## **Working Group on Business and Human Rights**

## **Extractive sector, just transition and human rights**

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We welcome the opportunity to make a submission to the UN Working Group on Business and Human Rights. Our responses are in relation to the four questions set out below.

Q3 What mechanisms or processes should exist at the State level (e.g., inter-ministerial committee, ex ante human rights impact and risk assessment) to assess and ensure that extractive sector operations, including the production and distribution of transition minerals, do not impact negatively human rights? Are these measures effectively enforced and do they provide the necessary coverage in light of energy transition plans, programs and activities?

Q13 Should concessions, contracts, and legislation require all business enterprises producing, purchasing, processing, and distributing transition minerals to apply and implement human rights-based impact and risk assessments and due diligence standards, including gender-responsive HRDD and heightened HRDD for conflict-affected areas? If so, how could such processes ensure meaningful participation of impacted communities, particularly vulnerable and historically excluded groups?

Q19 Please provide examples of good practices regarding the integration of human rights issues in the extractive sector in the context of the energy transition.

Q21 Are there any specific recommendations to States, businesses (including investors), civil society, UN bodies and National Human Rights Institutions that would help further advance a just and human rights-based energy transition in the extractive sector? Any other comments or suggestions about the forthcoming report are also welcome.

**Context and Background**

Climate change-related public policy and investments earmarked for low and zero carbon projects stand to risk causing or contributing to human rights abuses while simultaneously leading to adverse outcomes for sustainable development efforts in developing countries. Most of the materials required to achieve net zero emissions in the coming decades are to be sourced from developing countries in the Global South, thereby offering the potential to contribute meaningfully towards the decent work, sustainable development and a just transition envisaged by the Paris Agreement. To do so, policymakers will need to clearly identify the human rights-related risks – from extraction to the end use of any given raw material and input – to ensure that the physical and transitional impacts of climate change address both human rights-related risks and opportunities. The policy disconnect that exists between the push to decarbonise and the need to protect, respect and remedy human rights perpetuates the long-held false dichotomy of “one or the other”, therefore spelling the need for a more integrative approach by policymakers.

There are numerous examples of human rights impacts associated with the extraction and processing of critical minerals, and the manufacture of renewable energy technology. Below we briefly spotlight three - polysilicon, lithium and mica – to provide context for the subsequent discussion on human rights responses.

**Polysilicon in Solar Technology**

Advances in photovoltaic technology in recent years and decades have placed solar at the forefront of the wave of renewable energy. Increasing take-up of the technology at industrial, commercial, local and domestic levels means extensive demand and significant competition between manufacturers, suppliers and distributors of the product.

A typical solar installation consists essentially of an array of photovoltaic panels as well as an inverter (which converts DC to AC power) and, where storage is required, a lithium-ion battery.

As a principal source of renewable energy – solar now comprises some 28% of global renewable capacity[[1]](#footnote-2) – photovoltaic technology is an integral part of the transition away from fossil fuels and is thus widely seen as a product that is sustainable on both environmental and social grounds. Yet the technology is associated with various human rights impacts. Some of these impacts occur in the extraction of raw materials required for key components of inverters, batteries and the aluminium housing of solar modules and panels. However, a key area of concern involves the processing and manufacturing stages of the solar cells themselves.

China dominates the solar panel supply chain,[[2]](#footnote-3) and some 45% of the world’s polysilicon is produced in the Xinjiang region, which has large reserves of silica and ready availability of inexpensive power thanks to sizeable coal fields and government subsidies.[[3]](#footnote-4) However, a series of reports have associated Xinjiang with widespread human rights abuses[[4]](#footnote-5) and in particular, polysilicon production with allegations of forced labour imposed by the Chinese state on members of the Uyghur minority.[[5]](#footnote-6) While some solar companies are attempting to commit to a Xinjiang-free supply chain, the existence of reports of ethnic minorities being forcibly transferred to factories in other parts of China implies that the risk of modern slavery is present in other parts of the country as well.[[6]](#footnote-7)

