



## STILL I RISE POSITION PAPER ON EU DUE DILIGENCE FRAMEWORK FOR A FAIR GREEN TRANSITION

### Introduction

The European Union is facing a key political and social moment that will shape the future of Europe's identity and quality of life standards. However, now more than ever, we are also aware of the negative consequences of uneven economic and technological development. If the last century has been the era of fossil fuels, the next decades will be the one of ecological transition to achieve the goal of building a climate-neutral EU by 2050<sup>1</sup>.

On the path to a 'green transition', the materials that will power our lives will change drastically, and cobalt is one of the most important of these.

Being part of the so-called '[EU Critical Raw Materials](#)', this metal is crucial in the production of batteries that power laptops, smartphones, light means of transport (such as e-bikes or e-scooters) or Electric Vehicles (EV). This means that the steady and secure supply of this material is crucial for the sustainability of our future and the international supremacy of the EU.

This paper looks at the human rights abuses in the cobalt value chain, notably child labour, and the responsibility of the EU and the industries and companies that will enable the 'green transition' to address them in the face of the prospect of exponential demand growth for cobalt.

Still I Rise calls for a rigorous and comprehensive mandatory due diligence policy for all companies placing cobalt-containing products on the European market. From international guidelines, to the revision of the EU due diligence framework, to existing laws in some Member States, standards need to be strengthened to ensure a value chain free of child labour and other human rights abuses.

**→ Zero-tolerance on child labour and enforcement mechanisms.** A comprehensive EU due diligence framework should pursue a zero-tolerance policy on child labour. This would mean that no business relationship that includes mining activity from high-risk areas in its value chain can start unless due diligence preventive measures are already in place. The suspension of activities should be specifically related to the actual implementation of preventive and mitigating measures. At national level, the legislation should

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<sup>1</sup> A European Green Deal, Priorities 2019-2024. Link: [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en)

acknowledge the aggravated nature of child labour and include it in the list of human rights abuses that trigger liability.

- **Mandatory due diligence based on context-related risk of human rights abuses in value chains.** Regardless of the size of the companies, if the value chain and business involves interests in high-risks contexts, due diligence has to be mandatory and comprehensive of all the steps. The debate on due diligence risks leaving aside short-term, new and informal business relationships that are characteristic for the upstream of the value chain. In the DRC, cobalt extraction by ASM plays a significant role in mineral production and economic activity, particularly as a swing producer that can be 'on or off', or switch from one commodity to another depending on the market conditions.
- **Guarantee of full traceability of value chain due diligence on battery-powered products.** Critical Raw Materials such as cobalt should establish a risk-based regulatory framework that demands full transparency of the value chain. Operators and companies that introduce cobalt-containing products have to carry out third-party audits of the supply chain through pre-validated verification mechanisms. A Supervisory Authority at national level should act as guarantor of the due diligence compliance.
- **Protect and support rule of law and good governance in strategic partnerships with third countries.** The European Commission has a critical role in the promotion and establishment of business relations, investments, and other kinds of partnerships with third countries. Moreover, the subject of the CSDD should be expanded to include the 'respect of the rule of law and good governance' would serve to tackle structural problems of corruption.
- **Engagement of artisanal miners as key stakeholders in the due diligence process.** Stakeholder engagement is particularly relevant given the close proximity to and impact on local communities. It is also intrinsically related to the identification and adequate implementation of preventive and remedial measures when human rights abuses happen. The establishment of functioning communication channels with people directly impacted by abusive businesses is the only way to break the cycle of silence.
- **Grievances process. Response times and relevance of complaints in the due diligence cycle.** Grievance mechanisms should not exceed the one-year deadline already set by the directive for the production of due diligence reports. In fact, it could actually inform the constant assessment of value chains in order to act as an "internal warning system" and the identification of preventive and mitigation actions. In all cases, a grievance process and related consequences should not exclude the admissibility of civil liability under the national law that will transpose the future Directive.

