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SCHOLARLY ARTICLE

Indigenous Peoples, Business, and the Struggles for Justice in the Green Transition: Towards a Rights-Based Approach to Just Transitions

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Abstract

This article explores the responsibility of wind energy developers for the rights of Indigenous Peoples whose lands are affected by wind energy projects. Applying a rights-based approach and drawing on three landmark court rulings involving the struggle of Indigenous communities against the development of wind energy projects, the analysis explores the insights provided by the cases for clarifying the responsibility of business actors involved in developing such projects. It examines how Indigenous Peoples' rights are frequently marginalized or overlooked in the planning and siting of wind energy projects and the need to respect the rights of Indigenous Peoples throughout a project in order to attain a transition that is just. Based on the analysis, we argue for a rights-based approach as the theoretical framework and analytical tool to advance justice in the green transition and a means to articulate the responsibilities of corporate actors within that context.

Keywords: corporate responsibility; human rights due diligence; Indigenous Peoples' rights; just transition litigation; wind energy

I. Introduction

The extraction of wind power and the development of infrastructure and technologies to produce renewable energy are increasing worldwide. As the global impact of climate change intensifies and evidence of its harmful effects on human rights grows,[1] states and corporate actors have begun accelerating efforts for a speedy energy transition, entailing a shift from fossil-fuel production and consumption towards renewable energy.[2] Yet, this transition is also negatively affecting human rights, raising concerns about the broader implications of renewable energy expansion. In this context, scholars have introduced the concept of 'green extractivism' to describe how renewable energy projects, including wind farms, can

[1] Report of the Special Rapporteur on the Promotion and Protection of Human Fights in the Context of Climate Change; Promotion and Protection of Human Rights in the Context of Climate Change Mitigation, Loss and Damage and Participation, UN Doc A/77/226 (26 July 2022).

[2] Ursula von der Leyen, 'State of the Union Address' (European Commission, 20 November 2023).

perpetuate exploitative practices under the guise of sustainability.[3] From a political ecology perspective, they emphasize that while the energy transition may embody certain extractive processes, it continues to generate territorial, environmental and socio-cultural impacts comparable to those resulting from traditional extractivism.[4] These impacts have been particularly highlighted in cases of contestation by Indigenous communities against wind energy production projects, leading to complaints in national courts and international grievance bodies.[5] In three landmark rulings from Kenya, Mexico and Norway, courts have underlined the importance of balancing renewable energy development with Indigenous rights and protections.[6] The particular cases that we refer to are the *Fosen* (Norway), *Turkana* (Kenya) and *Gunaa Sicarú* (Mexico) decisions, which were issued in 2021 and 2022. These cases, which contest the social or environmental impacts of business projects related to the energy transition, reflect a broader trend known as 'just transition litigation.'[7] The underlying argument as well as the outcomes of the court decisions underscore the need to recognize the adverse human rights effects resulting from wind energy projects as a significant issue in the governance of the green transition.

Despite the emphasis given to the interface between climate change and human rights issues by various reports and statements from United Nations (UN) human rights bodies[8] and an increasing number of court rulings,[9] the rights of Indigenous Peoples in relation to a just transition remain underexplored, especially in connection with corporate responsibilities.[10] While questions about the human rights impacts of companies are familiar, especially in the

[3] Alexander Dunlap, Judith Verweijen and Carlos Tornel, 'The Political Ecologies of "Green" Extractivism(s): An Introduction' (2024) 31 *Journal of Political Ecology*; Astrid Ulloa, 'Aesthetics of Green Dispossession: From Coal to Wind Extraction in La Guajira, Colombia' (2023) 30 *Journal of Political Ecology*. Diego Andreucci et al, 'The Coloniality of Green Extractivism: Unearthing Decarbonisation by Dispossession through the Case of Nickel' (2023) 107 *Political Geography* 102997.

[4] Green extractivism encompasses the impacts of wind, solar and other renewable energy projects. While their effects may differ, the human rights implications remain similar, particularly in how they affect the lands and livelihoods of Indigenous peoples. See Ulloa, ibid.

[5] Early wind-farm-related examples include protests in 2012 by Indigenous communities in the Isthmus of Tehuantepec region of Oaxaca in Mexico 2008, and complaints from the Jijnjevaerie reindeer herding community in the border area of Sweden and Norway to the OECD National Contact Points, 'Jijnjevaerie Saami village and Statkraft' (2 August 2016). See also Dorothée Cambou, 'Uncovering Injustices in the Green Transition: Sámi Rights in the Development of Wind Energy in Sweden' (2020) 11 *Arctic Review* 310; Eva Maria Fjellheim, 'Wind Energy on Trial in Saepmie: Epistemic Controversies and Strategic Ignorance in Norway's Green Energy Transition' (2023) 14 *Arctic Review on Law and Politics* 140.

[6] Supreme Court of Norway (2021) HR-2021-1975-S of 11 October 2021 (*Fosen* case). Available at https://www.domstol.no/en/supremecourt/rulings/2021/supreme-court-civil-cases/hr-2021-1975-s/ (accessed 4 April 2024). Environment and Land Court (2014) Meru ELC case no. 163 of 2104, formerly Nairobi ELC no. 1330 (*Turkana* case) available at https://media.business-humanrights.org/media/documents/Lake_Turkana_Wind_Power_Judgment_October_2021.pdf?fbclid=IwAR1CWK61-TnoE0fWTnngWp7f43uZRaG7A-oeBmOn9B7rWvsznOuLH80lXkU (accessed 4 April 2024). Decision of the Tribunal Unitario Agrario, proceeding number of 10th of August of 2022 (*Siracú* case).

[7] Annalisa Savaresi et al, 'Just Transition Litigation: A New Knowledge Frontier,' IUCN Academy of Environmental Law Colloquium, UEF, August 2023.

[8] E.g. Report of the Special Rapporteur on the Promotion and Protection of Human Rights in Context of Climate Change; Promotion and Protection of Human Rights in the Context of Climate Change Mitigation, Loss and Damage and Participation, UN doc A/77/226 (26 July 2022) paras 16 and 25; Human Rights Council, 'Green Financing, a Just Transition to Protect the Rights of Indigenous Peoples; Report of the Special Rapporteur on the Rights of Indigenous Peoples,' José Francisco Calí Tzay, UN Doc A/HRC/54/3 (21 July 2023).

[9] European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, case no. 53600/20, judgment (Grand Chamber) of 9 April 2024; District Court of The Hague, *Milieudefensie et al. v Royal Dutch Shell PLC* (26 May 2021) C/09/571932/HA ZA 19-379.

[10] Surya Deva, Anita Ramasastry and Florian Wettstein, 'Beyond Human Rights Due Diligence: What Else Do We Need?' (2023) 8:2 *Business and Human Rights Journal* 133–4.

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business and human rights (BHR) literature,[11] research tends to address a 'just transition' in a general sense regarding its impact on human rights, but so far it has failed to offer a thorough exploration of the issue in relation to Indigenous Peoples.[12] This indicates a knowledge gap at a time when we are witnessing a surge in litigation defined as 'just transition' cases,[13] highlighting the growing tensions between promoting the green transition and ensuring human rights as a foundation for achieving social justice.[14]

At the same time, disputes associated with Indigenous communities extend beyond the corpus of conventional human rights law, as their claims transcend demands for the protection of their individual human rights. These conflicts concern core issues of Indigenous self-determination and resource sovereignty, rooted deeply in a complex history of colonialism.[15] That history involves practices of dispossession, discrimination, assimilation, protectionism, cultural paternalism and resistance which persist in the present and perpetuate inequalities and dominance patterns.[16] In this complex landscape, a key question is how Indigenous Peoples' collective rights, which underpin their unique entitlements within the human rights framework, are recognized and enforced by the states.[17] Additionally, the extent of business actors' responsibilities in upholding these rights remains insufficiently defined.

This article addresses the knowledge gap described above by analysing three pivotal cases involving conflicts between wind energy developers and Indigenous communities, namely the *Fosen*, *Turkana* and *Gunaa Sicarú* judgments. While many cases are filling courtrooms, few lead to outcomes that confirm the rights of Indigenous Peoples affected by the wind projects at stake. The rationale for selecting the above cases for the analysis in this article rests on two key factors: first, they represent large-scale projects in Europe, Africa and Latin America, illustrating the global scale of the issue; second, each has resulted in legal rulings addressing their illegality, providing important precedents for analysing the intersection of energy projects, Indigenous rights and environmental justice. Moreover, the cases demonstrate that the issue and need for companies' understanding of their responsibilities is not limited to operations in the Global South, but is just as pertinent in the Global North, including the High North (Arctic). Drawing on these cases from a comparative perspective, we examined how the responsibility for Indigenous Peoples' rights is articulated in national court rulings that build on international hard or soft law. Employing a rights-based approach, increasingly prominent in the scholarly and policy discourse concerning the green transition, we connected the discussion on a just transition with international law instruments pertaining to the rights of Indigenous Peoples, including

[11] Karol Boudreaux and Scott Schang. 'Threats of, and Responses to, Agribusiness Land Acquisitions' (2019) 4:2 *Business and Human Rights Journal* 365–71; Jessi Cato, Mercy T Christopher and Ana Zbona 'Transition Minerals Tracker: 2021 Analysis,' Business and Human Rights Resource Centre (2022), https://media.business-humanrights.org/media/documents/Transition_Minerals_Tracker_Global_analysis.pdf (accessed 1 March 2025).

[12] Elodie Aba, 'A Fast and Fair Energy Transition: How Community Legal Action and New Legislation are Shaping the Global Shift to Renewable Energy' (2023) 8:2 *Business and Human Rights Journal* 252–8; Julia Dehm, 'Beyond Climate Due Diligence: Fossil Fuels, 'Red Lines' and Reparations' (2023) 8:2 *Business and Human Rights Journal* 151–79; Gabriela Quijano, 'Lithium Might Hold the Key to our Clean Energy Future, but Will this Star Metal Fully Deliver on its Green Potential?' (2020) 5:2 *Business and Human Rights Journal* 276–81.

[13] Savaresi et al (note 7).

[14] Kaisa Huhta, 'Conceptualising Energy Justice in the Context of Human Rights Law' (2023) 41 *Nordic Journal of Human Rights* 378.

