Just Energy Transition

The way to go for Africa

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LEGAL PRACTITIONERS & ARBITRATORS

Introduction

Last year, the Conference of Parties ("COP 28") took place in Dubai, UAE, featuring conversations and a renewed commitment to lay the ground work for a swift, just and equitable transition from fossil fuels, underpinned by deep emissions cuts and scaled-up financing. Africa's leaders at the event spoke as one, clamouring for a Just Energy Transition that reflects its developmental needs.[1] This collective stance of African countries on this issue is borne out of two immutable truths – Africa has contributed the least to global warming,[2] and the economies of most African countries are largely dependent on fossil fuels and cannot survive a rapid switch.

What brings the situation to a boil is that, given the stance of most financing institutions and countries in the West, African nations will no longer be able to attract external financing for energy projects if measures are not put in place to reduce carbon emissions as expected under the Paris Agreement. Already, energy sufficiency has remained a wistful dream for many African countries, and lack of finance has contributed largely to this debacle.[3]

By 2040, a significant drop in fossil fuel investment is expected globally. The prognosis is rather pessimistic, so much so that corporate giants in the global oil and gas industry are making calculated moves to integrate renewables into their investment portfolios. Without major policy and regulatory action, the current trajectory will lead most African countries to less energy security, less energy access and contracting economies.

But how did we get here? How did a global conundrum for which Africa accounts for less than 0.7% become such an important conversation that can make or mar many countries on the continent? Should Africa be excluded from current net zero targets, which seem better suited for more responsible parties like China, the United States, and the entire Middle East, which account for 7.1%, 14.4%, and 19.5% of global carbon emissions, respectively?[4] Or should Africa's path to net-zero be subsidised positively by more developed economies?

In proffering answers to these critical questions, this paper will investigate the origin of 'Just Energy Transition' and the reasons for the clamour by African leaders to be given the right to chart their own course to net zero.

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1. Revisit the interview 'The World is Looking at Climate Financing; To Attract it, We Must do the Work' by Mr Sina Sipasi, Partner and Head of the Energy and Natural Resources Practice Team, AELEX where this concept was discussed in some detail. Available online at https://www.linkedin.com/posts/aelexpartners_businessday-interview-with-sina-sipasi-activity-7110598160145629184-ubJb?utm_source=share&utm_medium=member_desktop.
2. Amadou Sy, "Africa: Financing Adaptation and Mitigation in the World's Most Vulnerable Region." Available online at https://www.brookings.edu/wp-content/uploads/2016/08/global_20160818_cop21_africa.pdf.
3. About 600 million people lack electricity and 970 million lack clean cooking fuel in Africa – Ahunna Eziakonwa, 1 November 2023, Available online at https://www.undp.org/africa/ticad/stories/just-energy-transitions-development-priority-africa.
4. AQAL Group, IEA (2021) 'The Picture of Inequality: CO2 Emissions per Capita and by Country in 2019'. Available online at https://aqalgroup.com/2019-worldwide-co2-emissions

2.0 Overview of the Paris Agreement

On 12 December 2015, at COP 21 in Paris, France, State Parties to the United Nations Framework Convention on Climate Change[5] ("UNFCCC") reached an agreement (hereinafter referred to as the "Paris Agreement"/ "Agreement")[6] to combat climate change and fast track the actions to reduce global temperatures below 2 degrees Celsius, i.e., 1.5 degree Celsius, above pre-industrial levels. The Paris Agreement sets out energy transition targets to reduce carbon emissions globally by at least 45% by 2030 and achieve net zero by 2050.

In this context, net zero is indicative of when the greenhouse gases emitted into the atmosphere globally are equivalent to the greenhouse gases being removed from the atmosphere. It will entail a simultaneous reduction of emissions into the atmosphere and removal of emissions from the atmosphere.

