latrobe transition, Weller concludes that it failed to attend to the challenges facing the most affected locations, side-stepped local fears about the transitional impacts, and denied the real problems of poverty, disempowerment, and disenfranchisement.<sup>212</sup> Similarly, it has been found that despite the interventions of governments, the Latrobe region remains one of the most disadvantaged regions in the State of Victoria.<sup>213</sup> The region has experienced an increase in crime rate with women and girls being particularly vulnerable, several market and non-market interventions have failed, promises of substitute jobs have remained unmet, and the transition process has been disrespectful of cultural identity and industrial heritage sites.<sup>214</sup>

A common trend in the examples above is the overall ad-hoc nature of just coal transition and the absence of concerted and dedicated legislation and policies. This is even though the transition from coal has been evident for decades and indeed many coal-producing countries have experienced continual decline for many decades. For example, it was in early 2019 that Germany produced a report on growth, structural change, and employment in its coal sector,<sup>215</sup> despite the commencement of the transition process in regions like Ruhr and Lusatia in the 1950s and 1980s,

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<sup>210</sup> Latrobe Valley, *About us*, <https://lva.vic.gov.au/about> [<https://perma.cc/GP4W-SY9D>] (last visited Oct. 26, 2023).

<sup>211</sup> Other countries like Spain and France have also adopted this ‘contract’ model. Spain, for example, signed a just transition agreement with ‘social partners’ by which the Spanish government committed to invest €250 million in ‘mining communities.’ See European Trade Union Confederation, *Spain Guarantees a Just Transition for Miners*, <https://www.etuc.org/en/spain-guarantees-just-transition-miners> [<https://perma.cc/MY7J-HGWA>]. (last visited Oct. 26, 2023) Likewise, France has developed the ecological transition contracts initiative for territories to voluntarily sign onto and co-construct with the central government (although none has been signed as at the writing of this article). See Ministry for the Ecological Transition, *Ecological Transition Contracts*, [https://www.ecologie.gouv.fr/sites/default/files/18007-2\\_CTE\\_4p\\_A4%20light.pdf](https://www.ecologie.gouv.fr/sites/default/files/18007-2_CTE_4p_A4%20light.pdf) [<https://perma.cc/RP6T-3TU7>]. See also World Resources Institute, “France’s Ecological Transition Contract” (2021) <https://www.wri.org/update/frances-ecological-transition-contracts> [<https://perma.cc/6YQP-RL2C>].

<sup>212</sup> Sally Weller, *Just Transition? Strategic Framing and the Challenges Facing Coal Dependent Communities*, 37 *EPCN’T AND PLAN. POL. AND SPACE* 298, 313 (2019).

<sup>213</sup> Submission 132 to the Australian Senate Standing Committees on Economics, from Cheryl Wragg & Peter Gibbons, *Regional Inequality in Australia* 3–14 (Nov. 13, 2019).

<sup>214</sup> *Id.*

<sup>215</sup> The report reiterates similar interventions in the countries already considered, including the need to safeguard the prospects of persons employed in the coal regions, long term investment and the creation of new jobs and prospects for companies, long term financing of measures, and socially balanced and equitable distribution of the advantages and burdens. See FED. MINISTRY FOR ECON. AFFAIRS AND ENERGY, COMM’N ON GROWTH, STRUCTURAL CHANGE AND, EMP. FINAL REPORT, 3–4 (2019).

respectively.<sup>216</sup> None of the countries considered in this section attended to just coal transition in their legislation on climate change or related mitigation policies.<sup>217</sup> This is indicative of the isolated consideration of climate change, particularly, climate mitigation, and the seeming secondary status of just transition concerns. As argued elsewhere, “just transition should not be [as] an ‘add-on’ to climate policy; it needs to be an integral part of a sustainable development policy framework.”<sup>218</sup> The failure of governments to consider just transition within their climate policies in the coal context mirrors the Powering Past Coal Alliance (PPCA) (the world’s largest coal transition coalition) treatment of the issue.<sup>219</sup> While the PPCA declaration refers to an economically inclusive coal phase-out which includes “appropriate support for workers and communities,” its more specific commitments do not include just transition.<sup>220</sup> To join the alliance, governments only need to commit to stop building new coal plants, stop providing international finance, set a phase-out date, and align policies with the global temperature goal under the Paris Agreement.<sup>221</sup> The need to ensure that the phase-out and transition are just and equitable is, however, not a requirement.

In countries where just coal transition is being attended to, it is mostly underpinned by the notion of distributive justice—equitable distribution of advantages and burdens. While this notion is rarely defined,<sup>222</sup> the interpretation in practice, as seen in the examples considered above, seems to be the dedication of large sums to transition programs and initiating job substitution initiatives. In turn, the mere existence of these initiatives becomes their metric of success. Compared to the characteristics listed in *Table 3*, most coal transition policies considered here only satisfy the characteristic of the availability of resources, although the resources (e.g., funding, investments, new job opportunities, etc.) are rarely situated in the context of the realization of combined

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<sup>216</sup> Brauers et al., *supra* note 168, at 24.

<sup>217</sup> There, however, appears to be increasing appetite for incorporating just transition in legislation or enacting stand-alone laws. The United States, for example, has multiple climate Bills in Congress with just transition provisions. *See* Climate Protection Act, S. 332, 113<sup>th</sup> Congress., § 197; (2013) American Clean Energy and Security Act, , H.R. 2454, 111<sup>th</sup> Congress. §§ 421–33; (2009) Low Carbon Economy Act, S. 1766, 110<sup>th</sup> Congress., § 502. (2007). The Canadian government also indicated its intention to draft and pass a just transition Act. *See* Alex Ballingall, *New Environment Minister Pledges ‘Thoughtful and Sensitive’ Approach to Climate Action*, THE STAR (Nov. 26, 2019), <https://www.thestar.com/politics/federal/2019/11/26/new-environment-minister-pledges-thoughtful-and-sensitive-approach-to-climate-action.html> [<https://perma.cc/EYN6-649K>].

<sup>218</sup> Bela Galgoczi, *Phasing Out Coal – A Just Transition Approach*, EUROPEAN TRADE UNION INST. 26 (2019).

<sup>219</sup> The EU Coal Regions in Transition initiative is another multilateral coalition on coal transition. The initiative, however, engages with the concept on just transition more frontally than the PCCA. *See* Eur. Comm’n, *Coal Regions in Transition*, [https://energy.ec.europa.eu/energy/topics/oil-gas-and-coal/EUeu-coal-regions/coal-regions-transition\\_en](https://energy.ec.europa.eu/energy/topics/oil-gas-and-coal/EUeu-coal-regions/coal-regions-transition_en) [<https://perma.cc/XD5W-XF7F>]. (last visited Oct. 26, 2023).

<sup>220</sup> The PCCAP, specifically, requires government members to phase-out existing coal power generation and place a moratorium on new coal stations without carbon capture and storage; businesses and non-government members to power their operations without coal; and all members to support clean power generation through policies and investments, including by restricting financing for coal power generation. *See* Powering Past Coal All. *Declaration*, <https://poweringpastcoal.org/about/declaration> (last visited Oct. 26, 2023).

