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

**Submitted by**

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**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)?**

In designing, and implementing human rights-compatible energy transition laws, states must engage stakeholders in the process leading to the enactment of such laws. Critical stakeholders include vulnerable members of the society especially women, children, disabled. This process should be designed to strengthen stakeholders’ capacity in addressing human rights violations by multinational companies (MNCs) and local businesses. Such laws must also promote and protect human rights, support an environment conducive to dialogue and peace between stakeholders, as well as informing and empowering actors and citizens on the interface between energy development and human rights. Reporting mechanisms must detail how businesses have adopted and are implementing economic, social and cultural rights, as well as respecting women’s economic and social rights.

1. **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?**

South Africa has a Just Energy Transition Investment Plan (JET IP) for the initial period 2023-2027 which seeks to “establish an ambitious long-term partnership to support South Africa’s pathway to low emissions and climate resilient development, to accelerate the just transition and the decarbonisation of the electricity system, and to develop new economic opportunities such as green hydrogen and electric vehicles amongst other interventions to support South Africa’s shift towards a low carbon future.” South Africa is currently developing plans to transition from coal to non-fossil fuel technology. However, due to the political and historical experiences, there are concerns that these plans and investments will not meet the needs of historically disadvantaged black South Africans.[[1]](#footnote-1) For countries such as South Africa, it is challenging to transition from a system in which fossil fuel technologies (and their inevitable carbon emissions) drive economic growth, to a system in which economic growth is decoupled from emissions. Courts are rejecting efforts by MNCs to prevent the transition to sustainable energy forms. In Kenya, the National Environmental Tribunal ruled that environmental assessment, and local community participation were not carried out in developing the Lamu coal power project.[[2]](#footnote-2)

1. **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?**

In many African countries, there are fragmentation of departments and ministries addressing human rights risks and impacts. This fragmentation of legislation, and responsibilities results in incoherence outcomes for energy Justice. There should be standardization approaches that foster cooperation and minimize duplication amongst sectors and actors, in the design and implementation of plans and programmes.

1. **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?**

Open channels of communication ensure transparency and accountability. Most energy projects and contracts are shrouded in secrecy. Many of these contracts contain stabilization clauses which prevents any challenge in cases of adverse human rights impact. States can ensure that communication of energy transition efforts by businesses in the extractive sector are accessible to intended audiences. The rights of the local community to demand answers to questions about developments in their community should not be constrained. The African Charter on Human and Peoples Rights (Article 9) guarantees the rights of every individual to receive information. Details of energy concession and climate change projects are publicly available. Who or what entity is awared, the amount, duration and risks assessment, social and labour plans must be made readily available to the public. Corporate reporting is a fundamental tool in safeguarding accountability and effective communication.

1. **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?**

Most BITs do not consider human rights-based approach due to the nature and structure of International Investment Law. For example, while the African Continental Free Trade Area Agreement (AfCFTA) recognises the importance of human rights for the development of international trade and economic cooperation, it does not contain any specific human rights compatible provision. If the transformative agenda of AfCFTA is to be realised and sustainable socio-economic development is to be achieved, human rights language must be integrated in the AfCFTA as a pathway to implementing human rights through trade. However, Article 27 of the Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (Zero Draft – November 2021), obliges Member States to promote and enforce “laws and policies to protect human rights, labour rights and the environment. (Article 27). States are under an obligation to ensure that investments within their territory are consistent with sustainable development goals and other “legitimate social and economic policy objectives”. (Article 21). Article 29 specifically refers to “Business Ethics, Human Rights and Labour Standards” and enjoins Investors to comply with “standards of business ethics, human rights and labour standards.” Other efforts by African governments to require the provision of social and environmental safeguards by investors in the extractive industries include the 2009 ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector, declarations of the Pan African Parliament, and the 2009 African Mining Vision.[[3]](#footnote-3)

1. **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?**

States in developing countries, especially Africa must recognize the development of National Action Plans is critical to realizing business and human rights norms despite being the continent with the most effects of corporate irresponsibility. Consequently, states must provide adequate funding for the development of NAPs on BHR as well as a Policy Framework. Lack of financial resources will complicate the process of obtaining adequate information as a baseline for drafting NAPs. The provision of funds and other resources will also guarantee the appointment of technical experts on BHRs that will assist in the development of NAPs.

1. **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 realising the Sustainable Development Goals?**

A just transition would ensure environmental sustainability as well as decent work, social inclusion and poverty eradication. States can harness the potential of energy transition by removing all obstacles to realization of human rights including gender inequality, asymmetrical information, inadequate knowledge-based systems, financial exclusion, and a lack of focus on these critical issues in trade policies and agreements. Additionally, women experience barriers in pursuing access to effective remedies for corporate-induced human rights abuses. The Maputo Protocol mandates States Parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. This includes integrating a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life. Women, in particular, are prone to be affected by the negative socio-economic and environmental impacts of corporate activities, health-related challenges, sexual exploitation, and gender-based violence, especially in the extractive sector. Trade agreements, such as AfCFTA, must provide adequate mechanisms for protecting the interests of women and other vulnerable members of the informal sector.