Some of the notable highlights under the Paris Agreement include:[7]

- Long-term temperature goal:[8] The Paris Agreement seeks to strengthen global response to climate change by requiring State Parties to limit global temperature increase to 1.5 degrees Celsius. The goal recognises that efforts must be sustained and scalable since climate change and global warming are not static concepts.
- Mitigation:[9] State Parties are to maintain a "Nationally Determined Contribution" (NDC) and to pursue domestic measures to achieve them. The Paris Agreement also requires State Parties to update their NDCs every five (5) years and provide information necessary for clarity and transparency,[10] which suggests some flexibility as the basis for a just energy transition.
- Global Peaking and Climate Neutrality:[11] State Parties are required to reach global peaking of greenhouse gas emissions (GHGs) as soon as possible. The Paris Agreement recognises that peaking will take longer for developing country Parties. Thus, this strategy is hoped to balance anthropogenic emissions by sources and removals by sinks of GHGs in the second half of the century.
- Sinks and reservoirs:[12] The Paris Agreement encourages State Parties to conserve and enhance, as appropriate, sinks and reservoirs of GHGs, including forests.
- Adaptation:[13] The Agreement recognises that adaptation is a common problem faced by all Parties. As a result, State Parties are implored to engage in adaptation through the formulation and implementation of National Action Plans. Also, State Parties are to submit and periodically update an adaptation strategy describing their priorities, needs, plans, and actions.
- Loss and Damage:[14] The Agreement recognises the need for State Parties to avert, minimise, and address loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage in our ecosystem.

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5. Adopted May 9, 1992. 1771 U.N.T.S. 107, 165; S. Treaty Doc No. 102-38 (1992); U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 I.L.M. 849 (1992).
6. Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015. U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).
7. UNFCC, 'Key Aspects of the Paris Agreement'. Available online at https://unfccc.int/most-requested/key-aspects-of-the-paris-agreement#:~:text=The%20Paris%20Agreement's%20central%20aim,further%20to%201.5%20degrees%20Celsius
8. Article 2 of the Paris Agreement.
9. Article 4 of the Paris Agreement.
10. Nigeria's last updated NDC is to reduce emissions level by 47% by 2030. Available online at https://climatechange.gov.ng/wp-content/uploads/2021/08/NDC_File-Amended-_11222.pdf
11. Article 4 of the Paris Agreement.
12. Article 5 of the Paris Agreement.
13. Article 7 of the Paris Agreement.
14. Article 8 of the Paris Agreement.

Binding Effect of the Paris Agreement

The Paris Agreement was adopted by 196 Parties at the UN Climate Change Conference (COP 21) in Paris, France, and entered into force on 21 May 2016, after 55 countries had ratified it. Most African nations are signatories to it[15] and are therefore bound by the Agreement based on the international law principle of Pacta Sunt Servanda.

Under international law, a distinction is drawn between monist and dualist countries. A monist country is bound to follow the dictates of an international treaty within its territory as long as it has ratified the instrument, while a dualist state requires an additional step of the treaty being enacted into law. In dualist states, citizens cannot enforce any rights under international treaties in their domestic courts until domestic legislation is enacted to give the treaty provisions legal effect. This applies to several dualist states in Africa, such as Nigeria, Zimbabwe, and Malawi.

Nigeria has ratified both the Kyoto Protocol[16] and the Paris Agreement[17] and is therefore bound by the provisions of both. In addition, the National Assembly has also embedded many of the obligations under these international instruments in the Climate Change Act enacted in 2021. The Act, amongst other things, sets a target of 'between 2050 – 2070' as the timeline for the attainment of net-zero GHG emissions.[18]

However, a country being bound by the provisions of the treaty may be insufficient to give effect to the obligations and commitments under that treaty where adequate enforcement measures are not provided. The Paris Agreement does not specify any penalty for non-compliance, neither is a special court established to enforce compliance.[19] There are no hard enforcement mechanisms in the Agreement to ensure formal accountability, as each state party is at liberty to determine for itself what measures it will take to meet its commitments.

This flexibility and ongoing information sharing are identified as the principal reasons the Paris Agreement was accepted by a majority of the countries in the world.[20]

In a situation where a state party does not follow through with its own NDC measures, the main formal consequence is a meeting with a global committee of neutral researchers to create new plans and set new targets. In addition, recent trends in climate litigation suggest that citizens should be able to hold their governments accountable for their commitments and targets under the Paris Agreement. The decision in Urgenda Foundation v State of the Netherlands,[21] upheld by the Hague Court of Appeal in 2018 and the Supreme Court in 2019, is a germane example. In that case, the court held that the Dutch Government acted in breach of their duty of care under Articles 2 and 8 of the European Convention on Human Rights ("ECHR") by failing to reduce greenhouse gas emissions by at least 25% by the end of 2020. The court's decision included a confirmation that Dutch national courts have an obligation to apply directly to those treaties to which the Netherlands is a party and ordered the State to comply with those obligations.