[15] Rebecca Lawrence, 'Internal Colonisation and Indigenous Resource Sovereignty: Wind Power Developments on Traditional Saami Lands' (2014) 32 *Environment and Planning D: Society and Space* 1036, 1037.

[16] Ibid.

[17] Scholars have examined this issue extensively. Notable reference works include Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford University Press, 2016); James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004).

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the UN Covenant on Civil and Political Rights (ICCPR) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). This framing also allowed us to clarify the responsibilities of corporate actors based on the framework of corporate responsibility for human rights that are embedded in the UN Guiding Principles on Business and Human Rights (UNGPs), and to further delineate what this responsibility entails in relation to Indigenous Peoples.[18]

Building on that foundation, our analysis moves on to encompass considerations for companies operating within renewable energy value chains that may impact Indigenous peoples. More specifically, we argue that corporate actors must transcend the constraints of national law to ensure the effective safeguarding of Indigenous Peoples' rights throughout the licensing and implementation process for wind energy projects. We identified five pivotal requirements that pertain to corporate respect for Indigenous Peoples' rights in that context: 1) prioritizing self-determination rights in land development, 2) ensuring Free Prior and Informed Consent (FPIC) as the cornerstone for meaningful consultation, 3) incorporating traditional and local knowledge to mitigate power asymmetries in impact assessment, 4) providing culturally appropriate mitigation and timely remediation measures 5) ensuring that widespread support for wind energy projects, viewed as essential for advancing the green transition, does not justify legal violations or the infringement of Indigenous Peoples' rights. Based on our analysis of the *Fosen*, *Turkana* and *Gunaa Sicarú* cases and the current development of human rights law, all five requirements appear crucial for ensuring the rights of Indigenous Peoples in the green transition, yet they often remain overlooked in practical implementation.

The article is structured as follows: Section 2 lays out the analytical framework, examining the evolution of the scholarly discourse on human rights within the context of a just transition, describing the general principles underlying a human rights-based approach, and outlining the framing in international law of the responsibilities of states and business to ensure Indigenous Peoples' rights. Subsequently, Section 3 examines the court rulings in disputes between wind energy developers and Indigenous communities in the *Fosen*, *Turkana* and *Gunaa Sicarú* cases. Then, Section 4 connects the analysis of the court rulings to the theoretical framing of a rights-based approach to a just transition, drawing lessons from the three court rulings for elaborating the responsibility of business actors towards the rights of Indigenous Peoples and finally specifying the contours of a rights-based approach for promoting justice for Indigenous Peoples in the green transition.

II. A Rights-based Approach to the Green Transition

A. Human Rights and a Just Transition

To date, the academic discourse surrounding the conceptualization of a just transition and human rights has been cursory. In interdisciplinary scholarship, the discussion often lacks specificity regarding the particular human rights involved and fails to explore their implications critically.[19] For example, while the overarching concept of 'human rights' is integral to each of the three topical perspectives of a 'just transition' proposed by Heffron and McCauley, the intricate details and ramifications for human rights are frequently overlooked or left unspecified.[20] Heffron and McCauley define a 'just transition' as comprising, at least, climate, energy and environmental justice. Focusing on the 'justice'

[18] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,' UN Doc A/HRC/17/31 (21 March 2011) (UNGPs).

[19] Similar claims have been made on energy justice and human rights law: Huhta K, 'Conceptualising Energy Justice in the Context of Human Rights Law' (2023) 41 *Nordic Journal of Human Rights* 378.

[20] Raphael J Heffron and Darren McCauley, 'What Is the "Just Transition"?' (2018) 88 *Geoforum* 74.

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element of these aspects of the transition, Heffron and McCauley define each, in the following way: *climate justice* concerns 'sharing the benefits and burdens of climate change from a human rights perspective';' *energy justice* refers to 'the application of human rights across the energy life-cycle (from cradle to grave)'; and *environmental justice* aims 'to treat all citizens equally and to involve them in the development, implementation and enforcement of environmental laws, regulations and policies.'[21] Thus, the justice aspect of a 'just transition' in regard to climate and energy in both cases embodies an explicit human rights reference as the compass setting the direction for that particular form of 'justice.' However, the authors fail to specify the substantive human rights content—or they solely allude to citizens' involvement in the development of laws, regulations and policies for promoting environmental justice. Moreover, because ensuring citizens' involvement through the right to public participation in environmental decision-making, as granted by the Aarhus Convention, does not fulfil Indigenous Peoples' demands, these analyses remain insufficient for the purposes of a just transition that respects the rights of Indigenous Peoples. In fact, as demonstrated by Fjellheim in renewable energy contexts, formalized dialogues led by state or corporate entities may be legitimate processes that are acceptable to the majority but detrimental to Indigenous communities.[22] This underscores the importance of recognizing and addressing the distinct rights and perspectives of Indigenous groups in the formulation and implementation of environmental regulations and policies, as well as development strategies more generally.

Moreover, despite widespread acknowledgement of justice as a fundamental aspect of the three topical aspects of a just transition,[23] critical voices have also highlighted a related lacuna in the energy scholarly discourse: the failure to address intersecting inequalities linked to gender, Indigeneity, race and other interwoven disparities.[24] This criticism arises from the fact that the core theories of justice employed by energy justice scholars are often grounded in Western value orientations and lean towards liberalism, emphasizing democracy and human rights while neglecting non-Western philosophies.[25] In response to such normative assumptions and potential biases, scholars have argued for the integration of Feminist, Indigenous, anti-racist and postcolonial approaches to justice, recognizing them as essential correctives to theories of justice rooted in colonial, liberalist or majoritarian paradigms.[26]

At the same time, the development of scholarship on a 'just transition' has been instrumental in expanding the understanding of the concept and its normative aspects, in the process challenging its original narrow focus on the workforce and fossil fuel considerations.[27] So far, the significance of a just transition has been predominantly examined in the literature within the particular context of mining 'critical' or 'transition'

[21] Ibid.

[22] Eva M Fjellheim, '"You Can Kill Us with Dialogue:" Critical Perspectives on Wind Energy Development in a Nordic-Saami Green Colonial Context' (2023) 24 *Human Rights Review* 25–51.

[23] Darren A McCauley et al, 'Advancing Energy Justice: The Triumvirate of Tenets' (2013) 32 *International Energy Law Review* 107; Kirsten Jenkins at al, 'Energy Justice: A Conceptual Review' (2016) 11 *Energy Research & Social Science* 174; Nynke van Uffelen, 'Revisiting Recognition in Energy Justice' (2022) 92 *Energy Research & Social Science* 102764.

[24] Benjamin K Sovacool et al, 'Pluralizing Energy Justice: Incorporating Feminist, Anti-Racist, Indigenous, and Postcolonial Perspectives' (2023) 97 *Energy Research & Social Science* 102996. See also Hasan, Qaraman, Raphael J. Heffron, et al, 'Stepping into the Just Transition Journey: The Energy Transition in Petrostates' (2024) 113 *Energy Research & Social Science* 103553.

[25] Jacobo Ramirez and Steffen Böhm, 'Transactional Colonialism in Wind Energy Investments: Energy Injustices against Vulnerable People in the Isthmus of Tehuantepec' (2021) 78 *Energy Research & Social Science* 102135.

[26] Ibid 1. In relation to the rights of Indigenous Peoples, see also Cambou (note 5).

[27] Xinxin Wang and Kevin Lo, 'Just Transition: a Conceptual Review,' (2021) 82 *Energy Research & Social Science* 102291; Heffron and McCauley (note 20) 74–7; Pablo García-García, Óscar Carpintero and Luis Buendía, 'Just Energy

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minerals, —such as cobalt, zinc, copper, lithium and others— that are crucial for windmill structures and turbines, solar panels or batteries to store (excess) energy.[28] Moving beyond the confines of the impacts of the transition for the company's workers, scholars have drawn attention to the vulnerability of local communities to adverse human rights impacts that may result from mining.[29] Many of the mining-induced human rights impacts relate to land, family sustenance and traditional lifestyles, somewhat similar to those that Indigenous groups affected by wind energy farms encounter.

As tensions arising from the green transition have become more apparent, and studies illuminate the extensive harmful impacts on human rights associated with the energy transition, policymakers have also responded by expanding the scope of a just transition to include diverse concerns beyond the workforce, such as vulnerable groups, youth, Indigenous Peoples, regional issues and the alleviation of poverty.[30] On this basis, human rights mechanisms and international institutions, including the UN General Assembly and the International Labour Organization (ILO), have increasingly underscored the pivotal role of human rights in the context of promoting green and just transitions. The UN General Assembly, for instance, explicitly calls for the application of a human rights-based approach to climate change adaptation and mitigation, 'focusing on the rights of those who are already vulnerable and marginalized due to poverty and discrimination.'[31] Similarly, the International Labour Organization has expanded its conception of a just transition from its application to the workforce, now also highlighting the intrinsic connection between a just transition and human rights standards, especially those of Indigenous Peoples.[32] Additionally, the ILO stresses the necessity for states and businesses to assess potential risks linked with the implementation of sustainable development policies in line with human rights principles. This discourse echoes the sentiments of Agenda 2030 for Sustainable Development, which recognizes the roles of both government and corporate actors in advancing sustainable development while emphasizing that inclusivity, equality, justice and respect for human rights are essential for sustainable development.[33]

Such legal and policy development is also reflected in other organizational settings. As part of its series of guidance elaborating on the implementation of risk-based due diligence in specific operational contexts, the Organisation for Economic Co-operation and Development (OECD) has issued *Due diligence guidance for meaningful stakeholder engagement in the extractive sector.*[34] While this instrument primarily targets the extractive sector, many of the associated human rights risks—and consequently, the relevance of due

Transitions to Low Carbon Economies: A Review of the Concept and its Effects on Labour and Income' (2020) 70 *Energy Research and Social Science* 101664.

[28] International Energy Agency, *The Role of Critical Minerals in Clean Energy Transitions* (IEA, Paris, 2021).