**Corporate responsibility to respect human rights.**

1. **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.**

Businesses should undertake human rights impact assessment and human rights due diligence before, during and after the conclusion of development projects or operations. They should also ensure that adequate training and periodic capacity development programmes are instituted as a cultural norm within the organisation. In particular, senior management must be adequately equipped with sufficient information on BHR principles and provide mechanisms for monitoring compliance in line with human rights standards. Barrick Gold makes specific reference to the UNGPs: “We are committed to and always strive to act in accordance with the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the Voluntary Principles on Security and Human Rights.” See Barrick, Human Rights Policy, <https://s25.q4cdn.com/322814910/files/doc\_downloads/gov\_docs/policies/Barrick\_Human\_Rights\_Policy.pdf>. It also codifies the UNGPs in its Human Rights Policy <https://s25.q4cdn.com/322814910/files/doc\_downloads/sustainability/Barrick\_Sustainability\_Report\_2022.pdf>.

# Gold Fields, South Africa, embeds the UNGPs in its operational conduct by considering stakeholder groups mostly impacted in its business and supply chain. Eight significant issues were identified for Gold Fields, including abuse of power by public and private security. The company further conducted a detailed bow-tie analysis that included listing the causes of the issue, their consequences, and preventative controls, mitigatory controls in place. It successfully closed out the gaps during 2019 and 2020. See further, Gold Fields, Sustainability reporting <https://www.goldfields.com/sustainability-reporting.php>

1. **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 recognised human rights? If not, what should be done to strengthen their efficacy?**

BIT agreements are increasingly cognizing the importance of human rights-based approach to investments. The Nigeria-Morocco BIT (Article 15) is often referred to as the most progressive BIT due to its human rights provisions. Article 29 of the Zero Draft of Protocol on Investment to the AfCFTA also mandates business respect for human rights.

1. **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?**

Investors in energy transition projects must recongise and adapt to local context and rights. Investing in emission reduction schemes, solar panel and windmills require mass hectares of land. Investors should not, in their bid to invest in these technologies deprive citizens of their basic rights. Such deprivation by investors includes land dislocation from their ancestral lands, cheap labor, lack of decent work and wages, green capitalism, land grabbing. Other human rights impact includes environmental racism, exclusion of women and youth from decision making processes. See Bronwen Everill, “When the Rubber Hits the Road” <https://foreignpolicy.com/2021/11/06/liberia-firestone-rubber-capital-us-war-review-gregg-mitman/> for the experiences of local communities in Liberia as a result of Firestones activities.

Investors must be required to conduct gender responsive HRDD in meaningful consultation with stakeholders including local communities, civil society organizations, Indigenous Peoples, and human rights defenders. Limited information on energy transition programs complicates the energy transition process. Transition should not be at any cost to local communities. Businesses must incorporate the voices of stakeholders. Gender based vulnerability assessment must be incorporated in any plans or programmes.

1. **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?**

Informal economy mostly powers the African economy. Yet this sector is largely unregulated. Women, children and the disabled are mostly affected by lack of regulation and protection. States should protect the vulnerable people engaged in ASM including supply chain.

Africa’s informal sector is one of the largest in the world.[[4]](#footnote-4) The sector increasingly generates jobs for various sectors of the economy. While this sector lacks the necessary access to capital to be able to sustain the economy, there is increasing evidence that women and vulnerable members of the public are greatly impacted. This impact revolves around gender inequality, asymmetrical information, inadequate knowledge-based systems, financial exclusion, and a lack of focus on these critical issues by trade policies and agreements. Additionally, women experience barriers in pursuing access to effective remedies for corporate-induced human rights abuses.

1. **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?**

Yes, this should be mandated in contracts, concessions and legislation. As identified above, it will offer robust protections for women, children and other stakeholders in the informal sector.

1. **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)?**

Education awareness remains critical. Courses in Universities must integrate business and human rights scholarship. Human rights education and training should be regularly conducted with corporate entities. It is important to adopt enquiry-based learning methods that will integrate practical skills and knowledge and prepare students to engage in real-world problem-solving.[[5]](#footnote-5)

**Access to remedy**

1. **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?**

Operational level grievance mechanisms are best suited for this sector. The procedure for seeking remedy should be easy, cheap and accessible for litigants. Home state judicial remedies complicates remedial mechanisms for litigants who are mostly indigents and logistic challenges may prevent several claimants from seeking justice.