<sup>221</sup> Powering Past Coal All. *PPCA Co-chairs Announce Expanded Membership Offer for National Governments*, <https://poweringpastcoal.org/news/ppca-announce-expanded-membership-national-governments/> [<https://perma.cc/Y2UF-SJJH>].

<sup>222</sup> Germany’s 2019 report, for example, refers to a “socially balanced and equitable distribution of the advantages and burdens.” *See* FED. MINISTRY FOR ECON. AFFAIRS AND ENERGY, COMM’N ON GROWTH, STRUCTURAL CHANGE AND EMP., *supra* note 215, at 4.



capabilities and wellbeing. While the Latrobe transition framework references the improvement of well-being as one of its objectives, there is no evidence that it has achieved this. Recommendations in Germany's 2019 structural change and employment report include the need for continuous active involvement of stakeholders in coal regions, and ensuring that equal living conditions are created not only through a strong economy but also through the supply of basic necessities. The institutionalization and creation of a legal framework for the structural development process and integration of federal states, local communities and local stakeholders, and the deployment of funding to improve the quality of life and soft location factors are emphasized in the report. These emphases are consistent with the characteristics contained in *Table 3*.<sup>223</sup> It, however, remains to be seen the extent to which they would be implemented.

Compared to the coal sector, just transition is scarcely engaged in the context of transition from the oil and gas economy.<sup>224</sup> It has been noted that even a complete transition from coal will fall short of the commitments needed to save the world from the most drastic implications of global warming as carbon emissions from oil and gas in operating fields alone are considered enough to push the world past the 1.5°C mark.<sup>225</sup> When existing current policies and investment plans in oil and gas proven reserves are also taken into consideration, then it becomes impossible to reach even the lower mark of 2°C.<sup>226</sup> The bottom line is that, like coal, oil and gas must be transitioned from. The three fossil fuels, while having different implications are, however, linked. This is because the failure to make the required cuts in the more carbon-intensive industry (coal) compels even steeper cuts in comparatively less carbon-intensive sectors (like oil and gas).<sup>227</sup> The oil and gas transition raises vital justice questions including, the extent and pace of the transition, the ecological and social implications of transition pathways,<sup>228</sup> and whether the continued role of oil and gas in the

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<sup>223</sup> *Id.* at 82–84.

<sup>224</sup> For example, in their review of just transition policies, Piggot et al only reference the Scottish Oil Worker Transition Fund as an illustrative example of an oil specific just fossil fuel transition policy. They, however, note that the fund was not specifically focused on transitioning away from fossil fuels, as 44 percent of re-employed participants remained in the oil and gas sector. See Georgia Piggot et al., *Realizing a Just and Equitable Transition away from Fossil Fuels*, STOCKHOLM ENV'T INST. 2 (2019).

<sup>225</sup> GLOBAL GAS AND OIL NETWORK *Oil, Gas and the Climate: An Analysis of Oil and Gas Industry Plans for Expansion and Compatibility with Global Emission Limits 2* (December 2019), <https://www.ciel.org/wp-content/uploads/2019/12/oilGasClimateDec2019.pdf> [<https://perma.cc/TP6U-B5P8>].

<sup>226</sup> Under the IEA's Stated Policies Scenario (STEPS) where about 640 barrels of new oil and 115 tcm of new natural gas projects are embarked on, there is a 50 percent probability of reaching 2.7°C temperature increase and 66 percent chance of hitting 3.2°C. A 1.5°C compliant pathway requires USD \$1,600 billion less in oil and gas investment compared to the STEPS. See INT'L ENERGY AGENCY (IEA), *The Oil and Gas Industry in Energy Transitions: Insights from IEA Analysis* 49, 100 (2020).

<sup>227</sup> *Id.* at 54.

<sup>228</sup> The IEA outlines four 'strategic options' for the transition of the oil and gas sector: traditional oil and gas operations management (focusing on lower cost resources and projects with shorter payback periods, giving preference to natural gas and lighter crude oils, and reducing emissions along the oil and gas value chain), the use of carbon capture, utilization and storage (CCUS) technologies, transition towards low-carbon liquids and gases, and the transition of fuel companies to renewable energy companies. *Id.* at 122–60. These options have varying

short, medium, and long term is framed only as an energy transition issue or also a justice question. It also raises the questions of whether the transition should be left to the vagaries of the market or whether there should be an agreed order in which oil fields and gas reserves should close, and the justice dimensions of stranded oil and gas assets (stranded volumes, capital and value). It is sufficient to note for now that just as in the case of coal transition, the transition from oil and gas will be riddled with diverse socio-economic implications which, if not proactively addressed, would potentially result in an unjust transition.<sup>229</sup>

Transitioning from coal as an energy source is generally viewed as a low-hanging fruit, given the more viable existing alternatives, the economic decline of the sector over time, and its immense carbon intensity.<sup>230</sup> On the other hand, oil, particularly in the transportation and manufacturing sectors, is considered not as easily replaceable, and global demand is projected to be on the increase until at least 2030<sup>231</sup> while gas is widely accepted as a transition fuel (a bridge to a low-carbon future).<sup>232</sup> These varied conceptions inform varying levels of urgency and attention to transitioning from coal, oil, and gas. Other unique features of the oil and gas sector, including the more prominent role of multinational companies, susceptibility to trends in an integrated international market, and value chain, make transitioning from oil and gas different from coal.<sup>233</sup> However, as the experience with the coal transition instructs, an early start is a key determinant to whether the oil and gas transition will be just. The EU Just Transition Fund Regulation and the Scottish Oil Worker Transition initiative are two of the very few policy examples of just transition in the oil and gas sector. This section focuses on these instruments and concludes by comparing them to the characteristics listed in *table 3*.

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implications whether considered singularly or jointly. For example, emphasis on lower cost resources and lighter crude oils advantages crude oil products from places like the Middle East and Russia, while recent finds in Africa or countries with offshore fields are disadvantaged.

<sup>229</sup> For example, it has been estimated that, globally, more than one million workers in oilfield services will lose their jobs by the end of 2020. See Gabrielle Jeliakov et al., *Offshore Oil and Gas Workers' Views on Industry Conditions and the Energy Transition* GREENPEACE (2020), <https://www.greenpeace.org.uk/resources/offshore-oil-and-gas-workers-report/> [<https://perma.cc/H4F7-TX4E>].

<sup>230</sup> See Robert Pollin & Brian Callaci, *The Economics of Just Transition: A Framework for Supporting Fossil-Fuel Dependent Workers and Communities in the United States* 44:2 Lab. Stud. J. 93, 97. (2019)

<sup>231</sup> *Id.* See also IEA, *supra* note 226 at 57–58.

<sup>232</sup> See generally INT'L ENERGY AGENCY (IEA) *The Role of Gas in Today's Energy Transitions* 2 (2019); Amir Safari et al., *Natural Gas: A Transition Fuel for Sustainable Energy System Transformation* 7 ENERGY SCI. AND ENG'G 1075, 1094 (2019).