[29] Maria Figueroa, Christian Flores and Nicolas Silva, 'Just Energy Transitions and Indigenous Experiences in Chile: Integrating Meaningful Stakeholder Engagement and Energy Justice' in Karin Buhmann et al (eds), *The Routledge International Handbook on Meaningful Stakeholder Engagement* (Routledge, 2025) 332–51; Karin Buhmann, 'Addressing a Human Rights Paradox in the Green Transition: Guidance for Invested Mining Operations to Benefit Local Communities' (2023) 419 *Journal of Cleaner Production* 137903; John Owen et al, 'Fast Track to Failure? Energy Transition Minerals and the Future of Consultation and Consent' (2022) 89 *Energy Research & Social Science* 102665.

[30] Vilja Johansson, 'Just Transition as an Evolving Concept in International Climate Law' (2023) 35 *Journal of Environmental Law* 229, 242.

[31] UN Human Rights Office of the High Commissioner, 'Applying a Human Rights-based Approach to Climate Change Negotiations, Policies and Measures' (2010); UN Human Rights Office of the High Commissioner, 'Frequently Asked Questions on Human Rights and Climate Change, Fact Sheet no. 38' (New York and Geneva 2021).

[32] International Labour Organization, 'Indigenous Peoples and a Just Transition for All' (November 2022).

[33] See in particular SDGs 8, 12, 13 and 17.

[34] OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD, 2017).

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diligence steps for companies—may also apply to the wind sector.[35] Indeed, further attention to due diligence, including as established by the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, is sorely needed for a just transition.[36]

Nonetheless, as this part of the review of the current literature and trends within international law and organizations has evidenced, concerns remain about companies' adequate integration of human rights for achieving sustainable development, including for the energy transition to be just in not harming human rights of affected communities, including Indigenous groups. This underscores the relevance of a rights-based approach as a means of prioritizing human rights in the development discourse.

B. Human-rights-based Approach

Building on the earlier more general rights-based approach (RBA) to development theory,[37] a human-rights-based approach places human rights at the centre of economic projects and wider societal change for the delivery of public goods.[38] Within the current context of global sustainable development, a human rights-based approach can be summarized as a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.[39] As described by United Nations agencies, it 'seeks to analyze inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress and often result in groups of people being left behind.'[40] On this basis, a rights-based approach to the green transition emphasizes the importance of integrating human rights considerations into environmental policies and practices, thereby advancing both environmental sustainability and social justice goals.

From a legal perspective, a human-rights-based approach to a just transition is arguably founded on several key international agreements. The preamble to the Paris Agreement, which states its commitment to respecting human rights, was the first international environmental agreement to mention climate change with reference to a just transition and human rights.[41] Agenda 2030 (embodying the 17 Sustainable Development Goals

[35] See Sarah L Seck, 'Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights' (2016) 12:1 *McGill International Journal of Sustainable Development Policy and Law* 54–97.

[36] Compare also OECD Watch (n.d.). The OECD Guidelines and Just Transition, https://www.oecdwatch.org/oecd-ncps/the-oecd-guidelines-for-mnes/what-is-in-the-oecd-guidelines/the-oecd-guidelines-and-just-transition/ (accessed 2 February 2025).

[37] Hans-Otto Sano, 'How Can a Human Rights-Based Approach Contribute to Poverty Reduction? The Relevance of Human Rights to Sustainable Development Goal One' in Markus Kaltenborn, Markus Krajewski and Heike Kuhn (eds), *Sustainable Development Goals and Human Rights* (Springer International Publishing, 2020); Peter Uvin, 'From the Right to Development to the Rights-Based Approach: How "Human Rights" Entered Development' (2007) 17 *Development in Practice* 597.

[38] E.g. Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18 *Health and Human Rights* 109. Emilie Filmer-Wilson, 'The Human Rights-Based Approach to Development: The Right to Water' (2005) 23 *Netherlands Quarterly of Human Rights* 213.

[39] UN Sustainable Development Group, 'Human Rights-Based Approach,' https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach (accessed 4 April 2024). See also United Nations Environment Programme, 'Adopting a Human Rights-based Approach to Ecosystem-based Adaptation: A Contribution to Sustainable Development' (2022), https://wedocs.unep.org/20.500.11822/41325 (accessed 4 April 2024).

[40] Ibid.

[41] Despite initial efforts by advocacy groups to integrate a comprehensive rights-based approach into the Agreement, negotiators chose to address a just transition and human rights separately. Originally, this decision had fragmented the endorsement of a unified rights-based approach within the Agreement. Johansson (note 30).

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(SDGs),[42] including SDGs 7 and 13, which jointly advocate for a transition to a low-carbon economy and the fight against climate change), underlines the central importance of human rights for achieving sustainable development. Additionally, Agenda 2030 underscores the importance of respecting human rights in business contexts, explicitly referencing the UNGPs.[43]

While the human-rights-based approach has natural appeal in a human rights setting, it also contains weaknesses that raise questions about its potential to address the current crisis. Specifically, the human rights regime has been criticized in so far as it does not fundamentally challenge the existing development paradigm that prioritizes economic growth over alternative models of development.[44] Similarly, inherent tensions within the human rights regime call into question its effectiveness in tackling structural injustice and inequality.[45] Moreover, some have suggested that the human rights regime itself may contribute to the problem rather than solely serving as a solution.[46]

At the same time, some of these critiques have contributed to the emergence of the recognition of Indigenous Peoples' rights as a distinct regime. This recognition, as currently framed within the body of law addressing Indigenous rights, highlights the need for a more comprehensive and inclusive approach to address the injustices and enduring inequalities Indigenous groups face within the broader human rights framework.

C. *Indigenous Peoples' Rights and Corporate Responsibilities*

Although the essence of Indigenous Peoples' rights diverges from the traditional understanding of human rights, Indigenous rights are embedded in a structure reminiscent of conventional human rights systems. In this regard, it follows from international law that states bear the primary duty to protect human rights, and therefore also Indigenous Peoples' rights. This duty requires states to establish adequate institutional mechanisms and legal frameworks for fulfilling the purpose of conventional human rights, such as the International Bill of Human Rights (IBHR) and specific instruments concerning the rights of Indigenous Peoples, as further explained below. In addition, the UNGPs further elaborate on the implications of this responsibility for states, while also explaining that businesses are responsible for complying with all applicable laws and for respecting human rights.[47] Furthermore, corporate actors are also expected to respect human rights, including the rights of Indigenous Peoples, independently of states' abilities or willingness to fulfil their human rights obligations.[48] This is especially pertinent in situations in which host nations fail to acknowledge the status of Indigenous Peoples or provide insufficient national protection. It is significant in many ways that the UNGPs refer to the IBHR and the ILO fundamental conventions as the minimum for corporate responsibility in this regard. In the current context, importantly, the fact that the IBHR is the minimum, also means that companies should exceed those baseline standards, particularly in situations involving Indigenous Peoples or their ancestral lands.[49]

[42] UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1 (2015).

[43] Ibid para. 67.

[44] See, for example, Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2008).

[45] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 2018); Susan Marks, 'Human Rights and Root Causes' (2011) 74 *The Modern Law Review* 57.

[46] David Kennedy, 'International Human Rights Movement: Part of the Problem? Boundaries in the Field of Human Rights' (2002) 15 *Harvard Human Rights Journal* 101.

[47] UNGPs (note 18).

[48] Ibid, Principle 11, commentary.

[49] Ibid, Principle 12, commentary.

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More particularly, when considering what human rights are to be applied to the situation of Indigenous Peoples, business actors must consider relevant provisions of general international law such as Article 27 of the ICCPR and instruments that are especially applicable to their situation,[50] namely ILO Convention 169 on Indigenous and Tribal Peoples and the UNDRIP.[51] Countries that have ratified ILO Convention 169 have committed themselves to involving Indigenous Peoples in decision-making and respecting their right to determine their own priorities for the process of development. This includes decisions that affect their lives, beliefs, institutions and spiritual well-being, as well as the lands they occupy or utilize and their economic, social and cultural development.[52]

With the adoption of UNDRIP, most countries have also recognized the collective rights of Indigenous Peoples to self-determination, which includes their right to autonomy and self-government in internal and local affairs, their collective rights to lands, territories and resources, and the right to participate in decisions affecting them through FPIC.[53] These rights grant Indigenous Peoples a distinctive status as both human rights holders and peoples entitled to collective rights under international law. Despite its legal status as a declaration and therefore international soft law, UNDRIP is considered to be the most significant and authoritative international instrument for guaranteeing the rights of Indigenous Peoples.[54] While its status as customary law remains contested,[55] its broad endorsement by states, international organizations and corporate mechanisms has reinforced its influence over the years.[56] In other words, both state and business actors are expected to uphold its provisions.

While states remain the primary recipient of UNDRIP, current trends underscore the importance of business actors exceeding the minimum human rights standards and considering contextually relevant human rights instruments, such as UNDRIP or ILO Convention No 169. This need has been reflected in the development of policies and guidelines by numerous international and regional financial and business governance institutions for both public and private projects impacting Indigenous communities.

[50] Ibid. See also National Contact Point Sweden, 'Final Statement by the OECD National Contact Points of Norway and Sweden in the Case Jijnjevaerie Saami Village – Statkraft SCA Vind AB (SSVAB)' (2015).

[51] International Labour Organization Convention (No. 169) concerning Indigenous and Tribal People in independent countries, 27 June 1989, 1650, UNTS 383 (entered into force 5 September 1991); United Nations General Assembly, 'Declaration on the Rights of Indigenous People' (adopted on 13 September 2007) UN Doc A/RES/61/295 (UNDRIP).

[52] ILO Convention 169, articles 6, 7.

[53] UNDRIP, articles 3, 4, 26 and 32.

[54] Overall, UNDRIP's status as the most authoritative instrument for Indigenous Peoples' rights is rooted in its comprehensive coverage, international recognition and normative influence. The Declaration has influenced national laws, policies and judicial decisions around the world. Many international organizations, UN bodies and countries have incorporated its principles into their legal frameworks, recognizing its normative authority.

[55] Given the unique nature of UNDRIP as an international law instrument—shaped over two decades with the direct involvement of rights holders—its classification as non-binding fails to reflect its true legal authority. For references addressing this issue, including its customary value, see, for example, James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment,' *Jurist* (3 October 2007). However, it is also argued that the narratives supporting the customary value of human rights law do little to ensure the enforcement of those rights. Shea Esterling, 'Looking Forward Looking Back: Customary International Law, Human Rights and Indigenous Peoples' (2021) 28 *International Journal on Minority and Group Rights* 1.