While not exactly a legal precedent, it is arguable that national courts can be convinced, as Urgenda succeeded in doing in the Netherlands, to hold State Parties accountable to their commitments under the Paris Agreement.

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15. Only Libya is yet to ratify the Paris Agreement.
16. The Kyoto Protocol gives effect to the UNFCCC by requiring industrialised nations to cut their GHG emissions in line with their individual targets. It is the first successful attempt to extend the scope of the UNFCCC. The Kyoto Protocol was adopted on 11 December 1997, but came into force on 16 February 2005 owing to its complex ratification process.
17. on 10 December 2004 and 16 May 2017, respectively.
18. See section 1(f) of the Climate Change Act, which sets out the highlighted objective of the Act in line with Nigeria's international climate change obligations, i.e., the Kyoto Protocol and the Paris Agreement.
19. World Economic Forum (2021), 'Is the Paris Climate Agreement legally binding? Experts explain'. Available online at https://www.weforum.org/agenda/2021/11/paris-climate-agreement-legally-binding/.
20. How are Countries held accountable under the Paris Agreement? Available online at https://climate.mit.edu/ask-mit/how-are-countries-held-accountable-under-paris-agreement.
21. [2015] HAZA C/09/00456689.

African Idea of a Just Transition

Globally, the journey to net zero includes the simultaneous actions of reducing emissions by scaling back fossil fuel use and decarbonising the environment through sinks and other carbon capture measures. For the advanced countries, the first and most critical step is to transition from fossil fuels as a source of energy to renewable sources. This will necessarily require redirecting the flow of financing from new fossil fuel energy projects in favour of renewable energy projects.

A swift, uncompromising transition to renewable energy would simply not work for all countries in the world because while the effects of climate change are ubiquitous, the people who suffer the worst impacts of the climate crisis are not those most responsible for it and are also not those best equipped to immediately transition to clean energy sources. It is on this premise that the Paris Agreement also features a commitment from developed countries to provide financial and technological assistance to developing countries towards meeting their NDCs.

The concept of a just energy transition for Africa should, therefore, prioritise energy access, security and affordability over the need to defund fossil fuels. The first step is to reflect on our NDC goals that align with prioritising economic, racial and gender justice while setting realistic targets towards net zero. The necessity for this approach is borne out by the current world data on energy security. While renewable energy sources dominate the energy mix in countries like Iceland, Sweden, Uruguay, and France by as much as 90%, most African countries still rely on fossil fuels.[22] Also, the economies of countries like Angola and Nigeria depend largely on revenue from the exploration of fossil fuels.

Achieving universal access to affordable energy in Africa by 2030 would require about 90 million persons to be connected to access the energy sources.[23] A just energy transition should, therefore, be an affordable plan that ensures energy is available within relatively easy reach and is adequate and reliable to meet the demands of end-users.[24]

Premised on the foregoing, it is evident that the anticipated timeline of achieving net zero through the energy transition under the Paris Agreement is rather ambitious, and Africa will benefit from a concerted approach where the energy transition measures of developed countries include increased financial and technological assistance. African countries will then leverage such assistance to take greater measures towards achieving net zero in the long term.

This approach is consistent with the enforcement mechanism under the Paris Agreement, and it will help Africa find the right balance between scaling up developments for renewable energy projects and the gradual phasing out of investments in fossil fuel projects, resulting in a cleaner and greener energy future for the continent.[25]

In summary, a just transition is one that is home grown, reflecting the economic needs and aspirations of the people within the country.

