**Franciscans International**

**Responses to the call for inputs for the Working Group on Business and Human Rights report on**

**“Extractive sector, just transition and human rights”**

**May 2023**

The call for submissions notes that the extractives sector will be understood as a “range of business enterprises, institutions and peoples involved in the extraction of oil, gas, solid minerals, and rare metals.” Franciscans International (FI) notes that these extractive industries usually operate in a context of human rights violations, degradation of the environment, and in a vacuum of impunity.

FI is concerned that without guarantees of non-repetition, and comprehensive and binding legislation for human rights and environmental due diligence and accountability, business enterprises involved in extraction will continue to cause or contribute to human rights violations and environmental degradation in the context of the so-called energy transition. As equally underscored by one of our Franciscan partners, “clean energy is a contradiction in terms;” indeed, “what we see around the world is that mining always implies violence and human rights violations; environmental and ecological sacrifice; conflict with and within affected communities; labour exploitation and deepening of socio-economic inequalities.”[[1]](#footnote-2)

The Global North, which has much higher energy consumption, demands concentrated mineral extraction in countries mainly in the Global South to maintain their unsustainable lifestyles. At the same time, the Global North has failed to provide adequate technology transfer and financial support to facilitate improvements in the energy sectors of developing States. We note that many Indigenous peoples, activists and others are referring to the “transition” as “green colonialism”, and that the adverse impacts associated with extraction will once again disproportionately affect Indigenous peoples and other marginalized groups.[[2]](#footnote-3)

We have chosen to focus on a few of the questions from the call for submissions, but note that some of our answers relate to other questions as well.

**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)?***

First and foremost, States can better advance human rights-compatible energy transition laws and policies that ensure responsible business conduct through policy coherence between their international legal obligations and domestic laws and policies. This should include the implementation of legislation on the right to a clean, healthy and sustainable environment, “including with respect to biodiversity and ecosystems.”[[3]](#footnote-4) Legislative reform should also include the reversal of any lax environmental licensing and monitoring procedures, especially those developed as a result of undue influence and corruption by corporations, and/or as part of economic recovery plans during after the Covid-19 pandemic.[[4]](#footnote-5)

We underscore that renewable energy technologies, such as large-scale wind farms and hydroelectric dams, can have significant environmental impacts, including habitat destruction, soil erosion, and loss of biodiversity. States cannot effectively deal with the climate crisis, especially with a view towards future generations, by further degrading land and entire ecosystems. In addition to the adoption and strengthening of relevant laws and policies, States should also establish and strengthen independent, public environmental institutions, particularly those who could effectively supervise and monitor the implementation of environmental policies, regulations and legislation.

States should adopt forward-looking laws, policies, and practices that deal with the extraction of minerals and rare metals used in so-called “green energy”. States should also ensure that laws and policies towards fossil fuels are strengthened with an aim towards a total ban on extraction. Given the gravity of the crisis, and borrowing from the commentary to UNGP 19, companies, including those with relationships linked to fossil fuel extraction, should “be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.”

**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 must have mechanisms with clear procedures to ensure that all legislative or administrative measures, including those related to extractives, that may affect Indigenous peoples have their free, prior and informed consent.[[5]](#footnote-6) Likewise, in upholding the right to self-determination of Indigenous peoples, States and businesses must respect the right to say no to projects that affect them.

We are also aware that many of these energy and extractive projects affects not only Indigenous peoples, but other populations. In this sense, we agree with the Inter-American Commission’s recommendation that States should consult anyone “whose rights could be violated by programs and projects that involve a risk of significant environmental damage including those aimed at mitigating greenhouse gases and adapting to the impacts of climate change”.[[6]](#footnote-7) For example, in Colombia, Law 134 provides the possibility to conduct a “popular consultation”[[7]](#footnote-8) which has been used to consult on extractive projects.[[8]](#footnote-9) “Popular consultation” is a mechanism of broad civil participation to give the population the possibility to decide on national, departmental, municipal, district or local matters[[9]](#footnote-10). After the consultation, the results are binding.[[10]](#footnote-11) In addition, our partners consider that there should be consultations (that guarantee public participation and access to information for all communities) on specific extractive and energy projects, as well as on legislation and public policies related to the energy transition.

States should implement mandatory human rights and environmental due diligence laws, whereby such processes are regularly reviewed and monitored by State authorities. In cases where businesses cause or contribute to human rights violations and abuses, States should impose relevant criminal, civil or administrative sanctions through adequate proceedings.[[11]](#footnote-12) This should include effective redress mechanisms, including business accountability, and that victims of business activities are guaranteed their right to an effective remedy, including reparation and restoration of the environment.[[12]](#footnote-13) As part of these processes, States should ensure that corporations preemptively avoid and prevent human rights abuses, including through legislation on domestic liability in cases where corporations “cannot prevent or mitigate the risks.”[[13]](#footnote-14)

**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?***

The UN Guiding Principles on Business and Human Rights underscores that all businesses should respect human rights, although “the means through which enterprises meet that responsibility may vary […].”[[14]](#footnote-15)In regard to severity of impacts, our partners note “what we have seen around the world is that mining always implies violence and human rights violations; environmental and ecological sacrifice; conflict with and within affected communities; labour exploitation and deepening of socio-economic inequalities.”[[15]](#footnote-16)

Accordingly, FI underscores the need for extractive activities to proceed in a manner that acknowledges these severe impacts and attempts to address them at each stage of business activities and operations.