[56] On the corporate side, this includes the 2013 United Nations Global Compact's Business Reference Guide and the 2023 OECD Guidelines for Multinational Enterprises.

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In 2012, the International Finance Corporation (IFC) developed its Performance Standard 7 on Indigenous Peoples, which requires the FPIC of Indigenous Peoples in certain circumstances that directly and adversely impact them.[57] Furthermore, in a follow-up to its 2011 revision of the Guidelines for Multinational Enterprises, the OECD on its own or with other organizations has elaborated upon the responsibility of the private sector in relation to the rights of Indigenous Peoples.[58] In the OECD-Food and Agriculture Organisation (FAO) Guidance, a dedicated section on engagement with Indigenous Peoples highlights international instruments and standards (such as UNDRIP and ILO Convention No. 169) and recognizes the importance both for states and companies of ensuring that they protect and respect legitimate tenure rights.[59]

Although far from the reality of corporate practice, as evidenced by continuous UN reports addressing the situation of Indigenous Peoples,[60] it follows from the above that the corporate responsibility to respect the human rights of Indigenous Peoples as prescribed by the UNGPs is based on human rights due diligence (HRDD). However, the absence of mandatory and uniform HRDD demands and agreement on the substance of international legal standards concerning the implementation of the rights of Indigenous Peoples leads to a lack of clarity over what the rights of Indigenous Peoples entail in terms of the responses required of business actors to fulfil their corporate responsibility to respect. In turn, this contributes to the challenge of preventing human rights abuses related to business activities. In that regard, it has been argued that institutional guidelines 'still fall short of interpreting international human rights law.'[61] For instance, safeguarding policies and guidelines from the IFC and the OECD have not provided detailed explanations regarding the extent and significance of 'consent' in relation to the requirement of achieving FPIC. In practice, this lack of clarity supports damaging processes, as consent is occasionally misconstrued as merely necessary for consultation rather than a substantive requirement before advancing with a project.[62] Furthermore, even in cases in which domestic laws mandate HRDD, concerns arise over poorly crafted legislation, which may lead to superficially compliance-oriented, 'check box' human rights due diligence processes.[63]

Thus, while it remains uncertain whether HRDD can genuinely improve conditions for rights holders and address structural economic issues,[64] the need persists to clarify what the rights of Indigenous Peoples entail for corporate actors for them to respect human rights. The following sections of this article help respond to this need by analysing three disputes that have arisen because of the development of wind farm projects on the traditional land of Indigenous Peoples. We first briefly outline the trend and then describe and analyze each of the cases.

[57] International Finance Corporation, 'Performance Standard 7 Indigenous Peoples' (2012).

[58] OECD, 'OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector' (Paris: OECD Publishing, 2017) Annex B.

[59] OECD/FAO, 'Guidance for Responsible Agricultural Supply Chains' (OECD Publishing, 2016 Paris) 78–85.

[60] James Anaya, 'Extractive Industries and Indigenous Peoples' (2013) UN Doc A/HRC/24/41.

[61] José Francisco Calí Tzay, 'Green Financing – A Just Transition to Protect the Rights of Indigenous Peoples' (2023) UN Doc A/HRC/54/31, para 34.

[62] Ibid para 38. On the contested meaning of FPIC, see James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 67 *University of Toronto Law Journal* 435.

[63] Human Rights Council, 'Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability' (2018) UN Doc. A/HRC/38/20/Add.2, para 17.

[64] Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 *Leiden Journal of International Law* 389.

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III. Just Transition Litigation and the Rights of Indigenous Peoples

For several years, Indigenous communities in Europe, Africa and Latin America have contested the legality of numerous wind energy projects built without their community support,[65] often experiencing disappointing outcomes regarding their claims. However, a shift occurred in October 2021, when the Supreme Court of Norway ruled that the Fosen project violated human rights, as guaranteed under Article 27 of the ICCPR.[66] Similarly, in the same month, the Kenyan Environment and Land Court declared the title deeds for the land on which the Lake Turkana wind farm project was built to be unlawful. Representing several pastoralist communities, the plaintiffs argued that the construction of the wind-power plants infringed upon their human rights.[67] Moreover, in 2022, the licence for the Gunaa Sicarú wind park in Oaxaca, Mexico, was revoked as a result of a court decision to cancel energy supply contracts with Eólica Oaxaca, a subsidiary of the French company Électricité de France (EDF).[68] The case followed a request by the Indigenous community of Unión Hidalgo supported by the civil society group ProDESC that the contract be cancelled due to the wind energy project's impact on their traditional lands. While each court's decision developed and advanced distinct legal arguments, in all three cases the plaintiffs had appealed to the responsibilities of companies for their rights as Indigenous Peoples. On this basis, the following sections examine the *Fosen*, *Lake Turkana* and *Gunaa Sicarú* cases with a view to identifying insights for a rights-based approach to a just transition respecting the rights of Indigenous Peoples.

A. *Fosen*

In 2010, Norwegian authorities awarded licences for extensive wind farm development on the Fosen peninsula in central Norway. Finalized in 2019–2020 and comprising six wind farms, the industrial installation is located in an area where the local Sámi have practised reindeer husbandry since time immemorial. The Sámi are an Indigenous People, traditionally living across central and northern Norway, Sweden, Finland and northwestern Russia. Reindeer herding, which includes migrating with the reindeer between summer and winter pastures, is key to their livelihoods and a protected right at the national and international levels.

The Fosen wind farm project, led by the Fosen Wind company—a Norwegian joint venture backed by European investors—was initially authorized by the relevant authorities, as it was not deemed to violate Sámi human rights. Despite ongoing concerns that Sámi rights are not sufficiently protected at the domestic level, Norway remains one of the few countries to have ratified ILO Convention 169 and incorporated Article 27 of the ICCPR into its legal system. This has positioned Norway as having one of the more robust frameworks for safeguarding Indigenous rights while also providing legal certainty for companies and investors seeking to operate in the region. However, in its landmark *Fosen* decision in 2021, the Supreme Court of Norway ruled unanimously that the government-issued licences for the Roan and Storheia wind energy facilities on the Fosen peninsula were

[65] In this regard the following article does not target Indigenous-led initiatives, which may benefit them collectively as several case studies demonstrate in Canada. See Dorothée Cambou and Greg Poelzer, 'Enhancing Energy Justice in the Arctic' in David C Natcher and Timo Koivurova (eds), *Renewable Economies in the Arctic* (Routledge, 2021); Adrian Smith and Dayna Scott, 'Energy without Injustice?: Indigenous Participation in Renewable Energy Generation' in S Atapattu, C Gonzalez and S Seck (eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge University Press, 2021) 383–98.

[66] *Fosen* case (note 6).

[67] *Turkana* case (note 6).

[68] *Gunaa Sicarú* case (note 6).

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invalid because the licences violated the protection of Sámi rights under Article 27 of the ICCPR. The decision followed years of legal struggle where the Fosen Sámi had challenged the validity of the licences through national and international courts, including a petition to the OECD and the UN Committee on the Elimination of Racial Discrimination (CERD). In 2018, CERD urged the Norwegian government to temporarily halt the project, but the OECD National Contact Point petition had little impact in resolving the matter. Instead, it primarily advised BKM, one of the Fosen investors, to carry out appropriate due diligence, including ensuring FPIC.[69] As a result, the project went ahead over communities' objections while national lawsuits were still pending.

The Fosen decision is particularly significant because it marks the first time the Norwegian Supreme Court has recognized a violation of the human rights of the Sámi people concerning their culture.[70] Against this backdrop, three key aspects of the court's decision are particularly relevant for assessing the broader framework of corporate responsibility in the green transition. First, the court's assessment of the threshold for violations of Sámi rights under Article 27 is particularly significant, especially given that this provision is applicable in many countries worldwide. While Article 27 of the ICCPR primarily concerns the rights of minorities to culture, the Human Rights Council's broad interpretation of this provision includes protections for Indigenous individuals against actions that could significantly disrupt their cultural practices, such as reindeer husbandry.[71] In practice, this means that decision-making by relevant authorities regarding wind energy projects or any other initiatives affecting the Sámi way of life depends on determining whether a project crosses the threshold for a violation. Typically, only projects causing substantial negative impacts are prohibited by government authorities. Conversely, this interpretation also suggests that measures with limited impact on the way of life of minority groups may not necessarily amount to a denial of rights under Article 27 of the ICCPR.[72]

In opposition to the government's conclusions, the Supreme Court found in the *Fosen* decision that the project's interference was significant and thus constituted a violation of ICCPR Article 27. In determining the impact of the Fosen windmill project, the court also noted that the project must be seen in the context of other activities in the area, thereby implying consideration of the extent of existing as well as planned activities in the Fosen area and their cumulative impact on the local Sámi reindeer herders.[73] The reindeer herders' potential loss of their winter pastures and a substantial part of their income was key to deciding on the significance of the impact. Importantly, the court also considered Sámi knowledge as a basis for its assessment. In its decision, it took note of the environmental impact assessment commissioned by Fosen Wind but chose to emphasize the conclusions from an assessment conducted by the expert witness for the Nord-Fosen Sámi community.[74] Finally, the fact that the company was unable to remedy this loss in a manner congruent with the culture of the Sámi was also highlighted by the court. Contrary

[69] OECD National Contact Point of Switzerland, *Specific Instance Regarding the BKW Group Submitted by the Society for Threatened Peoples Switzerland – Follow-Up Statement*, Berne, 19 May 2022.

[70] *Fosen* case (note 6); Øyvind Ravna, 'The Fosen Case and the Protection of Sámi Culture in Norway Pursuant to Article 27 ICCPR' (2023) 30 *International Journal on Minority and Group Rights* 156.

[71] *Ivan Kitok v Sweden* (Communication No. 197/1985) UN Doc CCPR/C/33/D/197/1985 (Human Rights Committee, 1988).

[72] *Ilmari Länsman and others v Finland (Communication* No 511/1992) UN Doc CCPR/C/52/D/511/1992 (Human Rights Committee, 8 November 1994) para 9.4.

[73] Fosen case, note 6 para 115.

