**Grassroots Justice Network (GJN) submission to UN Working Group on Business and Human Rights Call for inputs: Extractive sector, just transition and human rights**

**Introduction**

This submission is made by the [Grassroots Justice Network](https://namati.org/network/) (GJN) Corporate Accountability subgroup, which coordinates collective action regarding corporate actions related to [land and environmental justice](https://namati.org/network/land-and-environmental-justice/). GJN connects over 3,000 grassroots justice organizations that support individuals and communities to know, use, and shape the law. Throughout the world, GJN members are empowering communities that have been systemically harmed or marginalized to be able to govern what happens to their land. This submission was drafted by several members of GJN, including Zimbabwe Environmental Law Association (ZELA, Zimbabwe), Lawyers for Human Rights (LHR, South Africa), Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC, Mexico), Derecho, Ambiente y Recursos Naturales (DAR, Perú), and Fiscalía del Medio Ambiente (FIMA, Chile).

GJN affirms its support for a transition away from fossil fuels, and advocates for community-centered designs and implementation plans that reflect the most pressing needs of communities impacted by corporate development. We believe that access to justice is central to ensuring a just transition. We, therefore, submit as follows:

 ***Question 1: How can States better advance human rights-compatible energy transition laws and policies that ensure responsible business conduct in all aspects of energy transition efforts and programs (e.g., including, but not limited to, design, approval, financing, implementation, and reporting of energy transition programs)?***

A rights-based energy transition is one that recognises the ways in which the extraction of minerals needed for just transition impacts different communities and takes into consideration the rights and participation of affected communities.

Our submission identifies the following recommendations:

1. *Participation and Consent:* Communities’ free, prior and informed consent (FPIC) is essential in all kinds of developments that will impact land rights. To ensure FPIC, States have a responsibility to put in place mechanisms that allow communities to create their own structure for providing consent and have their processes recognised. At the outset, it is essential that a gender approach be incorporated in all processes. The identification of disproportionate needs and impacts ensures a more holistic participatory process. For example, express provisions for women, youths, and people with disabilities and their access to information and in decision-making processes are present in the new Customary Land Rights Law in Sierra Leone; while Norway’s [Norwegian Petroleum Act](https://www.npd.no/en/regulations/acts/act-29-november-1996-no2.-72-relating-to-petroleum-activities/) (29 November 1996 No. 72 relating to petroleum activities) mandates consultations with affected communities prior to the commencement of extractive operations.
2. *Access to Justice for Land Transfers.* Extraction for a just transition requires numerous land transfers in locations where mining previously did not take place. In a context where over 2.3 billion people lack proof of housing or tenure and over 1.5 billion have unresolved justice problems, these vast new projects are at risk of infringing on land rights ([Task Force on Access to Justice)](https://www.justice.sdg16.plus/_files/ugd/90b3d6_746fc8e4f9404abeb994928d3fe85c9e.pdf). In order to ensure that the land transfers occur without offending rights, States must devote additional resources to complete land registration and provide quick and clear resolution to land conflicts. Laws like The Community Land Act, No. 27 of 2016 in Kenya create opportunities to increase registration, but only if the State is adequately resourced and motivated to implement the registration process.
3. *Recognition and protection of human rights defenders (HRDs), including community paralegals:* HRDs, including journalists, paralegals, activists, members of Indigenous Peoples and local communities, are crucial actors to ensure a just energy transition. The legal recognition of HRDs and the work they do is a critical starting point. At the minimum, States must adopt and effectively enforce legislation recognizing their roles and contributions. A few examples include Kenya’s formal recognition of paralegals in the [Legal Aid Act of 2016](http://kenyalaw.org:8181/exist/rest//db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/L/Legal%20Aid%20Act%20-%20No.%206%20of%202016/docs/LegalAidAct6of2016.pdf), Mongolia’s recognition of HRDs in [The Law on the Legal Status of Human Rights Defenders](https://www2.ohchr.org/english/OHCHRreport2021/story-mongolia-new-law-to-protect-human-rights-defenders.html), and the [Southern Africa Model Law](https://southerndefenders.africa/2023/04/25/the-southern-africa-model-law-on-the-protection-and-promotion-of-hrds/) on the protection and Promotion of Human Rights Defenders.
4. *Transparency and access to information.* Strong national laws and policies on accountability and access to information on extractive industries can facilitate better interaction with communities. These laws should require timely, relevant, accessible disclosure of payments, expenses, impact prevention, and possible social and environmental risks. Canada’s [Extractive Sector Transparency Measures Act](https://laws-lois.justice.gc.ca/eng/acts/E-22.7/page-1.html), which was enacted specifically to deter corruption in the extractive industry is a good example. The Act requires companies to publicly disclose their payments to governments for the exploitation of natural resources. The United States has implemented the [Dodd-Frank Wall Street Reform](https://www.congress.gov/bill/111th-congress/house-bill/4173/text) and [Consumer Protection Act](https://www.congress.gov/bill/117th-congress/house-bill/2668), which mandates the public disclosure of information about the use of ‘conflict minerals’, which may contribute to human rights abuses. The U.S. Securities and Exchange Commission (SEC) enforces this requirement, and companies are required to report annually on their due diligence efforts to identify and mitigate human rights risks in their supply chains.
5. *Mandatory Due Diligence Requirements and other Regulatory provisions*: [Principle 15](https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) of the UNGPs underscore that companies continuously conduct human rights due diligence (HRDD), with advanced measures in conflict-affected areas, to fully respect human rights in their operations. The EU has taken the lead by adopting a number of directives, including the EU’s [Corporate Sustainability Due Diligence Directive](https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en), which requires companies to carry out due diligence with respect to the human rights and environmental risks associated with their operations. The directive applies to a wide range of companies, including those in the extractive sector, and mandates the identification and assessment of risks, as well as reporting on their due diligence efforts. While the Directive is a significant and welcome step, improvements, [specifically recognizing human rights defenders (HRDs)](https://www.frontlinedefenders.org/en/statement-report/eu-vote-corporate-sustainability-due-diligence-fails-fully-recognise-key-role-human) can be made in its provisions. To complement due diligence, States must employ additional regulatory tools such as obliging the adoption of a precautionary approach, establishing a strict liability regime, imposing transparency, reporting or disclosure legislation, and addressing systemic problems with the free market economy.
6. *Recognition of unequal energy transmission systems*: A rights-based approach to the energy transition can be achieved by recognising the inequalities in the current energy systems, for example in Sub-Saharan Africa more than 50% of the region’s population still lacks access to electricity [(UNCTAD 2023](https://unctad.org/news/improving-energy-access-key-meeting-development-goals-africa#:~:text=Although%20access%20to%20energy%20has,still%20lacks%20access%20to%20electricity.)). State must ensure that the restructuring of energy systems will not entrench present exploitative mechanisms that are deepening poverty and inequality. States must consider not only restructuring of energy generation – but also energy distribution. Community led and small-scale efforts that can produce and distribute local energy solutions should be encouraged, not penalized.
7. *Strategic Environmental Assessments.* Applying [Strategic Environmental Assessments](https://capacity4dev.europa.eu/groups/public-environment-climate/info/strategic-environmental-assessment#:~:text=A%20Strategic%20Environmental%20Assessment%20(SEA,making%20alongside%20economic%20and%20social) (SEA) in plans and programs from the initial stages of a project can be considered to promote sustainability and balance between energy transition, land management and conservation of natural resources. SEAs seek to be able to plan and manage energy with an integrated approach, taking into account the real demand of users, their particularities, and capacities for sustainability. Prior consultation should be applied as a mandatory mechanism, with differentiated approaches in order to be considered as a binding starting point for the implementation of public policies that guarantee human rights.
8. I*nclusion of human rights obligations in international agreements and investment treaties:* States must facilitate agreements and investment treaties promoting international human rights standards, including but not limited to the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines on Multinational Enterprises. A good example is the [International Responsible Business Conduct (RBC) Agreement for the Renewable Energy Sector](https://www.imvoconvenanten.nl/en/renewable-energy/about-agreement#:~:text=On%20March%206%2C%202023%20the,committed%20themselves%20to%20the%20Agreement.) signed in the Netherlands. The agreement aims to assist wind and solar energy companies to improve their human rights and environmental due diligence practices. Collectively, all the participants aim to explore, identify and address the risks and impacts for people and the environment in the operations and supply chains of the renewable energy sector. The multi-stakeholder collaboration offers shared solutions to address problems that companies cannot solve entirely by themselves. **T**he Southern African Development Community (SADC) [Model Bilateral Investment Treaty (BIT) Template](https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf), 2019 [Morocco Model BIT](https://edit.wti.org/document/show/b5908c50-ef94-4902-b71d-12024f285ef8) and the [2017 Columbia Model BIT](https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6082/download) have examples on how human rights obligations can be included in investment agreements.

*8. Collective agreement and regulations on public procurement:* The increasing need to secure transitional minerals and renewable energy tenders has increased the corruption and other procurement risks in various states. Therefore, collective agreements and strong regulations on public procurement encourages the inclusion of due diligence criteria in public tender and procurement processes. For example, Ghana’s Renewable Energy Act, 2011 (Act 832) establishes a procurement scheme to deliver a competitive market rate for electricity generated from a renewable source.