**Lithium**

From the grid-scale batteries that are our most versatile current means of storage of renewable energy to the powerpacks that are the driving force of electric vehicles, lithium-ion battery technology is integral to the sustainable energy transition.[[7]](#footnote-8) Rechargeable lithium-ion batteries have cathodes of variable composition and therefore can contain a range of different minerals,[[8]](#footnote-9) including cobalt, which has been extensively linked to the violation of labour rights in the Democratic Republic of the Congo.[[9]](#footnote-10)

Lithium itself is a crucial component of the cathode and ingredient of the electrolyte. Widely present across the planet in low concentrations,[[10]](#footnote-11) the metal was formerly comparatively low-profile, with limited uses in the ceramic and pharmaceutical industries. However, the rise of lithium-ion batteries has sparked a rush to secure future supply of the mineral. This is especially true as unlike other ‘transition minerals’ like cobalt (used in NMC type batteries) or manganese (used in both NMC and LMO type batteries), lithium is utilised amongst all lithium-ion battery types, heavily tying its future extraction to the growth in demand for such batteries.[[11]](#footnote-12) As Jubilee Australia reports, such dependence is affirmed by lithium-ion batteries comprising ’65 per cent of lithium’s global end-use market’.[[12]](#footnote-13)

Lithium ore (most commonly spodumene) is extracted from pegmatites via traditional-type mining operations in several countries; Australia is the largest producer (as well as being the largest single-nation exporter of lithium). [[13]](#footnote-14) Extracting spodumene lithium is comparatively difficult (in relation to other methods) and the process is highly resource-intensive, creating significant waste.[[14]](#footnote-15) However, a significant percentage of the world’s lithium reserves is found not in rock but in brine deposits. This lithium is easier and substantially cheaper to extract.[[15]](#footnote-16) Some 80% of lithium resources[[16]](#footnote-17) of this type are contained in a relatively compact area of the Andes highlands that has been dubbed the ‘lithium triangle’.[[17]](#footnote-18) The region, which covers northern Chile, northwestern Argentina and southwestern Bolivia, has over 50% of known global lithium resources and some 70% of lithium reserves,[[18]](#footnote-19) although as the price of lithium rises, these figures can shift fast.

In the region there are several companies producing lithium and dozens more projects in the pipeline. There is downstream pressure to bring lithium projects online quickly, but brine lithium extraction in the region has been associated with significant potential impacts on the right to water,[[19]](#footnote-20) while local Indigenous communities maintain that their rights to consultation, free prior and informed consent, and self-determination are being inadequately respected when extractive concessions are granted by governments.[[20]](#footnote-21) The long-term environmental impact of this type of extraction is little known, and community concerns about water are serious, particularly given the extreme aridity of the region and the compounding effects of climate change.

**Mica**

Muscovite mica is considered particularly valuable due to its capacity to insulate heat, resist significant voltages, and be significantly light and flexible.[[21]](#footnote-22) For these reasons, the mineral has been extensively utilised as an insulation material. This is particularly the case in electronics (ie. computer parts) and electrical technology, which comprise 26% of the total-end usage of mica.[[22]](#footnote-23) Electronic applications include computer circuit boards, sensors and lithium-ion batteries, all of which are currently used in the automotive industry or will be central to the shift to electric vehicles.[[23]](#footnote-24) Electrical technologies use mica insulation to prevent unnecessary energy loss – a quality that is central to the shift to clean energy.

It is important to note the different ways mica is mined, as this informs the geography of extraction and contemporary rights issues. Sheet mica – the preferred form of mica for electrical applications – requires the mineral to be picked, split and cut by hand in order to retain its delicate crystal structure.[[24]](#footnote-25) This factor means that current mica mining requires human labour in sourcing countries, and there is a correlation between high-mica production and low-labour costs.[[25]](#footnote-26) This somewhat informs the dominant countries in the supply chain of mica, as extraction is more economically feasible in the Global South.