<sup>233</sup> The IEA maps the oil and gas industry as including national oil companies (NOCs), international national oil companies (INOCs), international oil companies (IOCs) and the independents. Service companies, pure downstream companies and trading companies are part of the oil and gas value chain. While NOCs and INOCs are the largest companies in terms of oil and gas production and reserves, the upstream division of the IOCs represents the majority of the industry's financial value and their role both in the upstream and midstream sectors makes them active players in the international oil market. Further, while IOCs own only a small portion of global oil production (about 13%), they have some level of influence over three times the production they directly own. See IEA, *supra* note 232, at 16–24. Further, in a recent report, Tienhaara and Cotula show the chilling effect of multinational companies' threat of investor-state dispute settlement proceedings against States that enact climate policies which adversely affect their operations. See generally Kyla Tienhaara & Lorenzo Cotula, *Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets*, INT'L INST. FOR ENV'T AND DEV. (2020).

The EU Just Transition Fund Regulation (JTF Regulation) is arguably one of the most targeted binding legal instruments on just transition.<sup>234</sup> The Regulation builds on the European Green Deal adopted by the European Commission in 2019 which proposed a just transition mechanism for EU member states.<sup>235</sup> The mechanism was established in 2020. It includes an investment scheme under InvestEU, a public sector loan facility, and the JTF. While the InvestEU and the public loan facility are scoped broadly to support activities relating to the energy transition, the JTF focuses on “supporting the most affected territories and workers concerned and to promote a balanced socio-economic transition.”<sup>236</sup> Importantly, the JTF is premised on the principle of economic, social, and territorial cohesion enshrined in the Treaty on the Functioning of the EU (TFEU) which mandates that the “Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least-favoured regions.”<sup>237</sup> The scope of support in the JTF Regulation includes coal transition’s overall focus on economic diversification and conversion, upskilling and reskilling of workers, and provision of job-search assistance, as well as broader social objectives including sustainable local mobility, upgrade of heating networks, and regeneration of brownfield sites.<sup>238</sup>

To draw from the JTF, eligible Member States are required to prepare and submit territorial just transition plans (TJTP) covering affected territories. Such plans are required to be prepared with “relevant local and regional authorities of the territories concerned.”<sup>239</sup> While the Regulation lacks specificity on the meaning of ‘relevant local and regional authorities,’ it further requires that “relevant partners” shall be involved in the preparation and implementation of the TJTP in accordance with Article 6 of the 2018 Common Provisions Regulation (CPR).<sup>240</sup> The CPR requires partnership with urban and other public authorities, economic and social partners, and relevant bodies representing civil society, environmental partners, and other bodies promoting social inclusion, fundamental rights, etc.<sup>241</sup> Given the importance of social dialogue in just transition discourse, subjecting the participation regime of the Regulation to a provision in a generic instrument is flawed. There also appears to be an equation of the various bodies required to

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<sup>234</sup> *Regulation of the EU Establishing the Just Transition Fund*, 2021/1056, L231/1 OJEU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R1056> [<https://perma.cc/9JUF-C9X4>] [hereinafter “EU 2021”].

<sup>235</sup> *Communication from the Commission to the European Parliament, the European Council, The Council, The European Economic and Social Committee and the Committee of the Regions – The European Green Deal*, at 15–19COM (2019) 640 final (Nov. 12, 2019) (EC)

<sup>236</sup> EU 2021, *supra* note 234 at recital 5.

<sup>237</sup> *Treaty of the Functioning of the European Union*, 17 December 2007, 2007 OJ. (C 326) 49, art. 174 (entered into force 1 December 2009) [hereinafter “Treaty”].

<sup>238</sup> EU 2021, *supra* note 234, at art. 8(2)(k) – (m). The list has since been expanded further to amendment by the European Parliament as discussed above.

<sup>239</sup> *Id.* at art. 7(1).

<sup>240</sup> *Id.*

<sup>241</sup> *Common Provisions Regulation*, COM 2018/0196 (COD), art. 6(1).

participate in the design of the TJTP, without preference for the voice of affected communities and, particularly, the voice of specific vulnerable sub-groups within the larger identified vulnerable community. The TJTP is required to contain a description of the national transition process to EU 2030 climate targets and 2050 climate neutral economy, justification for the identified territories, and impact assessment of the territories' transition challenges “including the social, economic, and environmental impact of the transition.”<sup>242</sup> It should also contain how the JTF support will cater to diverse socio-ecological impacts of the transition, and justification for investment in non-small and medium enterprises through a gap analysis demonstrating how the investment helps to make up for the number of jobs lost.<sup>243</sup>

Key gateway provisions to accessing the JTF include that the territories must qualify as “most negatively affected” and the proposed activities must fall within the exclusive list in Article 4(2).<sup>244</sup> Eligible territories are expected to be “precisely defined and correspond to NUTS level 3 regions or should be parts thereof.”<sup>245</sup> There are 1500 regions under the 2021 NUTS classification.<sup>246</sup> NUTS level 3 regions are considered small regions of 150,000 – 800,000 population.<sup>247</sup> Other than this specification, there are no other express indicators for identifying the “most negatively affected” communities. The only other implied indicator is “expected job losses in fossil fuel production and . . . industrial facilities with the highest greenhouse gas intensity.”<sup>248</sup> These eligibility criteria are narrow, potentially exclude territories not within the NUTS level 3 classification, fail to pay adequate attention to non-job and non-quantifiable effects, overlook past and existing injustice, and pay no attention to less manifest injustices within sub-groups which might not be evident in data on jobs and other territorial economic indices. Support under the JTF is graduated to reflect the level of climate policy ambition while also recognizing the economic and developmental constraints of regions. This is consistent with the differentiation principle which undergirds the international climate regime.

The Regulation specifically draws attention to outermost regions, sparsely populated, rural, remote, and geographically disadvantaged areas “where the geographical and socio-economic characteristics may require a different approach to support the transition process.”<sup>249</sup> This place-based sensitivity draws from experience with the coal transition, where coal mines, which are often concentrated and located in isolated places, are further isolated and disadvantaged when the mines are shuttered. Safeguarding the interest of vulnerable groups that might suffer disproportionately from the adverse effects of the transition (e.g., workers with disabilities), the protection of the

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<sup>242</sup> EU 2021, *supra* note 234, at art. 11(2)(c).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*, at art. 11(1).

<sup>245</sup> *Id.* at recital 19.

<sup>246</sup> EUROSTAT, *NUTS – Nomenclature of Territorial Units for Statistics*,

<https://ec.europa.eu/eurostat/web/nuts/background> [<https://perma.cc/9BBU-YE5H>] (last visited Oct. 18, 2023).

<sup>247</sup> EUROSTAT, *Principles and Characteristics*, <https://ec.europa.eu/eurostat/web/nuts/principles-and-characteristics> [<https://perma.cc/7Q7P-CYQW>] (last visited Oct. 18, 2023).

<sup>248</sup> EU 2021, *supra* note 234, at art. 11(2)(c).