***Question 2: What measures and mechanisms should be provided by extractive sector legislation, bilateral investment treaties, concessions, and contracts to allow individuals or communities affected by extractive activities to seek effective remedy for business-related human rights abuses? What remedies are best suited for this sector?***

Access to an effective remedy is an integral part of any human rights system. Governments, financiers and companies have a duty to provide an effective way to gather information and provide a solution where there has been a violation. The following are some of the recommendations for communities to access an effective remedy:

1. *Grievance and Complaints Mechanisms:* States should take initiatives to put in place judicial and non-judicial effective mechanisms in place for addressing grievances or complaints related to extractive sector operations. These mechanisms should be publicized, accessible, transparent, and impartial, and should provide for effective remedies for individuals and communities affected by human rights abuses. [Community experiences and their specific demands](https://www.lhr.org.za/lhr-resources/the-impact-and-assessment-of-improper-mine-closures-in-south-africa-community-perspectives-on-human-rights/) should not be confined to a tick-box exercise, which most companies are accused of doing. A few examples of grievance and complaint mechanisms at the State-level include: Ghana’s [Minerals Commission](https://www.mincom.gov.gh/), Australia’s[Office of the Commonwealth Ombudsman](https://www.ombudsman.gov.au/), Canada’s [Office of the Ombudsman](https://core-ombuds.canada.ca/index.aspx?lang=eng). Additionally, developing platforms where communities can safely and freely air their concerns without reprisals must be present. Ghana has established the Community Mining Scheme, which provides a platform for communities affected by mining to voice their concerns and receive compensation for any harm caused by mining activities. It is important to note that these mechanisms are only effective if they are accessible to affected communities, and if they provide community-defined remedies for abuses.
2. *Independent legal and technical support:* Communities need dedicated support to be able to engage as an empowered counterparty. For example, communities need assistance to understand the grievance mechanisms that are available, to file complaints, and to assess proposed options for remedy. To fulfill [Principle 31](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf) of the UNGPs companies should invest in communities’ capacities by setting aside funds in blind trusts that enable communities to access the legal and technical support they need to engage effectively.
3. *Business and Human Rights Treaty*: State must support the process of developing a legally binding instrument on business and human rights currently ongoing at the United Nations levels. This will ensure that there are direct human rights obligations placed upon all companies operating in all jurisdictions. The instrument presents an opportunity to develop an independent tribunal or international court to hold companies, particularly those that operate transnationally, accountable for committing or contributing to human rights abuses and violations.
4. Social protection and new sources of livelihood is an example of an effective remedy that can be provided for people who lose jobs in fossil fuel industries. States in partnership with other stakeholders must implement remediation plans to adequately clean up the environment, compensate for damage and bring back livelihoods to such affected communities.

***Question 3:*** ***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?***

The transition to renewable energies is intricately linked to the extractive industry. The development of renewable energy technologies necessitates the use of transition minerals like lithium, cobalt, and rare earth metals. However, the extraction, production, and distribution of minerals often detrimentally impact human rights. It is, therefore, essential that mechanisms and processes exist at the State level to assess and ensure that extractive sector operations, do not impact negatively human rights:

1. *Participation of impacted communities.* Impacted communities should have the opportunity to lead the just transition based on their own vision of development. Many impacted communities are eager to lead the urgent work on just transition: stewarding nature; building alternative energy infrastructure; increasing resilience; shifting towards regenerative agriculture; among others. The manner of obtaining transition minerals should embrace the native knowledge and problem-solving of communities, while also creating on-ramps for communities historically harmed to be able to take advantage of the energy transition.
2. *Human Rights Impact Assessments (HRIAs)*: States must incorporate legislative provisions that mandate human rights impact assessment throughout a project. Specifically, prior to the commencement of extractive operations, States ought to mandate HRIAs to be conducted by companies. Canada’s [Impact Assessment Act](https://laws.justice.gc.ca/eng/acts/i-2.75/index.html) requires companies to consider the impacts of their operations on the rights of Indigenous Peoples and other potentially affected communities. This requirement includes a range of factors, including human health and socio-economic conditions. While HRIAs are an important tool for identifying and mitigating the potential impacts of these operations on human rights, their effectiveness ultimately depends on their enforcement and the willingness of companies to take action to address the risks identified in the assessments.
3. *Human Rights Reporting*: A key component of transparency and access to information is human rights reporting. Mandating reporting to companies adds a layer of accountability and scrutiny to make sure its operations respect and protect human rights. Reporting should be disaggregated by gendered impacts and be based on other relevant identities within the communities. These reports should be publicly available and subject to independent verification. This is a different kind of reporting from the environmental, social and governance (ESG) scoring. The reporting complements all the other aspects mentioned herein and it is essential for states to have robust legal frameworks in place, effective enforcement mechanisms, and meaningful remedies. Important aspects that are often absent in ESG reporting include:
4. requiring companies to disclose their beneficial ownership and payments made to governments;
5. providing access to information about the allocation of mining rights and licenses;
6. how a company is respecting the affected communities’ right to Free, Prior, and Informed Consent; and
7. *Implementation of robust legal frameworks:* States must prioritize the implementation of robust legal frameworks that promote, and respect human rights in the context of extractive industry operations. These frameworks should be established on and influenced by community needs, and international human rights standards, should be legally binding, and should provide meaningful and effective remedies for individuals and communities affected by extractive sector operations.