At the core of the human rights issues associated with mining for mica is the prevalence of illegal mining operations in certain nations. This issue is particularly prevalent in countries like India and Madagascar where the regulatory framework and government resources to prevent such activities are weak. Additionally, SOMO argues that the majority of the mica mines operating in India are illegal.[[26]](#footnote-27) The operations of these mines, typically on the periphery of the state and with limited oversight, are more likely to become sites of serious concern for exploitation and rights abuses.

The confluence of the small-scale nature of mica mining and its dominant presence in the Global South creates the conditions conducive to the presence of child labour. In Madagascar, mica mining is usually a whole-family occupation, including the children.[[27]](#footnote-28) However, children also work in other sectors of the industry like sorting. Such instances of child labour were also documented in India, and the issue is known to major transnational corporations.[[28]](#footnote-29) In addition to child labour issues, working in mica mines attracts health risks. This is particularly the case in illegal mines where safety checks are minimal. Prolonged exposure to mica without proper personal protective equipment can cause ‘mica pneumoconiosis’, a lung disease.[[29]](#footnote-30)

# Responses to UNWG questions

**Q3 *What mechanisms or processes should exist at the State level (e.g., inter-ministerial committee, ex ante human rights impact and risk assessment) to assess and ensure that extractive sector operations, including the production and distribution of transition minerals, do not impact negatively human rights? Are these measures effectively enforced and do they provide the necessary coverage in light of energy transition plans, programs and activities?***

With significant demands on states in terms of guaranteeing their own energy security as well as a scramble to bring new transition mineral mines online for foreign investment or export revenue, the dangers of environmental and social safeguards being bypassed or watered-down is high in the context of the energy transition.

Moreover, lack of coordination across government in this context can seriously prejudice rights outcomes. Project impact assessments in many jurisdictions are processed individually without regard for the combined impact of mining projects, there is frequently inadequate interaction between Indigenous affairs bodies and mining and environmental ones. For example, in the context of lithium, a report recommends: ‘a process of strategic landscape-level planning that was informed by ongoing hydrological studies, biodiversity data, mineral resource mapping, and local stakeholder community engagement and input’.[[30]](#footnote-31)

National Action Plans have the potential to coordinate responses of this sort across government departments but a body that has oversight and accountability for implementation likely needs to be in place for them to be effective. It is also important for National Action Plans to include clear timelines and KPIs to ensure transparency and accountability over the actions of all stakeholders to better ensure their effectiveness.

***Q13 Should concessions, contracts, and legislation require all business enterprises producing, purchasing, processing, and distributing transition minerals to apply and implement human rights-based impact and risk assessments and due diligence standards, including gender-responsive HRDD and heightened HRDD for conflict-affected areas? If so, how could such processes ensure meaningful participation of impacted communities, particularly vulnerable and historically excluded groups?***

**HRDD must be co-designed and implemented in partnership with rightsholders:** Rights holders are crucial to implementing an effective HRDD process. In developing and implementing HRDD, it is critical to ensure that the process institutionalises mechanisms by which rights holders (who are likely to be workers, local communities and others) may meaningfully challenge corporate practices. ‘If HRDD is defined by policies and practices that prioritize process over outcomes, then it will be a less effective mechanism for preventing corporate human right impacts and instead be a legitimization exercise for corporate operations’.[[31]](#footnote-32)

**HRDD should be mandated by the state in a manner that provides clarity around its scope and includes an appropriate enforcement framework to engender compliance:** Laws focused simply

on disclosure or reporting of risks have had limited success in improving business practices or providing accountability for impacted rights holders.[[32]](#footnote-33) The development of legal frameworks that provide clarity to the obligations inherent in HRDD are key to increasing its effectiveness. The laws mandating HRDD should both incentivise business to implement HRDD effectively and provide for accountability if they do not.