[74] Ibid para 89; Dorothée Cambou, 'The Significance of the Fosen Decision for Protecting the Cultural Rights of the Sámi Indigenous People in the Green Transition' in Dorothée Cambou and Ravna Øyvind (eds), *The Significance of Sámi Rights: Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (Routledge, 2023) 59.

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to arguments made by the wind-power company, the court found that monetary compensation to provide winter feeding—a method that is not traditionally used by Sámi reindeer herders—was inadequate to prevent a violation of Article 27 of the ICCPR.[75] As a result of this decision, the Supreme Court revoked the licence for the Fosen wind energy installation, though arguably with questionable timing, given that the construction of the turbines had already been finalized.

Second, in a just transition context, it is noteworthy that the violation of the human rights of the Sámi had occurred despite the necessary consultation required by national law. Considering the jurisprudence of the HRC as well as Norwegian case law, the Supreme Court observed that the presence or extent of consultation with the affected communities should not be considered a decisive factor. Notably, the court observed that undertaking consultation did not prevent a violation of Article 27 if the consequences of the interference were sufficiently serious. Thus, the court found that while consultation with minority groups was an important factor, it was insufficient in itself to prevent a violation of human rights if the negative effects were substantial.[76] The court's ruling rejected the argument presented by the wind power company, which had claimed that significant weight must be placed on consultation and involvement in the decision-making process.[77] In contrast, the court found that it was not an absolute requirement under the Convention that the minority had participated in the decision, although that, too, may be essential in the overall assessment.[78]

Third, the *Fosen* decision is also significant for highlighting the possible conflict between the promotion of the green shift and the protection of human rights. In its decision, the court examined and agreed with the wind energy company's assertion that the transition and increased production of renewable energy are important considerations in the overall assessment of wind farm development. However, it also underlined that Article 27 of ICCPR did not allow for a balancing of interests. According to the court, such balancing may only be permitted in the event of a conflict between fundamental rights (i.e., an explicit and direct conflict between Article 27 and another ICCPR article).[79] Taking into consideration the project development, the court observed that the windfarms could have been located in other locations less prone to interference with reindeer herding. Thus, the court did not reject the importance of expanding wind energy for the transition and its longterm ecological effects. Rather, it rejected the suitability of the chosen site because it placed a disproportionate burden on the Fosen reindeer communities when less intrusive development alternatives existed.[80] Contributing to its landmark character, the *Fosen* ruling signals that the green transition does not take priority over the obligations and responsibilities of states and companies towards human rights. Notwithstanding the urgency of climate action, as this decision suggests, policies and development projects supporting the green transition cannot override the human rights of the members of Indigenous minorities.

However, the controversy continued after the *Fosen* ruling, with the wind turbines remaining in place. After years of negotiation, agreements were finally concluded, first with the Southern Fosen Sámi group in late 2023 and early 2024 with the Northern Fosen

[75] Ibid para 149.
[76] Ibid para 121.
[77] Ibid para 52.
[78] Ibid para 121. Interestingly the decision did not engage with the question of FPIC, a concept that is also not embraced by Norwegian law currently despite the ratification of ILO Convention 169.
[79] Ibid para 143.
[80] Ibid.

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Sámi group.[81] Following a demonstration by reindeer herders and environmental activists in the government quarter,[82] a mediation process was initiated. As a result, the state has undertaken the responsibility to facilitate a process aimed at securing additional winter grazing areas outside the Fosen reindeer herding district. In this context, the *Fosen* case not only underscores the challenges of evaluating the effects of wind energy projects on human rights, particularly those of Indigenous communities but also lays bare the constraints to safeguarding human rights within legal frameworks such as Norway's. Moreover, it also reveals the hurdles to implementing substantive and adequate remedies, even after judicial recognition of human rights violations.[83]

B. Turkana

In the *Lake Turkana* case, the legality of the Lake Turkana wind energy project, the largest wind energy installation in Africa, was brought into question following a court decision by the Land and Environmental Tribunal of Kenya in October 2021.[84] Using windmills provided by the Nordic company Vestas and financed by various foreign investors, the wind farm was constructed in 2017 in the northern part of Kenya.[85] Comprising 365 wind turbines, along with a high voltage substation and power line, the project was deemed essential by the national authorities and investors for delivering affordable and clean energy to the country's population.[86] However, the project entailed the acquisition and privatization of 150,000 acres of community land through a 99-year lease to the company LTWP, approved by the Kenyan authorities but contested by local communities based on national and international law, including their rights as Indigenous Peoples.[87] While the company offered corporate social responsibility 'strategies' to gain local support, no adequate compensation was paid because of its narrow definition of Indigenous communities in the area, which side-lined several communities due to their lack of permanent settlement in the area.[88] Testimonies revealed that several communities were not recognized as Indigenous by the government and, as a result, were denied adequate protection—an ongoing issue in Kenya, which has faced similar accusations of failing to uphold Indigenous Peoples' rights despite endorsing the UNDRIP.[89] Ultimately, this situation triggered a lawsuit and a decision

[81] Government of Norway, 'Agreement between Sør-Fosen site and Fosen Vind'(18.12.2023), https://www.regjeringen.no/en/aktuelt/agreement-between-nord-fosen-siida-and-roan-vind/id3028614/ (accessed 23 April 2024); Government of Norway (2024), 'Agreement between Nord-Fosen siida and Roan Vind,' (6.3.2024), https://www.regjeringen.no/en/aktuelt/agreement-between-nord-fosen-siida-and-roan-vind/id3028614/ (accessed 2 February 2025).

[82] 'Norway Wind Farms at Heart of Sami Protest Violate Human Rights, Minister Says' *Reuters* (2 March 2023) https://www.reuters.com/world/europe/norway-wind-farms-heart-sami-protest-violate-human-rights-minister-says-2023-03-02/ (accessed 26 April 2024).

[83] For a discussion on the distinction between and challenges related to substantive and procedural remedies, see Karin Buhmann, 'Confronting Challenges to Substantive Remedy for Victims: Opportunities for OECD NCPs Under a Due Diligence Regime Involving Civil Liability' (2023) 8 *Business and Human Rights Journal* 403.

[84] *Lake Turkana* case (note 6).

[85] Nordfund, 'Lake Turkana Wind Power,' https://www.norfund.no/lake-turkana/ (accessed 9 April 2024).

[86] Government of Kenya, *Kenya Vision 2030* (Nairobi, 2007).

[87] In 2016, the court ordered LTWP to confine its activities to 87.9 acres but did not stop the construction of the project. Instead, the court referred the case for mediation by the Marsabit CA to encourage an out-of-court settlement. Considering the importance of the lands to the communities, it also requested that LTWP ensure that the communities would not be denied access the Lake Turkana land.

[88] Gargule A Achiba, 'Navigating Contested Winds: Development Visions and Anti-Politics of Wind Energy in Northern Kenya' (2019) 8 *Land* 7, 16.

[89] See in particular the decisions of the African Court of Human and Peoples Rights about rights of the Ogiek and Endorois. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of

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by the Land and Environmental Tribunal of Kenya that established a violation of procedural law, thereby indicating that the government and the companies responsible had built the Lake Turkana wind energy project illegally.[90]

From a rights-based approach focusing on Indigenous Peoples, the Turkana decision is interesting in several ways. At the outset, the judgment underlined how developers had violated national laws, even in the face of strong governmental support for the project. In its ruling, the Court determined that the land acquisition had been performed illegally, unconstitutionally and unlawfully, violating national procedural laws governing communal land acquisition.[91] Despite the involvement of the county council, the ministry of energy and the national treasury in the approval process of the land acquisition, the court found that the allocation of the land was unlawful because the process did not respect the law protecting the collective rights of the pastoral communities to lands. In contrast to LTWP's depiction of the land as 'an investable terra nullius',[92] the court acknowledged that it was collectively owned and used by multiple local communities.[93] This required specific procedures mandated for the acquisition of such land, which the court found LTWP and the national authorities had failed to adhere to.[94] Notably, the court found that the company had not followed essential procedural rules, such as issuing notice of the project, conducting hearings, recording resident representations and obtaining the majority approval of the county council members.[95] Consequently, by neglecting the mandated procedural rules of participation outlined in the Trust Land Act to regulate the process of land acquisition, the court concluded that LTWP had violated Kenyan law.

In addition, even though the court did not find a breach of the environmental, socio-economic and cultural rights of the communities as protected under international law, the decision raised several issues directly concerned with the rights of Indigenous Peoples. In their claim, the communities contended that the project would dispossess them of part of their ancestral land, hindering its use for seasonal and cyclic purposes like pastureland, grazing corridors and cultural activities.[96] They also alleged that the project failed to seek their FPIC, contrary to the IFC performance standards concerning Indigenous Peoples and cultural heritage. However, in its ruling, the court contended that inadequate evidence was presented to substantiate these allegations and concluded that the project did not violate the human rights of the local communities.[97]

As in the *Fosen* decision, the court scrutinized whether the project could be deemed legitimate based on its contribution to green energy production and the national development of Kenya. More specifically, arguments were presented regarding the project's 'benefit to the people of Kenya and more so on economic development.' Moreover, '[i]t was contended that Kenyans shall benefit from power generated from the wind power project.'[98] Its status as 'one of the largest single private sector funded investments in the history of the country' was also reported.[99] However, the court,

Endorois Welfare Council v. Kenya, 276/2003 (2003), African Commission on Human and Peoples' Rights v. Republic of Kenya, Judgment, Application No. 006/212 (2017).

[90] *Lake Turkana* case (note 6).

[91] Ibid para 142.

[92] Cormack Z and Kurewa A, 'The Changing Value of Land in Northern Kenya: The Case of Lake Turkana Wind Power' (2018) 10 *Critical African Studies*, 91. Achiba (note 88) 16.

[93] Ibid Achiba; *Lake Turkana* case, para 104–6.

[94] *Lake Turkana* case, paras 107–10.

[95] Ibid para 110.

[96] Ibid paras 5–6, 76.

[97] Ibid para 130.

[98] Ibid para 81.

[99] Ibid para 57.