<sup>249</sup> *Id.* at recital 8.

identity of mining communities, and the continuity of past and future communities are also key objectives of the JTF Regulation.<sup>250</sup> The Regulation recognizes that the improvement of economies does not in itself translate into the improvement of the states of people and the community. The incorporation of the European Pillar of Social Rights particularly aligns the Regulation with the outcome-centric approach to just transition argued for in this article. The pillar speaks directly to the promotion of people's well-being, combatting social exclusion and discrimination, promotion of social justice, gender equality, generational solidarity, and the protection of the rights of the child.<sup>251</sup>

While not having a dedicated just transition instrument like the EU, Scotland has incorporated just transition principles in its 2019 Climate Change (Emissions Reduction Targets) (Scotland) Act.<sup>252</sup> The Act, which commits Scotland to 56, 75, and 90 percent emissions reductions by 2020, 2030, and 2040 (respectively) all relative to a 1990 baseline,<sup>253</sup> requires Scottish Ministers to lay a climate change plan every five years from when the provision comes into force.<sup>254</sup> The plan should include proposals and policies on the exploration of fossil fuels, including the exploitation of onshore unconventional oil and gas (UOG) reserves.<sup>255</sup> For context, Scotland accounts for 82 percent of the total oil and gas production in the United Kingdom, and there has been a steady increase in production, although oil and gas extraction in Scotland peaked in 1999.<sup>256</sup> In 2015, Scotland placed a moratorium on UOG exploration, and, through a 2019 policy, the Scottish government, while not foreclosing consideration of future applications for licensing UOG reserves, stated that it does not anticipate granting new UOG licenses.<sup>257</sup> It is worth noting that UOG reserves are concentrated in some of the most densely populated areas in the Midland Valley of Scotland (an area including Glasgow and Edinburgh),<sup>258</sup> while its offshore reserves are mostly in

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<sup>250</sup> *Id.* at recital 15.

<sup>251</sup> The European Pillar of Social Rights has twenty principles including education, training and life-long learning, gender equality, equal opportunities, fair wages providing for a decent standard of living, work-life balance, childcare and support to children, social protection, minimum income, old age income and pensions, healthcare, inclusion of people with disabilities, long term care, housing, and assistance for the homeless, and access to essential services. See *Interinstitutional Proclamation on the European Pillar of Social Rights*, OJ, 2017, (C 428/10) 12–5.

<sup>252</sup> *Climate Change (Emissions Reduction Targets) (Scotland) Act 2019*, (ASP 15) § 35c [Hereinafter “Scotland Climate Change Act”].

<sup>253</sup> *Id.* at § 2(1).

<sup>254</sup> *Id.* at § 35(1).

<sup>255</sup> *Id.* at § 35(8).

<sup>256</sup> Scottish Gov't, *Oil and Gas Statistics: 2018* (2019), <https://www.gov.scot/publications/oil-and-gas-production-statistics-2018/> [<https://perma.cc/C9NZ-JCDK>].

<sup>257</sup> Scottish Gov't, *Scotland's Onshore Unconventional Oil and Gas Policy* (2019), <https://www.gov.scot/publications/scottish-governments-finalised-policy-position-unconventional-oil-gas-development/> [<https://perma.cc/VFQ9-EN22>].

<sup>258</sup> See generally, Graham Dean, *The Scottish Oil-Shale Industry from the Viewpoint of the Modern-day Shale-gas Industry*, in JONATHAN CRAIG, ET AL., *HISTORY OF THE EUROPEAN OIL AND GAS INDUSTRY*, 53–69 (Geological Soc'y 2018).

the North East (area including Aberdeen, Aberdeenshire, Angus, Banffshire and Buchan Coast, Dundee).<sup>259</sup>

Unlike the moratorium placed on UOG, the Scottish government continues to allow exploration and production in the North Sea on the condition that the sector acts to help ensure a sustainable energy transition. Despite this, North Sea exploration has been made less economically viable given the downturn in the international global oil market, which has led to the closure of facilities and its attendant effects on workers and proximate communities in North East Scotland.<sup>260</sup> In 2016, the oil and gas transition training fund, with a three-year mandate (2016-2019), was established.<sup>261</sup> This stop-gap limited response has been criticized as failing to get the workers out of the sector, as most of the workers returned when the conditions improved.<sup>262</sup> More recently, as part of its COVID-19 response, the Scottish government announced a £62 million Energy Transition Fund to support the growth and diversification of oil, gas, and energy businesses in North East Scotland and attract private investment over five years.<sup>263</sup> From the above, one can conclude that the Scottish government has taken a narrow business-focused, jobs-centric, and short-term approach to just transition in the oil and gas sector.<sup>264</sup>

This narrow approach contradicts the more extensive just transition principles and climate justice principle which the Scotland Climate Change Act mandates. The Act requires the Scottish government to use the principles in explaining how proposals and policies affect different sectors and regions in Scotland, and how they support the workforce, employers and communities in the sectors and regions.<sup>265</sup> It further provides that the plan must explain how the implementation contributes to the achievement of sustainable development, including the UN sustainable development goals.<sup>266</sup> The Act describes the climate justice principle as taking action to reduce GHG emissions and adapt to climate change in ways which support people most affected by climate change, have done least to cause it and are least equipped to adapt to its effect, and help to

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<sup>259</sup> Just Transition COMM'N Scotland, *Paper 4/1 – Oil and Gas Sector background Information* 4-5 (2019), <https://www.gov.scot/binaries/content/documents/govscot/publications/minutes/2019/10/just-transition-commission-meeting-papers-september-2019/documents/paper-4-1-oil-and-gas/paper-4-1-oil-and-gas/govscot%3Adocument/Paper%2B4.1%2B-%2BOil%2Band%2Bgas.pdf> [https://perma.cc/AC6F-C9PY].

<sup>260</sup> EUR. COMM'N, *Case Study: Oil and Gas Transition Training Fund, Scotland* (2019) [https://ec.europa.eu/energy/topics/oil-gas-and-coal/EU-coal-regions/resources/oil-gas-transition-training-fund-scotland\\_en](https://ec.europa.eu/energy/topics/oil-gas-and-coal/EU-coal-regions/resources/oil-gas-transition-training-fund-scotland_en) [https://perma.cc/L936-9TFR].

<sup>261</sup> *Id.*

<sup>262</sup> Jeliakov, *supra* note 229, at 8. See also Andrew Fawthrop, *UK Trade Body Warns of up to 30,000 North Sea Job Losses amid Pandemic*, NS ENERGY (Apr. 28, 2020), <https://www.nsenergybusiness.com/news/industry-news/north-sea-job-losses-oguk/> [https://perma.cc/U5KR-A8EX].

<sup>263</sup> *£62 million Fund for Energy Sector*, SCOTTISH GOV'T (June 12, 2020) <https://www.gov.scot/news/gbp-62-million-fund-for-energy-sector/> [https://perma.cc/695N-V8QB].

<sup>264</sup> For example, OGUK's Roadmap 2035 for the UK oil and gas sector includes the industry being on track to become net-zero by 2050, met 50 percent of UK oil and gas demand, grow and diversify energy supply chain export revenues, secure at least 130,000 direct and indirect jobs, and create over £10 billion in economic value through technology and innovation. See OIL AND GAS U.K. (OGUK) *Economic Report 2019* 45 – 47 (2019).

<sup>265</sup> Scotland Climate Change Act, *supra* note 252, at §§ 35(20)(22).

<sup>266</sup> *Id.* at § 35(24)(b).

address inequality.<sup>267</sup> This provision borrows the language of climate justice in the international context and appears to affirm the historical responsibility recognized in the preamble to the 1992 United Nations Framework Convention on Climate Change.<sup>268</sup> As framed, it is reasonable to assume that the climate justice provision is meant to apply in the global context. This raises the question of how such provisions can be given effect in FFDEs, particularly in developed FFDEs like Scotland.