**Lessons learned from other sectors:** The OECD, which has led the development of practical guidance

for business and states on HRDD, notes that enterprises should involve ‘workers and trade unions and representative organisations of the workers’ own choosing’ in HRDD.[[33]](#footnote-34) Examples from other sectors that are relevant to considering just transition for the extractive industry include two US-based programs (Fair Food Program and Milk with Dignity) and a more recent Australian initiative (the Cleaning Accountability Framework, CAF).[[34]](#footnote-35) In each of these examples, the initiatives explicitly engage workers—as the best placed workplace monitors—to ensure that processes to prevent and redress human rights harms are not only worker-centred but also worker driven.[[35]](#footnote-36)

**Indigenous Peoples:**

The race for extraction of transition minerals represents a serious threat to the rights of Indigenous Peoples, with a significant proportion of extraction and proposed extraction being carried out on Indigenous territory.[[36]](#footnote-37) With a large number of new mines in development, and high commodity prices enabling the exploitation of poorer-quality ore bodies, with consequent greater proportional impact, there is a grave danger that the benefits of decarbonisation will be felt largely by the Global North while the negative impacts are ‘offshored’ to the Global South, with Indigenous communities especially impacted.

However, transition minerals and the energy transition in general also represent a significant opportunity to achieve more equitable outcomes from the three-way relationship between governments, extractive companies and Indigenous communities. However, to guarantee better outcomes, there is a need to integrate HRDD with the right to Free, Prior and Informed Consent and its associated principles.

Although the UNGPs include ‘meaningful consultation’ with rights-holders as part of the HRDD process, this must, as mentioned above, be co-designed in order to adequately incorporate rights-holder perspective. Fundamentally, the HRDD process still represents a corporation deciding whether or not it is violating the rights of an individual or a community.

The bottom-up nature of the development of Indigenous rights instruments is reflected in the rights themselves, which are intrinsically related to the relationship between Indigenous communities and their traditional territory, and, crucially, set out mechanisms for control over what happens on that territory. The right to free, prior and informed consent (FPIC) should be seen as an operationalisation of the broader right to self-determination.[[37]](#footnote-38)

In many ways, FPIC has become a standard around which wider Indigenous expectations have coalesced. What Indigenous peoples expect from FPIC goes beyond the meaning of the four words that comprise it to encompass such principles as Indigenous co-design of projects, equity stakes and co-ownership, involvement in project governance and more. In the context of extractive projects, this implies a genuine partnership between community and company in which risks are identified and addressed collaboratively and impacts mitigated. Only in this way can the right to self-determination which underpins FPIC be truly realised.

Similarly, it is crucial that FPIC is thought of not as a single signoff, but as an ongoing process, a relationship with regular connection and documented processes whereby consent is maintained and, if not maintained, can be withdrawn.

There is an evident need to integrate these bottom-up processes, where communities have significant agency into assessing how they are impacted and can help define the actual parameters of the project, with the more top-down HRDD processes. In the context of Indigenous communities, HRDD must go beyond ‘meaningful consultation’ to explicitly include FPIC at the core of the process. It is also easy to incorporate consideration of positive impact into these company-community processes, allowing a more holistic rights-based approach than the risk-focused UNGPs, which take inadequate account of positive corporate impacts on human rights.

In the context of the extraction of transition minerals and the shift to renewable energy technologies, the need for these two crucial human rights mechanisms to be integrated is evident. It is critical that governments play a role in so doing, by not only mandating HRDD in the context of granting transition mineral exploitation licenses but also ensuring that FPIC is reached in any project on Indigenous territory.

**Q19 *Please provide examples of good practices regarding the integration of human rights issues in the extractive sector in the context of the energy transition.***

**Multistakeholder partnership**: The ubiquity of lithium-ion batteries in consumer electronics, electric vehicles and renewable energy storage means that the human rights impacts of lithium extraction are of relevance to numerous supply chains. Electric vehicle manufacturers have shown interest recently in ensuring a socially sustainable supply of lithium, and some of them have formed a multi-stakeholder partnership with mining companies, local communities and a development agency to attempt to collaborate on achieving sustainable extraction of Chilean lithium, with a view to establishing some form of bottom-up assurance or certification.[[38]](#footnote-39) This direct engagement between companies at opposite ends of the supply chain, and the involvement of rights-holders, is one to follow with interest due to the need for end-to-end traceability through supply chains and bottom-up solutions to certification of social sustainability of products.