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recognizing the project's scale, emphasized that appropriating such a significant amount of land for private use was a drastic step requiring strict adherence to the law.[100] The court acknowledged the project's alleged economic and social benefits, such as job opportunities and socio-economic contributions to local communities through the company's corporate social responsibility policy.[101] Nevertheless, it concluded that no benefits from the project could justify a blatant violation of the law.[102] The court explicitly stated that non-compliance with the law for trust land allocation could not be excused on the grounds of public interest, legitimate expectation, government policy or any other justification.[103] Additionally, the court emphasized that even with the company's legitimate expectation that the government had complied with the regulations when allocating the land, the law could not be circumvented. In this context, the court underscored the government's fundamental responsibility for failing to ensure legal compliance but concluded that, as a major investor in a multibillion-shilling project, LTWP 'should have undertaken careful and foolproof due diligence.'[104]

Ultimately, despite finding a violation, the decision also demonstrates the difficulties in providing remediation to communities negatively affected by wind-power projects. Even though the court determined that the plaintiffs had been denied the opportunity for just compensation, it refrained from deciding on the amount of compensation and delegated this task to the relevant institutions designated by law.[105] Moreover, as in the *Fosen* case, the court did not terminate the project, arguing that it was already completed and operational. While acknowledging that a demolition order could be a remedy for the violation, the court opted not to issue such an order. Citing the absence of a request from the plaintiff,[106] the court also justified its decision on the fact that the project had been approved at the highest level of the Kenyan Government and that the plaintiffs had delayed filing the lawsuit until several years after the land acquisition.[107] The court, constrained by the reality of the completed project, therefore granted the project proponents one year to rectify the land allocation in compliance with existing laws. Failure to do so within the specified timeframe would result in the land reverting to the community.[108] However, after the issuance of the decision, LTWP informed the court that no actions had been taken toward implementing the judgment, which also means that the project continues to operate illegally.

C. *Gunaa Sicarú*

In 2017, Eólica de Oaxaca, the Mexican subsidiary of Electricité de France (EDF), proposed building a 300-megawatt (MW) wind-power plant in the Isthmus of Tehuantepec, one of the world's windiest regions and the location of the lands of several Indigenous communities. This project, among the largest in Latin America, involved 115 turbines and the use of 4,700 hectares of land. EDF's decision to proceed with this venture, despite already operating three wind farms in the region, followed the Mexican government's opening of the market to private investments in renewable energy. However, several local Indigenous groups opposed the project, leading to legal challenges both domestically and internationally.

[100] Ibid para 147.
[101] Ibid para 119.
[102] Ibid para 119.
[103] Ibid para 121.
[104] Ibid para 157.
[105] Ibid para 134.
[106] Ibid paras 153–4.
[107] Ibid.
[108] Ibid para 158.

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In 2018, they filed a complaint with the OECD National Contact Point in France, withdrawing it in 2019 due to perceived ineffectiveness.[109] In 2022, their legal actions in Mexican courts proved decisive, resulting in a decision by the Mexican Land and Agrarian Tribunal to halt the project before completion.[110] While significant in itself, this decision also reveals the challenges Indigenous communities encounter in accessing judicial remedies against multinational corporations, even when mandatory human rights due diligence is required. At the time, France was one of the few countries in the world that had adopted legislation mandating human rights due diligence from its largest corporations. After reviewing the Mexican court's decision, this article also explores the project's scrutiny under the French duty of vigilance law (*Loi Devoir Vigilance*).

From the perspective of a rights-based approach to the green transition, the merit of the *Gunaa Sicarú* judgment lies in its recognition of the collective land rights of Indigenous Peoples, which led to the cancellation of the project licences. The 2022 ruling specifically emphasized the centrality of land ownership in revoking the lease contract for various project-designated plots of land. Despite the company's claim that the project was situated on private land, the court determined its location within communal lands, affording them inalienable, imprescriptible and non-sizeable status under national law. The process of ascertaining land ownership involved grappling with several conflicting and false testimonies from various experts and residents.[111] The court's decision revealed that the company had initiated negotiations for the project with selected individuals from the Unión Hidalgo community, including self-proclaimed 'landholders committee' members.[112] Usufruct contracts were then concluded with individuals declaring themselves as 'landholders', who were allegedly deceived in signing the lease contracts.[113] However, the court's ultimate recognition of the communal status of the land emphasized that Indigenous customary authorities held decision-making power in land governance. The court emphasized that all decisions regarding the land should be made through community assemblies, rendering contracts with individuals inadmissible.[114] This authority extended to critical matters such as developing Indigenous consultations for infrastructure projects, including wind-power infrastructure.[115] Consequently, the court determined that the lease contract was unlawful due to the disregard for laws safeguarding Indigenous collective land rights,[116] aligning with the findings of the *Lake Turkana* decision mentioned earlier.

While the court decision was successful in temporarily halting the project, its timing was too late to prevent adverse effects on the Indigenous communities. In this regard, the decision is valuable as it illustrates the challenges in upholding the rights of Indigenous Peoples when public authorities inadequately protect them in practice. In a violation of the rights of Indigenous Peoples, including the standard of FPIC, as recognized under Mexican Law and re-affirmed by the court, it was effectively only several months after granting licences for the project that the Mexican authorities decided to consult the affected communities, amidst unrest.[117] Research has shown that Eólica de Oaxaca initially

[109] OECD Watch, 'Complaint: Union Hidalgo vs. EDF Group – EDF's Violation of FPIC at Wind Energy Park in Mexico,' available at https://www.oecdwatch.org/complaint/union-hidalgo-vs-edf-group/ (accessed February 2025).

[110] *Gunaa Sicarú* case, note 6.

[111] Ibid para 2.

[112] Ibid para 12.

[113] Ibid para 5.

[114] Ibid para 19–20.

[115] Ibid para 20.

[116] Ibid.

[117] The Mexican Federal Court acknowledged these breaches of FPIC in its October 2018 ruling, compelling the Mexican authorities to conduct appropriate consultations in alignment with FPIC standards outlined in

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opposed any dialogue and 'tried to proceed without the consent of the community.'[118] Moreover, subsequent research has also revealed that the project caused divisions and clashes among community members, a phenomenon observed in various other wind energy development projects in Mexico,[119] as well as in Kenya, as experienced in the *Turkana* case. In a context in which land ownership and use are poorly documented, recognized or contested, the development of wind energy projects can either create or exacerbate division and conflict among individuals and communities. This trend often arises from the process of privatizing communal land, which imbues it with a 'new value' yet leads to internal tensions jeopardizing the livelihoods and traditional lifestyles of Indigenous Peoples.[120] Whether these divisions and conflicts occur as a result of companies' tactics to promote their business and interests or are due to internal struggles within Indigenous communities, whose members are often split over the potential benefits of the project, the impacts are profound and shape the socio-economic landscape in a manner that can perpetuate existing injustices and create new ones.

In this context, the question of the responsibility of the parent company, EDF, for the adverse impacts of the development of the Gunaa Sicarú project and the violations caused by its subsidiary also becomes a critical issue. To protest the development, a lawsuit was additionally filed in France by representatives of the Indigenous Zapotec community of Unión Hidalgo, alongside two NGOs—ProDESC and the European Center for Constitutional and Human Rights (ECCHR)—against EDF based on France's duty of vigilance law. This law was the first to require large companies to establish and implement 'reasonable vigilance measures to identify the risks and prevent severe impacts ... resulting from the activities of the company and those of the companies which it controls.'[121] In their legal proceedings in France, the plaintiffs argued that EDF had failed to adhere to the Indigenous community's right to effective consultation regarding the Gunaa Sicarú wind park project, thereby infringing the community's entitlement to FPIC.[122] In November 2021, the Paris Civil Court, during preliminary legal processes, dismissed a plea to halt construction of the project, citing procedural reasons.[123] Nevertheless, the court confirmed its authority in matters associated with the duty of vigilance law and specified that a trial would be held against EDF's headquarters rather than its subsidiaries. However, the French lawsuit did not come to fruition, as it remained stalled in legal proceedings. As such, the obligation to safeguard the rights of Indigenous Peoples based on due diligence requirements remains largely untested. In sum, whether the *Gunaa Sicarú* case heralds a new era of accountability for multinational corporations operating in Indigenous territories or simply serves as a singular instance of legal intervention demonstrating the shortcomings of the current system, its impact underscores the ongoing need for robust mechanisms to ensure the protection of Indigenous rights in the context of the green transition.

international law. First District Federal Court in State of Oaxaca, Mexico, judicial decisions on the writs of amparo no. 376/2018, 377/2018 and 554/2018 (2018).

[118] Ramirez and Böhm (note 25).

[119] Ibid 13. See also Alexander Dunlap, 'The "Solution" Is Now the "Problem:" Wind Energy, Colonisation and the "Genocide-Ecocide Nexus" in the Isthmus of Tehuantepec, Oaxaca' (2018) 22 *The International Journal of Human Rights* 550.

[120] Ibid.

[121] France's duty of vigilance law, Comm. code, art. L. 225-102-4, para. 3.

[122] ProDesc, 'UN Experts Call on All Électricité de France (EDF) Key Stakeholders to Uphold Their Human Rights Obligations in the Development of a Wind-farm in Unión Hidalgo, Mexico'(2021), ps://prodesc.org.mx/en/un-experts-call-on-all-edfs-key-stakeholders-to-uphold-their-human-rights-obligations-in-the-development-of-a-wind-farm-in-union-hidalgo-mexico/ (accessed 9 April 2024).

[123] European Centre for Constitutional and Human Rights, 'EDF in Mexico: Paris court misses opportunity to prevent human rights violations French wind park project continues to endanger Indigenous community' (01.12.2021).

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IV. Insights from the *Fosen*, *Turkana* and *Gunaa Sicarú* Cases

The court decisions in the Fosen, Lake Turkana and Gunaa Sicarú cases epitomize the struggle of Indigenous Peoples against wind energy projects initiated on their traditional lands without their community's support. All three cases also point to the need to reinforce the human rights responsibility of companies and highlight to different extents the importance of general human rights, including the rights of Indigenous Peoples, in evaluating the accountability of wind energy companies for their impacts on Indigenous communities. As the cases show, the fact that a wind company operates in a country being bound by ILO Convention 169 is no guarantee that adequate processes or institutions are in place for Indigenous Peoples to be involved in decision-making, nor that the government's licensing process takes that into account. The same can be said for a company operating in an OECD country, like Norway. As the *Fosen* case shows, this does not by default translate into adequate procedures on the part of the government to ensure Indigenous Peoples' rights in the context of business operations, such as wind farm projects. This has important implications for companies to grasp their responsibility to respect human rights fully: they need to act, and undertake their due diligence, bearing in mind their own full responsibility to ensure the rights of Indigenous Peoples throughout the process.