Just transition principles recognized under the Scotland Climate Change Act include developing and maintaining social consensus; the creation of decent, fair, and high-value work while not negatively affecting the current workforce and overall economy; and contribution to resource-efficient and sustainable economic approaches which address inequality and poverty.<sup>269</sup> The Act also establishes a citizens assembly to consider how to address climate change effects and make recommendations on how to achieve the emission reduction targets and other matters relating to climate change. While the just transition principles themselves are narrow, the requirements that plans and programs align with the climate justice principle and aim to attain sustainable development goals are consistent with key elements of the just transition characteristics in *Table 3*. That said, it remains to be seen how this robust framing of just transition translates into how existing and new oil and gas projects are managed, and the extent to which people, communities, and nature, not just jobs and the economy, inform decisions.

### **Conclusion: Towards a Right to a Just Transition**

We can begin to draw a few conclusions here. First, there is gradual movement away from the more restricted notion of just transition to a broader vision which captures greater socio-ecological objectives. Second, the earlier examples of just transition policies and interventions in coal communities show the limitations of the narrow, job-focused approach to just transition. A narrow framing which has left communities socio-economically decimated and stripped of communal cohesion and a sense of cultural identity. Third, the more recent examples of transition in oil and gas communities, while rare and generally focused on unconventional oil and gas, are admmissive of the more expansive conceptualization of just transition. The EU and Scottish examples considered here show the possibilities of the implementation of the vision of just transition articulated in *Table 3*. Fourth, unlike the more ad hoc approach to just transition in the coal context, there are early signs of the codification of just transition in legislative instruments on climate change, providing more certainty to affected communities. Fifth, as reflected in the EU JTF

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<sup>267</sup> *Id.* at § 35(23).

<sup>268</sup> *United Nations Framework Convention on Climate Change*, (12 June 1992) 1771 UNTS 107 (entered into force 21 Mar 1994) preamble. *See generally*, Rikard Warlenius, *Decolonizing the Atmosphere: The Climate Justice Movement on Climate Debt*, 27 J. ENV'T AND DEV. 131–55 (2018); Paul Chatterton, et al., *Articulating Climate Justice in Copenhagen: Antagonism, the Commons, and Solidarity*, 45 ANTIPODE, 602–20 (2013).

<sup>269</sup> Scotland Climate Change Act, *supra* note 252 at § 35C.

Regulation, there is an essential rights dimension to the just transition discourse. I conclude this article with reflections on the issue of just transition as a human rights issue.

While Sen and Nussbaum disagree on some framings of the capability approach, they agree that the capability approach to justice and human rights are aligned. The end goal of both is human well-being and functioning, although this goal is more frontal in the capability approach where there is an insistence that rights transcend what has been put down on paper.<sup>270</sup> I have argued in this article that the attainment of well-being and functioning through the engendering of capabilities should be the primary objective of just transition. Why then is it important to frame capabilities in the language of rights? Nussbaum argues that this is necessary as rights language speaks to normative conclusions drawn from basic capabilities, and recognition of ‘fundamental rights’ places great emphasis on the importance of rights guaranteed by the state, emphasises people’s choice and autonomy, and “preserves a sense of the terrain of agreement.”<sup>271</sup> More relevant to this work are the legal guarantees provided by the rights language and the correlating rights–duties relationship that it fosters. This leads to the question of whether a case could be made for a right to a just transition. For one, the recognition of such a right raises just transition from being a mere add-on in climate policies, and an afterthought in sustainability transition decisions by states and corporations, to an essential component of such policies and a duty owed to affected communities and individuals. While this subject is deserving of a more extensive inquiry, I only offer some initial thoughts here.

Studies on the nexus between human rights and just transition are a rare find in the literature. Nevertheless, human rights have presence in the works of international organizations on just transition. For example, the ILO Guidelines recognize ‘rights’ as one of its key policy areas.<sup>272</sup> The rights highlighted by the ILO include those in its standards covering freedom of association, collective bargaining, prohibition of forced labour and child labour, non-discrimination, minimum wage, and social security.<sup>273</sup> The UNFCCC also affirms that the transition towards inclusive and low-carbon economies must maximize opportunities for rights and social protection for all.<sup>274</sup> Further, the ITUC argues that social protection,<sup>275</sup> an internationally recognized human right, is an essential component of just transition.<sup>276</sup> As shown above, the EU JTF Regulation is the only known just transition instrument to explicitly reflect the nexus between ‘social rights’ and just

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<sup>270</sup> Nussbaum argues that the language of rights, while uplifting, obscures issues and is not “especially informative”, hence, the need for the language of capabilities to talk about people’s basic entitlement. See Martha Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 274–75, 293 (1997).

<sup>271</sup> *Id.* at 295–96.

<sup>272</sup> ILO Guidelines, *supra* note 27, at 7.

<sup>273</sup> *Id.*

<sup>274</sup> UNFCCC, *supra* note 141, at 21.

<sup>275</sup> The ITUC defines social protection as systems that “consist of policies that help people manage social risks in order to prevent poverty and maintain decent incomes and living standards”. INT’L TRADE UNION CONFEDERATION (ITUC), *ITUC Economic and Social Policy Brief: The Role of Social Protection in a Just Transition* 4, [https://www.ituc-csi.org/IMG/pdf/role\\_of\\_social\\_protection\\_in\\_a\\_just\\_transition\\_en.pdf](https://www.ituc-csi.org/IMG/pdf/role_of_social_protection_in_a_just_transition_en.pdf) [<https://perma.cc/KF3N-ZH4N>].

<sup>276</sup> *Id.*



transition.<sup>277</sup> More recently, the UN special rapporteur on extreme poverty and human rights reports that, while just transition requires the protection of workers and communities affected by the impacts of ecological transformation, it also mandates the opening of new opportunities and the strengthening of “the rights of people living in poverty.”<sup>278</sup> Further, Principle 16 of the Framework Principles on Human Rights and the Environment states that “States should respect, protect and fulfil[ ] human rights in the actions they take to address environmental challenges and pursue sustainable development.”<sup>279</sup> It was argued that such a human-rights-centered approach makes sustainable development policies “more legitimate, coherent, robust and sustainable” and helps to ensure that they improve the lives of people.<sup>280</sup>

A few existing literature has considered the connection between just transition and Indigenous peoples rights,<sup>281</sup> human rights-based social protection,<sup>282</sup> right to work,<sup>283</sup> and human rights approach to fulfilling climate-related human rights obligations.<sup>284</sup> These different rights emphases show that while there is indeed an essential role for human rights in the just transition discourse, a right to a just transition is best construed as a bundle of different rights rather than a stand-alone right. The right to just transition acknowledges that response measures to climate change have potential social impacts, including human rights effects, and holders of these rights are entitled to expect and demand the prevention or redress of such human rights impacts. Fisher rightly notes that the non-retrogression and progressive realization principles, when read together, mandate that “mitigation programmes improve, not limit or impair, human rights.”<sup>285</sup> The non-retrogressive principle requires States not to “allow existing protection of economic, social and cultural rights to deteriorate unless there are strong justifications for a retrogressive measure” by demonstrating that the measure was only adopted after considering all options, assessing the impact and fully

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<sup>277</sup> EU 2021, *supra* note 234.