## The mines of Kolwezi in our homes. Cobalt and the ecological transition

Although cobalt does not rank as the most critical material on the CRM list<sup>2</sup>, it is certainly a critical material from a human rights point of view originating from a high-risk area. Reserves and primary production are concentrated in the Democratic Republic of Congo (DRC), a country that the EU itself ranks negatively in terms of governance and environmental impact management, along with known human rights violations and the prevalence of child labour throughout the chain.

However, the EU is highly dependent on production in other countries to supply its demand. In the specific case of cobalt, DRC holds the world's largest reserve of the metal and supplies between 50 and 70 percent of the world's raw cobalt yearly<sup>3</sup>. Mining is the main source of employment in the south of the country. In fact, the land is divided into licences and mining areas, the vast majority of which have been granted to foreign companies. In parallel to industrial exploitation, artisanal miners and small-scale enterprises (SMA) are responsible for 20% of the country's total production<sup>4</sup>.

Despite this wealth, the country is also home to the third largest impoverished population in the world while the miners who extract the material on a small scale earn between 1 and 2 dollars a day. Among them, an estimated 40,000 children are involved in the mining industry<sup>5</sup>, exposed to numerous direct and collateral risks from an unsafe and exploitative environment<sup>6</sup>.

Child labour is a fact in cobalt and coltan mines. All of our students -former miners between 8 and 14 years old- worked in life-threatening conditions, subjected to violence, extortion and intimidation. Once at the mining sites, children perform the following jobs: digging, sorting, transporting, screening, washing ores and, also, selling snacks, water, sweet juices, as well as prostitution and more. All of these jobs are defined as the worst forms of child labour by [ILO Convention 182](#).

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<sup>2</sup> The Critical Raw Materials List is an European Commission initiative instaurated in 2008 by which a set of materials from different origins and for different applications require an integrated strategy at European level. The List is updated every 3 years, with the latest version defined in 2020. The composition of the list looks at two main criteria: the economic importance (the share of the end use of a raw material in key sectors for the UE and possibility of substitution based on available technology levels); and the supply risk (computed based on the concentration supply, political instability, import reliance and share of European suppliers). As of the latest version, cobalt ranks 10th in supply risk and plays a major role in the batteries, fuel cells, motors, robotics, drones, ICT and 3D printing technologies.

<sup>3</sup> As of January 2022, the US Geological Survey estimated that DRC produced more than 70% of the world's cobalt mined. Link: <https://pubs.usgs.gov/periodicals/mcs2022/mcs2022-cobalt.pdf>

<sup>4</sup> Source: Cobalt Institute

<sup>5</sup> UNICEF estimate in 2014. Link: [https://unctad.org/system/files/official-document/ditccom2019d5\\_en.pdf](https://unctad.org/system/files/official-document/ditccom2019d5_en.pdf)

<sup>6</sup> Amnesty International, *'This is what we die for. Human rights abuses in the Democratic Republic of the Congo power the global trade in cobalt'*. Link: <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR6231832016ENGLISH.pdf>

Of all forms of hazardous work, mining is by far the most hazardous sector for children. Children are exposed to manifold risks, ranging from death and mutilation, to sexual abuse and STD's, unwanted pregnancies, skin infections, tuberculosis, water-borne diseases or physical development disorders.

## Due diligence in the EU

Mandatory human rights due diligence is a concept that has been widely recognised and developed internationally. In recent decades, frameworks have been consolidated in various areas that are applicable for all countries and companies. The most notorious are the United Nations Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, the Ten Principles of the UN Global Compact, ILO Conventions and the acquis of international human rights conventions.