Similarly, the IRMA standard, by far the most robust mining standard when it comes to human rights and Indigenous human rights, gains further legitimacy by involving downstream supply chain companies to enhance collaboration on responsible extractive processes.

**Agreement-making and benefit-sharing:** The agreement between Albemarle/Rockwood and the Consejo de Pueblos Atacameños in the Salar de Atacama, Northern Chile, is something of a landmark. It stands out for several reasons. Firstly, the agreement was made with a much wider number of communities than those who could be said to be directly impacted by the project, taking into account the Indigenous groups’ own view of territory. Secondly, the agreement was only to be established if every constituent community voted in favour of it. Though this process took four years, the resulting agreement is much more authoritative as a result. Thirdly, the agreement incorporates both environmental and social elements, with a series of provisions for stopping extraction if certain environmental indicators are reached, and for participatory community environmental monitoring, as well as a significant benefit-sharing arrangement. This arrangement sees 3.5% of lithium sales apportioned to the communities, who then decide how to use it in the context of community development priorities.

**Q21 *Are there any specific recommendations to States, businesses (including investors), civil society, UN bodies and National Human Rights Institutions that would help further advance a just and human rights-based energy transition in the extractive sector? Any other comments or suggestions about the forthcoming report are also welcome.***

**Recommendations for states:**

1. Ensure that adequate data to assess predicted and ongoing impacts of mining operations are held by the state, including collecting and monitoring independent environmental data at basin rather than project level. This should inform a basin management approach to impact assessment.
2. Fulfil government obligations on Indigenous consultation, consent and self-determination, recognising the ongoing nature of these obligations and not permitting that company–community consultation stand in for them.
3. Establish a standalone human rights impact assessment process for extractive projects that comprehensively assesses both negative and positive impacts with a human rights lens and incorporates community-designed consultation and consent processes.
4. Work to align departments such as Mining, Environment and Indigenous Affairs on a whole-of-government approach to extractive industries and their environmental and social sustainability, including via implementing and progressing National Action Plans on human rights.
5. Support the company–community dynamic via ongoing engagement in the process and assisting communities via provision of resources that allow them to engage external expertise for capability-building or other support, and participate in monitoring initiatives.
6. Foster opportunities for inter-company and cross-industry collaborations on these issues and putting in place clear mechanisms for regular three-way dialogue between companies, communities and government.

**Recommendations for business:**

* 1. Take time to understand the community context before project design, engaging transparently and in good faith with communities before any prospecting or exploration is undertaken and involving community members in designing the parameters of a new project or material change to an existing project.
  2. Conduct regular, in-person engagement with communities by an employee with sufficient executive power to make decisions within the meeting and a primary or secondary reporting line to the highest levels of the business.
  3. Enable participation of communities in ongoing evaluation and monitoring of environmental and social impact via such mechanisms as participatory environmental monitoring.
  4. Put in place clear guarantees for communities and a pre-established transition process in the case of acquisition or transfer of mining rights to another company.
  5. Apply a rights-based lens to assessment of risks and opportunities and community relations strategy in order to minimise negative impact from operations and maximise positive impact from other initiatives.
  6. Work with industry bodies and universities to introduce more social and rights-based elements into mining engineering courses. In the longer term, this would raise baseline capability for community engagement in junior mining companies.

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3. James Cockayne, Edgar Rodríguez Huera and Oana Burcu, *‘The Energy of Freedom’? Solar Energy, Modern Slavery and the Just Transition* (University of Nottingham Rights Lab, 2022) 6. [↑](#footnote-ref-4)
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