<sup>278</sup> Olivier De Schutter (Special Rapporteur on Extreme Poverty and Human Rights), *Interim Rep.: The “Just Transition” in the Economic Recovery: Eradicating Poverty within Planetary Boundaries*, U.N. Doc. A/75/181/Rev. 1, ¶ 8 (Oct. 7, 2020).

<sup>279</sup> *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/37/59, Framework Princ. 16 (Mar. 23, 2018).

<sup>280</sup> *Id.* at princ. 55.

<sup>281</sup> May Thazin Aung, *A Just Transition to Renewables must Recognize the Rights of Indigenous Peoples*, STOCKHOLM ENV'T INST. (2020), <https://www.sei.org/perspectives/a-just-transition-to-renewables-must-recognize-the-rights-of-indigenous-peoples/> [<https://perma.cc/ZC4J-L4PP>].

<sup>282</sup> Dunja Krause, *Why Human Rights-Based Social Protection is Needed in Climate Change Responses: A Just Transition*, SOCIAL PROTECTION AND HUMAN RIGHTS (2019), <https://socialprotection-humanrights.org/expertcom/why-human-rights-based-social-protection-is-needed-in-climate-change-responses-a-just-transition/> [<https://perma.cc/AQD6-34BG>].

<sup>283</sup> Sean Stephenson, *Jobs, Justice, Climate: Conflicting State Obligations in the International Human Rights and Climate Change Regimes*, 42 OTTAWA L. REVIEW., 155–79 (2010).

<sup>284</sup> Aled Dilwyn Fisher, *Human Rights in the Transition to a “Green Economy” – Critical Human Rights-Based Approaches to Climate change in Norway*, 32 NORDIC J. OF HUMAN. RTS., 258–79 (2014).

<sup>285</sup> *Id.* at 269.

using its maximum available resources.<sup>286</sup> Further, the principle of progressive realization imposes an obligation on States to “take appropriate measures towards the full realization of economic, social and cultural rights to the maximum of their available resources.”<sup>287</sup> These principles further reinforce the predication of just transition on human rights. These rights, which reframe the characteristics in *Table 3* using the language of rights, at the minimum, include right to a healthy environment, right to work, right of self-determination, right to social protection, property rights, right against discrimination, and right to meaningful participation. I provide a brief sketch of the contours of the first three of these component-rights in the context of a right to just transition.

The relationship between the right to work and just transition is the most common context in which human rights is considered in the sustainability transition context. Both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognize this right, which includes “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts” and state parties are required to “take appropriate steps to safeguard these rights.”<sup>288</sup> Although this right does not translate into “the right to a job,”<sup>289</sup> States are obligated to take steps to achieve full realization of the right.<sup>290</sup> This includes through providing technical and vocational guidance and training, making policies and adopting techniques “to achieve steady economic, social, and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”<sup>291</sup> Further to this right is the right of everyone to the enjoyment of just and favourable conditions of work including one which ensures fair wages and equal remuneration, decent living for themselves and their families, and safe and healthy working conditions.<sup>292</sup> States have a duty in international law to respect, protect, and fulfill these rights. While to respect is to refrain from interfering with the enjoyment of the right, to protect and fulfill mandates prevention of violations from third parties and taking positive measures to ensure full realization.<sup>293</sup>

Stephenson argues that although States could legally fulfill their climate obligations and guarantee the right to work, viewed through what he describes as a “progressive legal approach” which takes into consideration the political and economic contexts of policy implementation,<sup>294</sup>

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<sup>286</sup> OFFICE OF THE U. N. HIGH COMM’R FOR HUM (OHCHR), *Frequently Asked Questions on Economic, Social and Cultural Rights*, FACT SHEET NO. 33 (2008), <https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf> [<https://perma.cc/9WYG-DWWL>].

<sup>287</sup> *Id.* at 13.

<sup>288</sup> GA Res 217A (III), Universal Declaration of Human Rights, UN. Doc. A/810 71, art. 23(1) (1948) (UDHR); *International Covenant on Economic, Social and Cultural Rights*, 16 Dec. 1966, 993 UNTS 3, art. 6(1) (entered into force 3 January 1976) (hereinafter “ICESCR”).

<sup>289</sup> Jeremy Sarkin and Mark Koenig, *Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy*, 33 HUM. RTS. Q. 1, 8–9, 25–6 (2011).

<sup>290</sup> ICESCR, *supra* note 288, at art 6(2).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at art. 7.

<sup>293</sup> INT’L COMM’N OF JURISTS, *Maastricht Guidelines on violations of Economic, Social and Cultural Rights*, (Jan. 26, 1997)., [http://hrlibrary.umn.edu/instreet/Maastrichtguidelines\\_.html](http://hrlibrary.umn.edu/instreet/Maastrichtguidelines_.html) [<https://perma.cc/47SQ-3HWC>].

<sup>294</sup> See Stephenson, *supra* note 283, at 170–71.

there is normative conflict between both duties.<sup>295</sup> This conflict, he argues, pertains to consequences, “since a necessary consequence of a developed state’s climate change obligations violates the right to work.”<sup>296</sup> While I disagree that the violation of the right to work is a “necessary consequence” of climate change obligations, the actual implications of climate change policies, which have been variously referenced here, support Stephenson’s premise. What then does the State’s duty to respect, protect, and fulfill the right to work in the sustainability transition mean? While such duty cannot be interpreted as constricting states from having ambitious pro-climate policies, it compels similarly ambitious job-related measures, particularly targeted at persons now deprived of their right to work.<sup>297</sup> It also means that, as much as possible, the state has the duty to protect workers from measures taken by corporations which, although often designed to protect bottom lines, are often framed as pro-climate measures. Here, workers qualify as right holders with justiciable claims under international human rights (IHR) instruments like the ICESCR, depending on the domestic legal status of such instruments.<sup>298</sup> Framed this way, climate policies must be made alongside concrete measures that at the very least satisfy the minimum steps listed in Article 6(2) of the ICESCR (technical and vocational guidance, training, etc.). While this has already been done by many States as already seen, it is largely still considered optional. For example, the Canadian government has at the end of 2020 not articulated any coherent jobs-related just transition plan, although it released its climate change plan (PCF) in 2016.<sup>299</sup>

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<sup>295</sup> Stephenson defines normative conflict as “the impossibility of complying with or reconciling all of the requirements of two norms.” This could occur when the same act is subject to different norms (e.g., obligatory and prohibitory norms), when norms require conflicting acts, when a norm prohibits an essential precondition of another norm, or when a norm prohibits a necessary consequence of another norm. *Id.* at 165–66.

<sup>296</sup> *Id.* at 173.

<sup>297</sup> Similarly, Stephenson argues that states “are obligated to take a comprehensive approach towards employment policy, taking into account all necessary measures to ensure the right to work, which includes work-related security.” *Id.* at 165.