1. **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?**

In *SERAP v Nigeria*,[[6]](#footnote-6) the plaintiff, Socio-Economic Rights and Accountability Project (SERAP), a human rights NGO registered in Nigeria, alleged that Nigeria’s oil-rich Niger-Delta region has suffered from decades of oil spillage. This spillage has caused destruction of farmlands and damaged the quality and productivity of soil that the communities use for farming. The allegation claimed that the Nigerian government and oil companies had violated local communities’ rights to an adequate standard of living, including the rights to food, work, health, water, life and human dignity, a clean and healthy environment, and economic and social development as a consequence of, and because of the impact of oil-related pollution and environmental damage on agriculture and fisheries, oil spills and waste materials polluting water used for drinking and other domestic purposes. This case originated from a complaint brought on 23 July 2009 by SERAP under Article 10 of the Supplementary Protocol A/ SP.1/01/05 against Nigeria, the Attorney General of the Federation, NNPC, Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil. In this case, the Court ruled that it lacked jurisdiction over the corporate defendants because companies cannot be sued under international law. See SERAP v Nigeria ECW/ CCJ/APP/08/09; Rul. No: ECW/CCJ/APP/07/10 (10 December 2010). Here the Court noted that the ‘need to make corporations internationally answerable has led to some initiatives, namely the nomination of Special Representative of the Secretary General of the United Nations whose report titled “Protect, Respect and Remedy: A framework for Business and Human Rights” (the Ruggie Report) is one of the greatest references on the accountability of multinationals for human rights violations in the world.’].

In ClientEarth v Shell, Shell directors were personally sued over their climate strategy, which the claimants say is inadequate to meet climate targets and puts the company at risk as the world switches to clean energy.[[7]](#footnote-7) In May 2023, the UK High Court dismissed the case, but has since granted claimants an oral hearing where they intend to ask the Judge to reconsider.[[8]](#footnote-8)

**Good practices and other comments**

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

Nigeria vs Morocco BIT (not in operation yet); Zero Draft Protocol on Investment to the AfCFTA; South Africa’s Just Energy Transition Investment Plan (2023-2027)

1. **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?**

States and businesses must incorporate gender justice into energy laws and transition projects. Integrating human rights into energy legislation will not deliver just transition plans.

1. **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.**

**States**

Reduce the challenges associated with lack of regulatory clarity, and comprehensive laws to control corporate actors; guarantee that state-owned enterprises carry out human rights’ due diligence and human rights impact assessment; African states to Speedily ratify the Malabo Protocol, which guarantees corporate criminal liability; strengthen their oversight and regulatory responsibilities over businesses, have adequate resources, relevant knowledge and expertise to fulfil their obligations, and ensure that the workplace environment adheres to sustainable practices.

**Businesses**

Undertake human rights impact assessment and human rights due diligence before, during and after the conclusion of development projects or operations; adopt a rights-based approach in implementing BHR principles, especially those in the extractive sector. Adequate remedies must be provided for those impacted by their activities including compensation, and continuous engagement; promote operational wide awareness programmes for employees, staff, supply chains and third parties associated with the business on BHRs, sustainable practices and labour rights in host communities; engage and consult critically with local communities, understand local customs and traditions, and provide adequate and timely information about their projects; understand gendered disparities in human rights impacts, especially with regard to how women experience human rights violations in projects involving land displacement and resettlement; prohibit the employment of child labour, either as direct employees or in the supply chain; establish operational level non-judicial grievance mechanisms within the company.

**Civil Societies**

Mobilise rights holders to demand accountability from Member States on steps to curb corporate excesses; engage with host communities to identify priority areas and inform business practices in that regard; provide capacity-building and facilitate training on BHRs for states, businesses, and stakeholders; facilitate engagement and dialogue between states, businesses, host communities, chambers of commerce and other stakeholders.

1. Nicolette Pombo-van Zyl, “Gwede Mantashe raises coal versus renewable debates” ESI Africa <https://www.esi-africa.com/industry-sectors/future-energy/junior-indaba-raises-coal-versus-renewables-debate/> [↑](#footnote-ref-1)
2. See Oyeniyi Abe, *Implementing Business and Human Rghts Norms in Africa: Law and Policy Interventions* (2022) 189. [↑](#footnote-ref-2)
3. See further, Oyeniyi Abe, “The State of Business and Human Rights in Africa” <https://library.fes.de/pdf-files/bueros/fes-ua/19589-20221107.pdf> [↑](#footnote-ref-3)
4. Daouda Sembene/Hannah Brown, ‘Financing opportunities and challenges for Africa’s informal sector’, CDC talks (26 October 2021) <https://www.cgdev.org/blog/financing-opportunities-and-challenges-africas-informal-sector> [↑](#footnote-ref-4)
5. Olawuyi, D. and Abe O., *Business, Human Rights Law and Practice in Africa* (2022) 292. [↑](#footnote-ref-5)
6. Judgment N° ECW/CCJ/JUD/18/12 <https://ihrda.uwazi.io/en/entity/pftlz3gneo0wxsgq0kdszto6r>. [↑](#footnote-ref-6)
7. The Guardian, “Shell directors personally sued over ‘flawed’ climate strategy” <https://www.theguardian.com/environment/2023/feb/09/shell-directors-personally-sued-over-flawed-climate-strategy> [↑](#footnote-ref-7)
8. #  ClientEarth, “Our groundbreaking case against Shell’s Board of Directors” <https://www.clientearth.org/latest/latest-updates/news/we-re-taking-legal-action-against-shell-s-board-for-mismanaging-climate-risk/>

 [↑](#footnote-ref-8)