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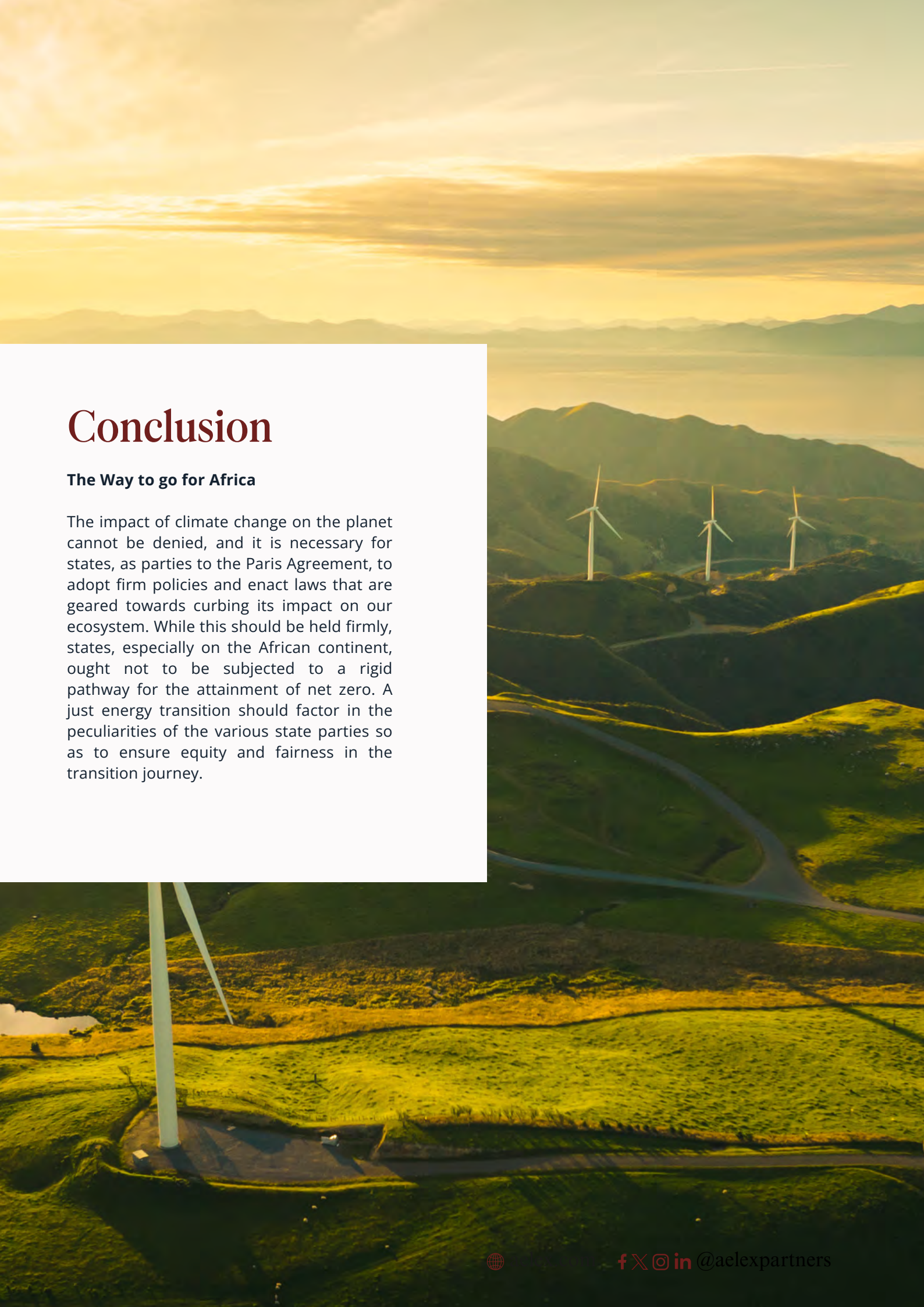
22. Hannah Ritchie, 'Which countries get the most electricity from low-carbon sources?' November 2021 Available online at https://ourworldindata.org/low-carbon-electricity-by-country#:~:text=Paraguay%2C%20Iceland%2C%20Sweden%2C%20and,their%20electricity%20from%20these%20sources.
23. UNDP (2023), 'Just Energy Transitions as a Development Priority for Africa'. Available online at https://www.undp.org/africa/ticad/stories/just-energy-transitions-development-priority-africa.
24. Ibid.
25. V. Chime, 'Tinubu to US Delegation: We Must Balance Fossil Fuels and Renewables to Address Poverty', TheCable. Available online at https://www.thecable.ng/tinubu-to-us-delegation-we-must-balance-fossil-fuels-and-renewables-to-address-poverty.



Conclusion

The Way to go for Africa

The impact of climate change on the planet cannot be denied, and it is necessary for states, as parties to the Paris Agreement, to adopt firm policies and enact laws that are geared towards curbing its impact on our ecosystem. While this should be held firmly, states, especially on the African continent, ought not to be subjected to a rigid pathway for the attainment of net zero. A just energy transition should factor in the peculiarities of the various state parties so as to ensure equity and fairness in the transition journey.

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