<sup>298</sup> In *Nevsun Resources Ltd v. Araya*, (2020) 1 SCR 166 SCC 5, at ¶ 119, the SCC held that “. . . like all state parties to the *International Covenant on Civil and Political Rights* (ICCPR), Canada has international obligations to ensure an effective remedy to victims of those rights (art. 2).” *Nevsun*, at ¶ 119. The court further referenced the findings of the Human Rights Committee that States must protect against the violation of rights by private persons and entities, and that States should ensure the enjoyment of *Covenant* rights to all individuals. Although the eventual finding of the court is premised on the basis that the allegations (forced labour, slavery, cruel, inhuman and degrading treatment, and crimes against humanity) by Eritrean workers against *Nevsun* (a Canadian company) come under customary international law which is automatically part of Canadian law (¶¶ 86 - 103), its reference to the ICCPR affirms Canada’s obligation under the covenant. *Nevsun*, [2020] at ¶ 86–103. A similar case can be made in respect of the ICESCR, which, like art. 2 of the ICCPR, obligates a State party to take steps to, to the maximum of its available resources, achieve progressively “the full realization of the rights recognized . . . by all appropriate means.” See ICESCR, *supra* note 288, at art 2(1).

<sup>299</sup> Norway is one other example. Fisher notes in 2014 that “there are no targeted worker protection schemes for petroleum’s inevitable decline, and no unified program for green, decent jobs to replace it”. Without such policy, she argues that “Norway risks violating the right [to work] . . . especially as the country has pushed for tougher *global* climate action that effectively accelerates petroleum’s decline.” See Fisher, *supra* note 284, at 269.

The UN special rapporteur on human rights and the environment, David Boyd, finds that more than 80 percent of UN State members legally recognize the right to a healthy environment, including in 110 states where the right enjoys constitutional protection, 101 states which have incorporated it into national legislation, and 126 States which have ratified it in regional treaties.<sup>300</sup> Given this widespread recognition, the argument has been made that the right qualifies as a principle of customary international law.<sup>301</sup> In the specific context of just transition, the right to a healthy environment potentially grounds a justiciable claim for reclamation of a coal mine or oil and gas field upon decommissioning or closure of oil wells or coal mines. In his report, Boyd highlights “non-toxic environments in which to live, work and play” and “healthy ecosystems and biodiversity” as some of the substantive elements of the right to a healthy environment.<sup>302</sup> While the reclamation of former mines or oil wells is not specifically mentioned here, it qualifies as an essential activity to make environments non-toxic (e.g., as in the case of tar sand with tailing ponds) and restore the health of the ecosystem.

However, while it might be difficult to make a case for the right to a reclaimed environment in Canada further to the right to a healthy environment (as no such right is recognized in the country),<sup>303</sup> it could, potentially, be made under other regimes. For example, the Alberta Environmental Protection and Enhancement Act (EPEA) under its “duty to reclaim” provision requires an operator to conserve, reclaim, and, unless exempted, obtain a certificate in respect of the conservation and reclamation of a land where coal mining or oil exploration is or has been carried out.<sup>304</sup> The Supreme Court of Canada (SCC) describes the requirement that a bankrupt operator in receivership complies with abandonment and remediation obligations as acting in the public interest and that it is the public that “is the beneficiary of those environmental obligations.”<sup>305</sup> These obligations were, in effect, accorded super-priority over other creditors’ claims as the court ordered that proceeds from the sale of the operator’s assets should be used to address its end-of-life obligations.<sup>306</sup> Although this decision was in the context of bankruptcy, it arguably supports the general principle that fossil fuel companies have an obligation to abandon and/or reclaim responsibly when transitioning. While regulators generally have the locus to initiate

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<sup>300</sup> *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Development, Right to a Healthy Environment: Good Practices* (Feb. 24–Mar. 20, 2020) U.N. Doc. A/HRC/43/53, paras. 10–13 (hereinafter “Good Practices”).

<sup>301</sup> See generally John Lee, *The Underlying Legal Theory to Support a Well-defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. LAW ENV'T., 283–346 (2000); Rebecca Bratspies, *Reasoning Up: Environmental Rights as Customary International Law*, in JOHN KNOX & RAMIN PEJAN, *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 122–35 (Cambridge Univ. Press 2018).

<sup>302</sup> Good Practices, *supra* note 300, at paras. 90–112.

<sup>303</sup> DAVID BOYD, *THE RIGHT TO A HEALTHY ENVIRONMENT: REVITALIZING CANADA’S CONSTITUTION*, 3–4 (Univ. B.C. Press 2012).

<sup>304</sup> *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, § 137, [https://kings-printer.alberta.ca/1266.cfm?page=E12.cfm&leg\\_type=Acts&isbncln=9780779841660](https://kings-printer.alberta.ca/1266.cfm?page=E12.cfm&leg_type=Acts&isbncln=9780779841660) [<https://perma.cc/GQQ9-SXP3>].

<sup>305</sup> *Orphan Well Association v. Grant Thornton Ltd.*, [2019] 1 SCR 150, at ¶ 122.

<sup>306</sup> *Id.* at para 163.

action to enforce compliance, private individuals like surface right holders could litigate to compel reclamation subject to the terms of a Surface Lease Agreement.<sup>307</sup>

At first glance, some rights might seem to conflict with the objective of achieving the global climate goals while steadily journeying towards a sustainable world. A closer look, however, affirms the argument that not securing these rights would either constrict progress or imperil progress supposedly achieved. Take the right of self-determination as an example. The International Court of Justice referred to the right of self-determination as “one of the essential principles of contemporary international law.”<sup>308</sup> Integral to the right of self-determination is sovereignty over resources—described elsewhere as “a basic constituent of the right of self-determination.”<sup>309</sup> Affirming this, both the ICESCR and ICCPR provide that, by virtue of this right, people can freely pursue their economic development, and to their own ends “freely dispose of their natural wealth and resources.”<sup>310</sup> This right is without prejudice to “obligations arising from international economic co-operation, based upon the principles of mutual benefit and international law.”<sup>311</sup> Nevertheless, under no condition could people be deprived of their means of subsistence.<sup>312</sup> The UNDRIP affirms the “right to self-determination,”<sup>313</sup> and the right to “determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”<sup>314</sup>

The necessity of leaving fossil fuel under the ground and attendant policies like the Scottish moratorium on unconventional oil and gas production and Canada’s thermal coal policy are *prima facie* infringements of the right of self-determination and resource governance. One response to this conflict is that the right could be restrained to achieve sustainability objectives, because failing to meet such sustainability imperatives would potentially inflict human rights harms on present and future generations.<sup>315</sup> However, on the other hand, it could also be argued that, ignoring sustainability and climate imperatives, people in all instances have a limitless right to do as they

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<sup>307</sup> A standard Alberta Surface Lease Agreement has such a requirement. It provides that “the Lessee shall have the right at any time and from time to time by written notice to the Lessor to surrender all or any portion of the leased premises and terminate this Lease agreement as it relates to the surrendered premises, provided however, . . . that all provisions for abandonment and reclamation have been complied with in accordance with applicable laws and regulations.” See *Alberta Surface Lease Agreement*, Canadian Ass’n of Petroleum Land Admin., <https://caplacanada.org/wp-content/uploads/2015/02/Alberta-Surface-Lease-Agreement.pdf>.

<sup>308</sup> *Case Concerning East Timor Merits (Portugal v. Australia)*, JUDGMENT, ICJ1995 ... REPORTS 4, at 102, ¶ 29.

<sup>309</sup> G.A. Res. 1803 (XVII), *Permanent Sovereignty over Natural Resources*, (Dec. 14, 1962) at PREAMBLE.

<sup>310</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) (Dec. 16, 1966) 993 UNTS 3 at art. 1(1)(2); International Covenant on Civil and Political Rights (ICCPR) (Dec. 16, 1966), 999 UNTS. 171 at art. 1(1)(2).

