

# Working Group on Business and Human Rights

MAY 2023

## State duty to protect human rights

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)?

**At all stages of the definition, design, and development of the transition policies and legal frameworks, states should implement the most ambitious human rights and responsible business conduct standards as possible. This entails adopting, for the entire supply chain, legally binding due diligence frameworks relating to transition policies rather than promote voluntary schemes, and close international coordination with other states to avoid a race to the bottom. States should co-define, co-design, and co-develop transition policies and legal frameworks with representative bodies that represent the most affected and vulnerable populations (e.g. Indigenous peoples, peasant communities) as well as trade unions and civil society actors with a proven history of human rights, social and environmental work in horizontal discussions that provide significant opportunities to shape and monitor these policies and legal frameworks. States should adopt the precautionary principle and ensuring stringent human rights impact assessments for policies, laws, and infrastructure projects, as it is crucial to identify risks and avoid human rights violations. Simply put, if it is possible that a given policy or action might cause harm to the public or the environment, even if there is still no scientific agreement on the issue, the policy or action in question should not be carried out. States should require the most ambitious recycling standards and focus on energy saving and efficiency, over further energy generation. This will help avoid, to the extent possible, the risks of human rights violations associated with the extraction of materials required for the manufacture of transition infrastructures, such as critical raw materials, but also feldspate, arcylca sands, aluminium, and steel/iron.**

2. Are you aware of any measures, both mandatory and voluntary, at national, regional, and international levels to foster business respect for human rights in the extractive sector, especially in the context of energy transition plans, programs and activities? If so, are these measures effectively enforced and do they provide the necessary coverage in light of evolving circumstances, including energy transition plans? Is greater clarity necessary in some areas of law and policy? What measures may reasonably correct this situation?

**The UN Global Compact and Guiding Principles for Business and Human Rights, OECD guidelines ("The Minerals Guidance"), the Intergovernmental Forum on Mining, Minerals, Metals, and Sustainable Development's Mining Policy Framework (MPF), and ICMM's Mining Principles offer decent starting points as voluntary policy, standards, and norms mechanisms that seek to avoid human rights impacts of**

**extractive projects, including those related to transition materials. Nevertheless, as shown by countless academic studies, reports by civil society organizations, and national and international judicial cases, their voluntary nature as well as uneven and hazardous implementation in practice mean that they fall tremendously short of their promises and potential.**

**States should convert these voluntary measures into legally-binding standards and ensure their effective and stringent implementation.**

**In addition, these principles and norms are often waived and ignored by states's recourse to "national security," "essential" or "public utility" declarations of extractive projects. Through such framing, states prioritize the development of such extractive projects over other concerns, including human rights. This is increasingly occurring in relation to extractive projects considered necessary for the energy transition, a concerning and inexcusable development that must be addressed.**

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?

**States should have a dedicated body, that is broadly and independently funded and staffed, including representatives from the most affected and vulnerable populations (e.g. Indigenous peoples, peasant communities) as well as trade unions and civil society actors with a proven history of human rights, social and environmental work, responsible for ex-ante and ex-post human rights impacts and risks evaluations.**

**In addition, states must have sufficiently funded and staffed vigilance bodies that can enforce the legal frameworks, investigate complaints, and credibly sanction and redress human rights violations when these are found to have occurred. Its public officers should be able to operate independently and not have any links to the extractive industries they are supposed to oversee. States should consider prohibiting these public officers from working for the extractive sector following their roles to avoid the risks of corporate capture of these institutions.**

4. How do States encourage and regulate communication of energy transition efforts by business in the extractive sector, including State-owned enterprises (SOEs), to avoid the publication of misleading or unsubstantiated claims or reporting of an entity's energy transition programs? Do these measures sufficiently ensure the adequacy, accessibility, reliability, and accuracy of information?

**It is necessary to sustain the efforts that have been made in terms of transparency and access to information. Most of the information on the extractive sector is considered national security and therefore is not adequately transparent, especially in the mining sector. There should be greater transparency on contracting and the environmental and social impacts of these projects. This information should be available in open databases and all formats available.**

5. Do current concessions, contracts, and bilateral investment treaties in the extractive sector aid or constrain domestic regulatory space available to States to meet their international human rights obligations in the context of the energy transition? What further changes in key provisions and licensing/procurement processes are desirable to advance energy transition in alignment with the UNGPs?