Moreover, the fact that none of the courts provided an adequate remedy—especially with the *Fosen* and *Turkana* decisions requiring an agreement after the project's completion, and the *Gunaa Sicarú* case still ongoing—highlights a general gap in legal protection for Indigenous groups affected by the wind industry. These cases also demonstrate broader challenges in securing remedy, particularly when considering the extra-domestic grievance mechanisms, such as those provided by the OECD or the UN CERD, which had all failed to alter the course of the concerned projects.

Based on the three courts' decisions, this next section presents key insights from the *Fosen*, *Turkana* and *Gunaa Sicarú* cases for the responsibility of corporations in the green transition. Subsequently, we outline the framework of a rights-based approach to addressing the situation of Indigenous Peoples with a view to ensure that the energy transition is just when it comes to impacts on these groups.

A. *Implications for the Responsibility of Corporate Actors for the Rights of Indigenous Peoples*

Five important lessons can be drawn from the *Fosen*, *Turkana* and *Gunaa Sicarú* court decisions on the responsibility of corporate actors in the green transition. At the outset, it is important to note that compliance with national law alone is insufficient for companies to fulfil their responsibility to respect the rights of Indigenous Peoples. All three cases serve as a clear illustration that national legislation and public authorities often fail to fulfil their duties to protect the rights of Indigenous Peoples. While a stronger commitment to Indigenous Peoples' rights at the domestic level is likely to provide better safeguards for their human rights,[124] these protections remain insufficient when governments prioritize competing interests, such as those of the green transition. As the outcomes of these cases demonstrate, the mere fact that a wind company operates in a country that has ratified ILO 169 (as in Mexico and Norway) or has committed to the UNDRIP and is bound by the ICCPR (as is the case with all three countries) does not guarantee adequate protections. The Fosen case, for instance, illustrates that even in Norway—widely regarded as one of the world's most robust democracies—the protection of Indigenous rights remains inadequate.

[124] The fact that Norway and Mexico have ratified ILO Convention 169 is reflected, to some extent, in the stronger regulatory requirements concerning the rights of Indigenous Peoples that companies must consider during the licensing process.

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Given their independent responsibility to respect human rights, business actors should consequently not assume that adherence to national law equates to compliance with international standards on Indigenous rights. In accordance with the UNGPs, they should undertake human rights due diligence, even when not mandated by national law, to ensure that their activities do not infringe or contribute to violations of Indigenous Peoples' rights. Accordingly, they should identify and assess any actual or potential adverse impact of a project and take measures to mitigate and remedy interferences and violations when necessary. Nonetheless, as evidenced by the French case prior to the Mexican *Gunaa Sicarú* decision, mandatory due diligence is also no guarantee that companies will deliver fully on their corporate responsibility to respect human rights. In this context, examining corporate responsibility inevitably raises questions about the adequacy of remedial mechanisms to ensure the accountability of business actors, both within their host countries and their home states.

Following this, the first lesson is that upholding the rights of Indigenous communities to the governance of their lands and resources is indispensable for embracing a rights-based approach to promote justice in the transitions. Despite limited recognition of their self-determining authorities, which varies greatly from one country to another, as evidenced in the case of Norway, Mexico and Kenya, Indigenous communities possess their own governance structures and internal laws that regulate their ancestral territories. Businesses must acknowledge the collective land rights of Indigenous Peoples, granting them decision-making authority over their lands. Land stands as the cornerstone of Indigenous communities' lives and cultures, serving as the foundation for the exercise of their self-determination rights. Respect for self-determination and land rights is also what may differentiate community-led initiatives from development projects that Indigenous Peoples do not control. While the former uphold Indigenous governance and decision-making, the latter are often met with Indigenous opposition because they undermine local autonomy and disregard the community's needs and values, all under the guise of what is portrayed as sustainable development. However, when deprived of the right to access and utilize their lands, territories and resources, Indigenous Peoples' ability to shape their own development is compromised, and their fundamental rights are endangered.

Yet, because numerous countries fail to acknowledge and effectively protect Indigenous territorial and land rights, businesses are allowed to operate on lands that can be considered unceded, unlawfully expropriated or unfairly appropriated. As illustrated by the *Fosen*, *Lake Turkana* and *Gunaa Sicarú* cases, national authorities often fail to secure land rights adequately, either by neglecting to recognize the ownership and usage rights of local communities or by willingly omitting protection measures to favour specific development interests. Consequently, businesses are faced with the responsibility of ensuring that those rights are properly safeguarded before initiating wind energy projects. The situation is further complicated when corporate actors fail to recognize Indigenous claims to land or face unsettled land claims between communities. When disregarding or marginalizing certain claims, corporate actors not only run the risk of curtailing the rights of communities but also perpetuating patterns of dispossession and subjugation, potentially leading to the emergence of new forms of injustice. In fact, as specifically reported in relation to Turkana and Gunaa Sicarú, development initiatives can exacerbate divisions or conflicts among communities and their members.[125] By introducing new (economic) value to the land, wind energy projects create a complex mix of outcomes: while local communities may seek to share in the perceived benefits of the project, they also

[125] Zoe Cormack and Abdikadi Kurewa, 'The Changing Value of Land in Northern Kenya: The Case of Lake Turkana Wind Power' (2018) 10 *Critical African Studies* 89.

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face new forms of exclusion.[126] In addition, the development of such projects can catalyze detrimental socio-economic processes impacting communities' sense of belonging to the land.[127] This underscores the need to protect the collective rights of Indigenous Peoples, which inevitably raises complex legal and political challenges when the state fails to recognize them in practice.

Second, while consulting with Indigenous Peoples is crucial, it should not be considered as a comprehensive and exhaustive measure. The significance of adequate consultation was underscored in all three court rulings: *Fosen*, *Gunaa Sicarú* and *Turkana.* Without proper consultation, involving the relevant representative authorities, the decision-making process for wind projects can be compromised, as highlighted in the *Gunaa Sicarú* and *Turkana* decisions. In accordance with international law, adequate consultation with Indigenous Peoples requires FPIC. The standard mandates consultation through Indigenous representatives for free and informed consent before approving projects affecting their lands.[128] It applies to states and business actors, regardless of national legislation. Several institutions and international organizations, including the OECD, increasingly highlight FPIC as a fundamental aspect of consultation, emphasizing the need for 'meaningful' engagement as a due diligence requirement.[129] In this regard, FPIC is now understood as the basic requirement for ensuring meaningful consultation. Nonetheless, it is important to underline that achieving FPIC should not be viewed as an end in itself and does not justify harmful practices against Indigenous Peoples. This aspect was particularly emphasized in the *Fosen* decision in relation to the consultation procedure.[130] Thus, from an Indigenous rights-based perspective on a just transition, although consultation with Indigenous Peoples is crucial for respecting their rights, consultation must be recognized as just one aspect of the rights that should be upheld by states and corporate actors.

Third, environmental or social impact assessments must incorporate the rights and knowledge of Indigenous Peoples. Business or governmental authorities often determine the impact of energy projects on the rights of Indigenous Peoples, and this task is commonly delegated to experts and scientists who may not always involve Indigenous Peoples in the assessment process. The *Gunaa Sicarú* and *Fosen* decisions underscore the importance of valuing the voice and knowledge of Indigenous representatives in establishing a violation. However, the court in the *Turkana* case was unable to find sufficient evidence to confirm a human rights violation, prompting questions about whether Indigenous rights and knowledge were adequately considered throughout the proceedings. In fact, the court's lack of engagement with international law and human rights in its decision is also a reminder that the language of human rights is not equally favoured by all state institutions in the world. Thus, to ensure an Indigenous Peoples' rights-based approach to a just transition, one crucial consideration is the integration of the rights of Indigenous Peoples throughout the entire development process and the inclusion of their knowledge into impact assessments of wind energy projects taking place on their lands. Fourth, ensuring culturally appropriate and timely mitigation and remedy measures is imperative. The *Fosen* ruling emphasizes that monetary compensation alone may not adequately address the impacts of projects, stressing the need for business operators to design mitigation plans

[126] Ibid.

[127] Jake Lomax, Naho Mirumachi and Marine Hautsch, 'Does Renewable Energy Affect Violent Conflict? Exploring Social Opposition and Injustice in the Struggle over the Lake Turkana Wind Farm, Kenya' (2023) *100 Energy Research & Social Science* 103089.

[128] UNDRIP, art 32.

[129] UNGPs (note 18) Principle 18 with commentary.

[130] *Fosen* case, note 6, para 121.

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that respect the cultural rights of Indigenous Peoples.[131] From a legal perspective, it is crucial to refrain from initiating the construction of wind power plants while legal disputes are pending. The insights that may be gained from the *Fosen* and *Turkana* decisions highlight that despite official approval and strong support, a project can still be deemed illegal, posing challenges to identifying suitable remedies once a wind farm is built on Indigenous lands in violation of their rights. Both cases illustrate the court's difficulty in finding such remedies, due to the operational status of the projects. Importantly, none of these decisions has provided a satisfactory resolution to how Indigenous communities can be appropriately compensated for the harm caused by these projects. Drawing on *Guinaa Sicarú* and *Turkana*, it also becomes apparent that the adverse effect on Indigenous communities often exceeds the benefits provided by the development project, particularly when the communities do not reap the rewards of the energy generated by the project. Furthermore, merely proposing a wind energy project can also foster division, exacerbate tensions or incite conflicts among communities, implicating wind energy developers in a complex web of social responsibility that frequently remains unaddressed. Despite the urgency of advancing renewable energy projects for the green transition, it is therefore essential to prioritize the protection of Indigenous Peoples' rights before fast-tracking project development. This distinction is pivotal to determining the just or unjust nature of projects.