<sup>311</sup> ICESCR, *Id.* at art. 1(2); ICCPR, *Id.* at art. 1(2).

<sup>312</sup> *Id.*

<sup>313</sup> U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) G.A. Res. 61/295 (Sept. 13, 2007), at art. 3.

<sup>314</sup> *Id.*

<sup>315</sup> See generally Petra Gümplová, *Restraining Permanent Sovereignty over Natural Resources*, 53 ENRAHONAR. QADERNS DE FILOSOFIA, 93–114 (2014).

wish with their resources. It is clear from the ICESCR and ICCPR that the right of self-determination and resource governance is not absolute. The covenants subject it to international law obligations, obligations arising from international economic cooperation, and the principle of mutual benefit. While mitigation measures under the international climate regime could easily be brought under these limitations, the Siracusa Principles require that limitations be interpreted in favor of the rights at issue and must not be interpreted so as to jeopardize the essence of the right concerned.<sup>316</sup> A more availing interpretation, therefore, is one that allows and facilitates the deployment of the right of self-determination and resource governance for the attainment of sustainability and climate objectives.

Under both the ICESCR and ICCPR, this at least means that: (a) peoples (e.g., Indigenous peoples and host communities) should play key roles (and in some cases give consent) in decisions about the future of fossil fuel resources, and (b) substitute means of subsistence must be provided, particularly, for communities and States which have fossil fuel as their primary means of subsistence. On point (a), we must return to Habermas who has argued that inclusive and public argumentative deliberations can yield (pro-climate) rationally motivated agreements.<sup>317</sup> Similarly, Sen argues that “open-minded engagement in public reasoning is . . . central to the pursuit of justice.”<sup>318</sup> But whether the deliberative or decision-making role of self-determination right-holders would be pro-sustainability is dependent on point (b)—whether subsistence concerns have been taken into consideration.<sup>319</sup> An apt analogy, perhaps, is the failure of non-Indigenous fishermen in Nova Scotia to take into consideration the right of Indigenous fishermen to subsistent and moderate livelihood fishing in their case for sustainable fishing.<sup>320</sup> A hasty conclusion that the right to self-determination and resource governance inhibits sustainability transition is a recipe for an unjust transition. This is not only with respect to effects of transitioning from carbon-intensive industries, but also with regard to the low-carbon industries transitioned to. Mazin Aung, for example, notes that violations of Indigenous peoples’ rights characterize large-scale renewable energy projects in Southeast Asia and that such projects could be both sustainable and equitable if

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<sup>316</sup> AM. ASS’N for the INT’L COMM’N OF JURISTS, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, at princ. 2, 3 (1985), <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> [<https://perma.cc/ZW7B-Q2AK>].

<sup>317</sup> JURGEN HABERMAS (TRANS. BY WILLIAM REHG), *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY*, 305 (Mass. Inst. Tech. Press 1996).

<sup>318</sup> Sen, *supra* note 65, at 390.

<sup>319</sup> Mezirow notes that “economic, social, and psychological conditions fostering social justice are essential for inclusion in effective critical-dialectical discourse—the process by which we come to understand our own experience—overcoming the threat of exclusion constitutes a significant epistemological rationale for adult educators to commit themselves to economic, cultural, and social action initiatives.” See Jack Mezirow, *Transformative Learning as Discourse*, 1 J. TRANSFORMATIVE EDUC. 58, 60 (2003).

<sup>320</sup> See Amanda Coletta, *Indigenous People in Nova Scotia Exercised their Right to Catch Lobster. Now they’re Under Attack*, WASHINGTON POST (Oct. 26, 2020), [https://www.washingtonpost.com/world/the\\_americas/canada-nova-scotia-indigenous-lobster-fishery/2020/10/24/d7e83f54-12ed-11eb-82af-864652063d61\\_story.html](https://www.washingtonpost.com/world/the_americas/canada-nova-scotia-indigenous-lobster-fishery/2020/10/24/d7e83f54-12ed-11eb-82af-864652063d61_story.html) [<https://perma.cc/863X-VCAC>]. In *R v. Marshall*, the SCC . . . affirmed that the respondent had right treaty rights to (catch) to secure necessities which it construed as “moderate livelihood.” *R v. Marshall*, 3 S.C.R. at 533, para. 24. This, however, does not extend to “the open-ended accumulation of wealth.” *Id.*

“Indigenous peoples are empowered to manage their own resources to develop renewables that benefit their communities.”<sup>321</sup>

More remains to be said on just transition and the right to social protection, right against discrimination, right to meaningful participation, and property rights. These rights, like the ones considered above, are recognized in IHR instruments and are implicated to varying degrees by sustainability transition initiatives and policies.<sup>322</sup> The examples considered above support the claim that the just transition discourse is a human rights discourse; hence, it is not an optional component of climate policies. People and communities impacted by measures to combat climate change are entitled to project their well-being concerns as human rights issues. Rather than inhibiting ambitious sustainability and climate measures, this human-rights-sensitive approach has the potential to protect pro-climate policies from becoming another domain of injustice or reinforcing past injustices. This rights-based framing also plays a role in the globalization of the just transition discourse, a subject of future research.

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<sup>321</sup> Aung, *supra* note 281. On human rights effects of renewable energy projects, see *Renewable Energy Risking Rights and Returns: An Analysis of Solar, Bioenergy and Geothermal Companies' Human Rights Commitments*, BUS. AND HUM. RTS. RES. CTR. (2018), [https://media.business-humanrights.org/media/documents/files/Solar\\_Bioenergy\\_Geothermal\\_Briefing\\_-\\_Final\\_0.pdf](https://media.business-humanrights.org/media/documents/files/Solar_Bioenergy_Geothermal_Briefing_-_Final_0.pdf) [<https://perma.cc/D6DD-KUWW>].

<sup>322</sup> For example, the Right to social protection (social security) under art. 9 of the ICESCR, *supra* note 288 at art 9. The right includes right to access and maintain benefits to secure protection, *inter alia*, from lack of work-related income, unaffordable access to health care, and insufficient family support, particularly for children and adult dependents. See UN. Econ. and Soc. Council, *General Comment No. 19 – The Right to Social Security (art. 9)*, (Feb. 4, 2008) U.N. Doc. E/C.12/GC/19, ¶ 2. *Right against discrimination*: ICESCR, art 2(2), 10(3); UDHR, *supra* note 288, at art 7, 23(2). *Right to Meaningful Participation: Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, June 25, 1998, 2161 UNTS.... 447, art 1, 6–8 (entered into force Oct. 30, 2001) (Aarhus Convention). UDHR, *supra* note 288, at art 17(1)(2). On property rights, for example, in *Pa. Coal Co. v. Mahon* 260 US. 393, 415, (1922) where state law had been enacted preventing a company from extracting coal from a property it has right to, Justice Holmes of the US. Supreme Court held that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” (*Pa. Coal Co.*, 260 U.S. at 415 referring to the provision under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution prohibiting the expropriation of private property without compensation and forbids government from forcing individuals to bear burdens which should be borne by the whole public). See Joseph Margolies, *Fossil Fuel Extraction Bans: A Takings Analysis*, 30 ENV'T CLAIMS J. 87, 89–94 (2018).