**Investment and trade agreements could enhance the regulatory space for states in the region, only if such agreements were to contain legally-binding clauses that demand both parties to the agreement to implement human rights and environmental due diligence frameworks for the entire supply chain, and communicate and coordinate their efforts with a methodology to ensure each party holds businesses operating within and from home and host states' jurisdictions.**

6. What are the gaps in the development and implementation of existing National Action Plans, legislation, and domestic, regional, or international frameworks (e.g., the Paris Agreement or climate change laws) on business and human rights, particularly in relation to the extractive sector, which if addressed will advance a just and human rights-based energy transition?

**These international frameworks have been overwhelmingly developed with a voluntary nature (such as the UN Global Compact, OECD guidelines, and ICMM's Mining Principles) or have only stipulated policy goals without specifying the concrete actions that specific sectors such as the extractive sector must undertake to ensure a just transition (such as the Paris Agreement).**

**None of these policy and legal frameworks designate targets for concretely diminishing fossil fuels extraction or minerals and metals extraction. Obviously, the former are especially crucial to combat global warming.**

7. How can energy transition policies, programs, plans and activities in one State have adverse human rights impacts outside of their territory or jurisdiction (including supply chain issues and sourcing)? What measures may reasonably correct this situation?

**State's transition policies and frameworks that stipulate the replacing of fossil fuel energy infrastructure with renewable energy generation and storage capacities without altering our energy consumption patterns in ways that lower overall energy consumption would need the manufacturing and rolling out of a huge volume of novel generation and storage infrastructures in these same states. The supply chains of these infrastructures span global production networks that begin with the extraction of massive volumes of materials, their refining, the use of these materials in manufacturing processes, the transportation of manufactured components as well as their assembly. Each of these steps can take place in territories outside of their jurisdiction while they all have ? difference risks for human rights violations.**

**Adopting and enforcing legally binding due diligence frameworks for the entire supply chain can help mitigate these risks. States can especially mitigate such risks by entering into bi- and multilateral agreements that ensure multi-stakeholder adoption, compliance, and enforcement of whole of supply chain due diligence**

**frameworks.**

8. How can States harness the potential of energy transition to accomplish important policy objectives related to human rights, such as achieving local empowerment, gender equality, protection of the environment, mitigation of climate change and realizing the Sustainable Development Goals?

**States must co-define, co-design, co-develop and co-monitor transition policies and legal frameworks with bodies that represent the most affected and vulnerable populations (e.g. Indigenous peoples and peasant communities) as well as trade unions and civil society actors with a proven history of human rights, social and environmental work.**

**States should also strive to implement the most ambitious human rights and responsible business conduct standards as possible at all stages of the definition, design, and development of the transition policies and legal frameworks. (see the [Sonora River](#) case)**

**This would ensure that the energy transition not only represents a significant opportunity for economic growth but also an opportunity to empower local communities and vulnerable populations by increasing autonomy, resilience, and the protection of all basic human rights, as well as a set of social and economic rights linked to the realization of the SDGs.**

**Corporate responsibility to respect human rights**

9. What roles should business enterprises in the extractive sector play to integrate human rights into ongoing energy transition plans and programs to address adverse human rights impacts? Please provide examples if possible.

**Extractive enterprises play a highly significant role in respecting human rights and ensuring that no human rights violations occur. There will nevertheless be a continuous challenge to implement human rights protection mechanisms in the extractive sector as long as the main criteria along which the enterprises are judged and evaluated, is profitability or the guaranteeing of access to those parts of the web of life that are considered as ecological “stocks” and “flows” or “natural resources.” If human rights remain a factor to be balanced against such considerations, the risks of human rights violations will loom large in the sector.**

10. Are human rights provisions, for example in existing concessions, contracts, and bilateral investment treaties, effective in encouraging businesses in the extractive sector, including investors, to respect all internationally recognized human rights? If not, what should be done to strengthen their efficacy?

**Their voluntary application or interpretation as a simple ex-ante box-ticking exercise often times makes these clauses ineffective. They are always better to include than exclude although they would have to be legally and effectively mandatory to make a meaningful difference. Close cooperation and clear definition of responsibilities of actors along the supply chain, including commodity trading houses and financial institutions as well as more clearly defined and accessible**

**ways to access remedy for affected populations are crucial components in any of such clauses.**

11. Have you seen extractive sector investors play a role in preventing and mitigating, or in exacerbating, negative impacts of energy transition efforts on human rights? Should investors be required to conduct gender responsive HRDD in meaningful consultation with local communities, civil society organizations, Indigenous Peoples, and human rights defenders? What remediation responsibility should investors have?