Finally, widespread support for wind energy projects as a matter of public interest in advancing the green transition does not justify legal violations or the infringement of the rights of Indigenous Peoples. This is explicitly emphasized in the *Fosen* and *Turkana* decisions. Regardless of the perceived benefits, including those stemming from corporate social responsibility initiatives, wind energy ventures must adhere rigorously to national and international legal frameworks, including human rights and the rights of Indigenous Peoples. However, as noted, not all states are equally committed to safeguarding these rights and often fail to provide adequate protection. This underscores the crucial role of businesses in being aware of their role in upholding Indigenous rights, as companies cannot solely rely on host states to ensure adequate protections. This commitment is key to ensuring that the transition supports renewable energy production without perpetuating patterns of discrimination, dispossession or subjugation. At the same time, it also raises important questions about how to frame corporate responsibility and accountability in safeguarding the rights of affected communities.

B. *Framing a Rights-based Approach to Promote Just Transitions*

The insights provided from the *Fosen*, *Turkana* and *Gunaa Sicarú* cases underscore the need to adopt a rights-based approach prioritizing the rights of Indigenous Peoples to ensure justice in the green transition. However, the application of a rights-based approach to the situation of Indigenous Peoples extends beyond the conventional understanding of human rights law and creates unique challenges for conceptualizing and applying a regime of responsibilities that guarantees the rights of Indigenous Peoples.

In this context, a rights-based approach features the rights of Indigenous Peoples both as human and collective rights.[132] This stems from the fact that Indigenous Peoples possess rights as distinct communities to self-determination in international law, encompassing political rights of self-government as well as the rights of individuals under classical human

[131] *Fosen* case, note 6, para 149. While benefit agreements have the potential to ensure responsible business conduct, their effectiveness remains uncertain, particularly in cases involving development on traditional Sámi land. See Rasmus Kløcker Larsen and others, 'Negotiated Agreements and Sámi Reindeer Herding in Sweden: Evaluating Outcomes' (2024) 0 *Society & Natural Resources* 15.

[132] Duncan Ivison, *Can Liberal States Accommodate Indigenous Peoples?* (Polity Press 2020) 77–8.

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rights law. In challenging the liberal interpretation of human rights, which assumes that rights, framed as equal citizenship rights, form an unproblematic basis for a 'common emancipatory project',[133] the approach, when applied to the situation of Indigenous Peoples, encompasses their collective right to self-determined development. This is due to the injustices endured by Indigenous Peoples, including colonization and dispossession of their lands, territories and resources, which have hindered their ability to exercize their right to development in alignment with their own needs and interests.[134] This said, the question of which communities can claim the status and rights of Indigenous Peoples is clearly a vexing one,[135] posing significant challenges for companies operating in states that partially recognize Indigenous Peoples and their rights. Even though companies will face significant challenges—such as navigating conflicting claims, —community self-identification remains nonetheless a crucial element in addressing government failures to recognize certain groups.[136]

Second, considering their collective rights to self-determination, the application of a rights-based approach implies that Indigenous Peoples possess not only the right to be included in development projects affecting their land, territories and resources but also the right to control the direction of development, allowing for the establishment of alternative development paradigms.[137] This contrasts with the conventional understanding of the human rights-based approach at the United Nations level, which emphasizes participation and inclusion of individuals and communities in decision-making processes without challenging the contested development paradigm that is currently championed by Western industrialized countries and most postcolonial nation-states at the expense of Indigenous Peoples.[138] Whereas the court decisions examined in this article largely fail to provide a detailed assertion of the right of Indigenous Peoples to self-determination, this right represents the cornerstone of their empowerment in shaping their future development in accordance with their own needs.

Additionally, in theory, a rights-based approach also provides the opportunity to integrate considerations of collective rights for both humans and non-human entities. This aligns with the development of Indigenous worldviews and ecocentric legal philosophies, which perceive humans as integral parts of a broader community of beings, interconnected with the Earth's welfare as a whole.[139] This conceptualization of a rights-based approach aims to ameliorate the traditional conceptualization of human rights that overlooks the specific situation and rights of Indigenous Peoples and tends to favour

[133] Ibid.

[134] UNDRIP, preamble.

[135] Andrew Erueti, *The UN Declaration on the Rights of Indigenous Peoples: A New Interpretative Approach* (Oxford University Press, 2022).

[136] It is widely agreed that a rigid definition fails to capture the diversity of self-identifying Indigenous groups. The UN recognizes Indigenous Peoples based on key characteristics, emphasizing self-identification, which is essential for self-determination and the recognition of their rights and status. See UNDRIP, art 33.

[137] Jérémie Gilbert and Corinne Lennox, 'Towards New Development Paradigms: The United Nations Declaration on the Rights of Indigenous Peoples as a Tool to Support Self-Determined Development,' *The United Nations Declaration on the Rights of Indigenous Peoples* (Routledge, 2020). Cathal Doyle and Jérémie Gilbert, 'Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"' (2011) 8 *European Yearbook of Minority Issues Online* 219.

[138] Victoria Tauli-Corpuz, 'Indigenous Peoples' Self-Determined Development: Challenges and Trajectories', *Indigenous Peoples' Self-Determined Development* (Tebtebba, 2010) 119–21; See alsoLauren E Eastwood, 'Resisting Dispossession: Indigenous Peoples, the World Bank and the Contested Terrain of Policy' (2011) 5 *New Global Studies*.

[139] Jérémie Gilbert, 'The Rights of Nature, Indigenous Peoples and International Human Rights Law: From Dichotomies to Synergies' (2022) 13 *Journal of Human Rights and the Environment* 399.

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theories based on anthropocentric assumptions.[140] This finding is notably important for the conceptualization of impacts assessment, which often adopts a narrow understanding of the environment in contrast with Indigenous Peoples' holistic relations with nature.

Finally, the fact that Indigenous Peoples possess collective rights challenges the traditional notion that states are the sole authorities governing land, territories and resources. In this light, the articulation of business obligations towards Indigenous Peoples, increasingly prominent in legal disputes involving renewable energy projects, presents complex and unresolved dilemmas. Particularly challenging is the delineation of corporate responsibilities regarding Indigenous Peoples' rights in the context of ongoing land disputes or inadequate state protection. Thus, while the UNGPs offer a foundational framework for addressing the relationship between corporate entities and Indigenous Peoples through human rights due diligence, persistent challenges within the current regime remain.

V. Conclusion

Addressing the responsibility of the wind energy business for the rights of Indigenous Peoples, this article discussed three landmark court cases in which Indigenous communities have contested the development of a wind energy project on their lands. In the absence of a comprehensive definition of what a just transition entails, there is a need to untangle the human rights dilemma around renewable energy development projects and specify what such projects mean in relation to the rights of Indigenous Peoples. The article contributes to addressing that need through an analysis of court rulings in the *Fosen* (Norway), *Turkana* (Kenya) and *Gunaa Sicarú* (Mexico) cases. In each of the disputes, the affected Indigenous communities had contested the local project for years through different types of remedial mechanisms at the domestic and international level, through domestic and foreign courts as well as international monitoring bodies. Whereas extra-domestic grievance mechanisms were ineffective in resolving the issue, at the domestic level, the court rulings established that all projects were unlawful and that the project developers had infringed various laws pertaining to the protection of the rights of Indigenous Peoples to lands and culture.

We applied a rights-based approach to Indigenous Peoples' rights in the context of a just transition, and, based on our analysis, posited that such an approach is also valuable for helping governments and companies play their part in creating a green transition that upholds those rights in the spirit of justice for Indigenous Peoples. Under the UNGPs, businesses are responsible for respecting human rights, even when states fail in their duty to protect them. Consequently, the effectiveness of this rights-based approach largely depends on companies' knowledge, understanding and unbiased support of Indigenous rights, regardless of the level of state protection. As the cases discussed here demonstrate, among other things, this requires that companies ensure meaningful and adequate involvement of Indigenous Peoples throughout the process and uphold their rights. We propose that the rights-based approach to just transitions be used as an analytical lens for assessing responsible business behaviour and ensuring the rights of Indigenous Peoples. It allows communities and activists to claim fairness and inclusivity in the green transition and business and government actors to operationalize the notion of justice. Moreover, it may provide an analytical lens for scholars and civil society groups to assess the congruence between strategies and policies supporting the green transition and aims to promote justice.

[140] Ibid 403.

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However, we concede that the use of such an approach raises important practical challenges. At the outset, accepting self-determination in the governance of land, resources and territories as the central feature of the rights-based approach means that the question of land rights, including ownership, access and use by Indigenous communities, must be addressed as the first order of business preceding all development. However, it also means that business actors will inevitably be confronted by the complexities raised by the settlement of land claims or the difficulty of assessing whether those lands are adequately protected by the state. These issues could also fundamentally disrupt government and business development initiatives, even when supported by a democratic state and driven by green transition goals.

Furthermore, when businesses are faced with respecting land rights and determining whether Indigenous Peoples' rights are protected by the state, they are placed in the position of having to assess the legitimacy of state protection. However, this risks positioning business actors as the primary authorities in deciding whether land acquisition complies with Indigenous rights. From the perspective of a rights-based approach, the dilemma therefore remains: can Indigenous Peoples' land rights be adequately protected when neither states nor businesses can be considered impartial or legitimate actors in ensuring the protection of Indigenous lands, territories and resources?

Applying the rights-based approach to the three cases, we argued that some lessons could nonetheless be drawn. In short, companies should not assume that following national law is sufficient to ensure respect for human rights. Moreover, simply organizing consultations with Indigenous communities is an inadequate measure for ensuring that their rights are meaningfully guaranteed. Finally, mitigating the negative effects of development projects by providing monetary compensation or reparations that are inconsistent with Indigenous culture is an insufficient remedy. We also identified the implications of corporations' duty to respect human rights and discussed the shortcomings, illustrated by the cases, of existing mechanisms for a just transition that respects Indigenous Peoples' rights, particularly in relation to land governance, involvement in licensing processes, and remedy mechanisms.

Finally, we propose that a rights-based approach to a just transition (RBAJT) must go beyond the well-established human rights-based approach. An RBAJT represents a shift from a narrowly defined, state-centric human rights framework to a more expansive understanding of rights and responsibilities. This broader perspective emerges from a comprehensive recognition of how domination and injustice are shaped by historical, political, material, epistemic and cultural relations. In other words, this approach calls for the inclusion of both individual and collective rights, as well as responsibilities that extend beyond the state and traditional governance models. While its transformative potential depends on how fully these elements are considered, an RBAJT offers a crucial framework for embedding justice more deeply at the core of the green transition.

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