States should adopt legislation to guarantee effective access to justice for victims. This includes removing any procedural barriers such as statutes of limitations, in particular for inter-generational victims, as it has been proven to be an obstacle for accessing justice.[[16]](#footnote-17) We have seen that the effects of extractive industries and other businesses activities might take years to manifest, and/or may continue over long periods of time.

Following some recommendations by various UN experts and special procedures,[[17]](#footnote-18) and given continued and potential adverse impacts on human rights and the environment by business, FI would also suggest that the Working Group make a recommendation towards calling on States to actively participate in the process towards the development of the legally binding instrument to regulate the activities of transnational corporations and other business enterprises, in international human rights law. In this regard, we note that the Working Group’s acknowledgment that the UNGPs “has not reached sufficient breadth or depth” to curb human rights violations.[[18]](#footnote-19)

1. Intervention of Rodrigo Peret, during “Clean Energy with Clean Conscience,” 1 June 2022, available at: <https://www.genevaenvironmentnetwork.org/events/clean-energy-with-clean-conscience-the-importance-of-human-rights-and-the-transition-to-clean-energy/#scroll-nav__3> [↑](#footnote-ref-2)
2. ‘Green colonialism’: Indigenous world leaders warn over west’s climate strategy, The Guardian, 23 April 2023, <https://www.theguardian.com/world/2023/apr/23/un-indigenous-peoples-forum-climate-strategy-warning> [↑](#footnote-ref-3)
3. Human Rights Council resolution 48/13, para.4(c) [↑](#footnote-ref-4)
4. Cfr. Human Rights Council, “Indigenous peoples and coronavirus disease (COVID-19) recovery”, Report of the Special Rapporteur on the rights of indigenous peoples, José Francisco Calí Tzay, A/HRC/48/54, 6 August 2021, para. 12-15 [↑](#footnote-ref-5)
5. Article 19, UN Declaration on the Rights of Indigenous Peoples [↑](#footnote-ref-6)
6. Inter-American Commission on human Rights, “Climate Emergency. Scope of Inter-American Human Rights Obligations”, Resolution 3/2021, adopted on December 31st, 2021, para. 13. [↑](#footnote-ref-7)
7. See LEY 134 DE 1994, “Por la cual se dictan normas sobre mecanismos de participación ciudadana.”, EL CONGRESO DE COLOMBIA, art. 8, https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=330 [↑](#footnote-ref-8)
8. See for example: Registraduría Nacional del Estado Civil, “En consulta popular celebrada el domingo 28 de julio, los habitantes de Piedras, Tolima dijeron ‘no’ a la exploración minera en su municipio”, <https://registraduria.gov.co/En-consulta-popular-celebrada-el-domingo-28-de-julio-los-habitantes-de-Piedras.html> [↑](#footnote-ref-9)
9. LEY 134 DE 1994, “Por la cual se dictan normas sobre mecanismos de participación ciudadana.”, EL CONGRESO DE COLOMBIA, art. 51 [↑](#footnote-ref-10)
10. LEY 134 DE 1994, “Por la cual se dictan normas sobre mecanismos de participación ciudadana.”, EL CONGRESO DE COLOMBIA, art. 55 [↑](#footnote-ref-11)
11. As outlined by the Committee on Economic, Social and Cultural Rights, States: ”*should consider imposing criminal or administrative sanctions and penalties, as appropriate, where business activities result in abuses of Covenant rights or where a failure to act with due diligence to mitigate risks allows such infringements to occur; enable civil suits and other effective means of claiming reparations by victims of rights violations against corporate perpetrators, in particular by lowering the costs to victims and by allowing forms of collective redress; revoke business licences and subsidies, if and to the extent necessary, from offenders; and revise relevant tax codes, public procurement contracts, export credits and other forms of State support, privileges and advantages in case of human rights violations, thus aligning business incentives with human rights responsibilities. States parties should regularly review the adequacy of laws and identify and address compliance and information gaps, as well as emerging problems.”*

    General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 15 [↑](#footnote-ref-12)
12. Inter-American Commission on human Rights, “Climate Emergency. Scope of Inter-American Human Rights Obligations”, Resolution 3/2021, adopted on December 31st, 2021, para. 14 [↑](#footnote-ref-13)
13. Statement on the implications of the Guiding Principles on Business and Human Rights in the

    context of Israeli settlements in the Occupied Palestinian Territory, Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 6 June 2014, p.10 [↑](#footnote-ref-14)
14. UNGP 14 [↑](#footnote-ref-15)
15. Intervention of Rodrigo Peret, during “Clean Energy with Clean Conscience,” 1 June 2022, available at: <https://www.genevaenvironmentnetwork.org/events/clean-energy-with-clean-conscience-the-importance-of-human-rights-and-the-transition-to-clean-energy/#scroll-nav__3> [↑](#footnote-ref-16)
16. Cfr. “Chile: Nearly 40 years on, still no remedy for victims of Swedish toxic waste – UN experts”, 7 June 2021, <https://www.ohchr.org/en/press-releases/2021/06/chile-nearly-40-years-still-no-remedy-victims-swedish-toxic-waste-un-experts> [↑](#footnote-ref-17)
17. For example, Report of the Independent Expert on human rights and international solidarity, Obiora Chinedu Okafor, International solidarity and the extraterritorial application of human rights: prospects and challenges, 19 April 2022, A/HRC/50/37, para 58(c). [↑](#footnote-ref-18)
18. *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/50/40/Add.3, above note 96, para. 7 [↑](#footnote-ref-19)