**There are investors that have exclusion lists of certain industries, such as fossil fuels.**

**Institutional investors should also have in place human rights and environmental due diligence mechanisms, developed in a participatory way and with a gender and intersectional perspective.**

**Investors have responsibility to remediate, as their investment could have favored, was linked to, promoted the negative impact, abuse or violation. The lack of prevention methods with a human rights perspective along with a risk approach can bring abuses or violations. If a remediation and reparation process is needed to address meaningfully a human rights abuse or violation institutional investors are main stakeholders to provide remedy and to hold the company they are invested in accountable.**

**Such as with companies, having a human rights and environmental due diligence mechanism in paper and a human rights policy or grievance mechanism is not enough to prevent and address abuses. There should be proof approved by affected rights-holders. Therefor meaningful engagement is needed in a trustworthy and safe environment.**

12. What role can the informal economy (e.g., artisanal and small-scale mineral exploitation, including supply chains) play in advancing a just and human rights-based energy transition?

13. 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?

**They should, although a balance must be found to ensure that large-scale upstream projects or significant downstream actors, such as commodity trading houses and large importers bear significantly more responsibility (including financial) to ensure the implementation of due diligence requirements. State actors have an especially crucial role in accompanying smaller-scale actors to ensure their compliance with such requirements, as well as in enforcing these for the larger and more significant actors in the supply chains (as measured in volumes financed, extracted, refined, and imported).**

**HRDD should always be gender responsive.**

**HRDD in conflict-affected areas and with historically marginalized groups and communities should consider special provisions in line with the UNGPs. This topic**

**should be explored more.**

14. How could extractive sector associations, higher education institutions and other stakeholders promote awareness and encourage human rights-compatible business practices (e.g., addressing greenwashing and green scamming practices)?

**They can make adherence to mandatory due diligence requirements (as they should regardless when these are legally binding) and work with state and civil society actors to promote and enforce them. Sector associations should expel members when these are found to be in breach of such requirements. Similarly, human rights due diligence should become a significant fixture in all higher education preparing persons to work in the extractive sector, even if they only fulfill a “technical role” since human rights due diligence is a shared responsibility and must entail a cultural shift across the entire sector, rather than be confined to a specialized department of the extractive enterprise.**

#### **Access to remedy**

15. 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?

16. Please provide examples of steps taken by States to investigate, punish and redress business-related human rights abuses related to the extractive sector in the context of energy transition projects. Are the steps and redress mechanisms effective in terms of both process and remedial outcomes?

17. Are you aware of any cases submitted to judicial and/or non-judicial instances (e.g., national human rights institutions, national contact points, mediation, etc.) regarding business-related human rights abuses in the extractive sector, particularly in the context of energy transition projects?

**Recently, in Mexico, the Federal Government declared all energy projects based on gas combustion as « clean energy » streams. We have documented the case of « Proyecto Integral Morelos » whose infrastructure phase had several damages and negative impacts against the communities affected by the construction and installation of the pipelines. One of the community leaders was murdered because of its open opposition to this project and several defenders were criminalized at the same time accused and imprisoned because of false testimonies. See [report](#).**

18. Are current dispute resolution provisions and frameworks in the extractive sector “fit for purpose” to address complaints related to human rights abuses linked to extractive activities and energy transition projects? If not, what are the alternatives for a legitimate, transparent, and effective dispute resolution system to address such complaints?

**Good practices and other comments**

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

20. What specific renewable energy policies, practices and safeguards should be adopted by States and business so that energy transition does not have adverse effects on human rights?

**The Free Prior and Informed Consult (FPIC) established in the ILO’s 169 Convention on Indigenous People’s Rights is one of the best examples and guidelines to all stakeholders to implement projects as a HRDD exercise. Unfortunately, The government and extractive companies have minimum knowledge or poor performances implementing FPIC activities. Further capacity building within sectors is needed to improve companies and authorities actions on human rights and due diligence.**

21. 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.

**Efforts to scale back the social-ecological metabolism and lower the energetic material throughput of society must be intensified and take front and center in any just transition since this is the only effective way of minimizing potential harms and human rights violations related to the generation of energy and extraction of materials. Circular economy and degrowth proposals must be taken much more seriously, especially in the more affluent regions. Degrowth is understood here as a global redistribution of energetic and material footprints towards far greater equality between the energetically-material rich and poor in the world. Along the propals made by the UN International Resource Panel, if emissions and land-use in relation to the extraction of materials are to be maintained within limits that would not have disastrous implications for human rights globally, material and energy consumption must be reduce drastically in those regions whose populations have large material-energetic per capita footprints whereas those populations with**

**inadequate access to energy and materials to secure the enjoyment of human rights must be provided with greater access.**

Other comments