In this context, the EU is in the process of a comprehensive reform of due diligence standards in relation to the economic and industrial expansion that the green transition will entail. The legislative proposals of the *Corporate Sustainability Due Diligence Directive (CSDD)* and the *Batteries Regulation*, still under discussion; the recently adopted *Corporate Sustainability Reporting Directive (CSRD)*; and the *Critical Raw Materials Act (CRMA)*, still being drafted by the Commission, should raise European standards in line with existing international policies and principles.

Until now, companies have enjoyed a lax legal framework in terms of due diligence. Especially when it comes to the implementation of necessary measures in value chains to comply with human rights standards and the establishment of grievance mechanisms. Another crucial element in the reinforcement process is the traceability of mined products to the final goods sold on the European market. Indeed, abusive practices occur in the first steps of the value chain (*upstream actors*) due to the physical remoteness of the places of origin and the usual absence of rule of law and weak governance that favour an environment without rights guarantees. Thus, when *downstream actors* purchase and process metals and minerals from these producers, the possibility of connecting the battery of a smartphone or a car, for example, to exploitative structures and child labour is lost.

It is therefore necessary that the new directives on Corporate Sustainability are sensitive to the shortcomings of an approach that privileges economic criteria to gauge the due diligence responsibilities of European/Western companies. In this respect, we expect that the CSRD reporting standards will only accept international companies that are able to determine the origin of ASM materials through engagement with suppliers and the identification of critical points (location, supplier and circumstances) in the value chain. Moreover, we expect it to assess the smelter's due diligence practices to see whether it identified or reasonably should have identified red flags in its supply chain. This should be done regardless of the company's turnover or number of employees.

In the particular case of the **CSDD**, we are concerned about the Commission's proposed language around the concept of the '*Company*'. As it is currently defined in Article 3, the wording ignores both the notion of enterprise-ensemble

[established](#) by the European Court of Justice in the field of EU competition law and the notion of 'group of companies' widely used in European legislation. This will [mean](#) that companies belonging to a group will only fall within the scope of the directive if they meet the threshold set out in Article 2. The directive should integrate the definition of the group company as set out by the article 2 of the [Directive 2013/34/EU that](#), which defines a 'group' as 'a parent undertaking and all its subsidiary undertakings'<sup>7</sup>. This is crucial in order to prevent multinational companies from fragmenting their organisational structure to escape due diligence obligations.

Moreover, the definition of "high-impact" sectors falls short on actually tackling the potential risk around human rights abuses that can happen in the mining sector as a necessary element of different value chains. On one hand the exclusion of the financial sector is at odds with strategies for ongoing due diligence and risks disincentivizing the implementation of the UNGPs and OECD Guidelines.

Particularly in the mining context, a robust due diligence process by financial institutions could mean taking a preventive approach to [avoid](#) providing financing or securities underwriting services to clients that cause, contribute to, or are connected to significant negative impacts related to human and labour rights, the environment, and corruption as well as to avoid financial and reputational risks.

The exclusion of the financial sector also means losing the opportunity of involving a transversal sector that could support efforts that address systemic issues and root cause of child labor as: poverty, corruption, access to education and lack of job opportunities.

On the other hand, the Directive is blind to "advanced" economic sectors that are critical for the EU and that are set to expand. By narrowing the concept of 'high-impact' to primary economic sectors, the Directive is leaving aside key industries of the EU's economic strategy, namely the ICT and the Electric Vehicles ones, that are actually at the core of the human rights violations and child labour in DRC and that will have a ripple effect around the world. Even the European Commission subscribed a [report](#) in 2011 to develop guidelines for the ICT sector.

A key role in strengthening due diligence requirements will also be played by the Batteries Regulation, which has provided for a mandatory implementation framework for all economic operators that place a battery on the EU market. We expect that in the legislative process through the Parliament and the Council, the Regulation will be expanded to cover all identified battery types, regardless of the battery's size or capacity. Likewise, economic operators should base their due diligence on all relevant information on geographic, sectoral, product and enterprise risk factors, including through consultation with actual and potentially affected stakeholders (including, local communities, Indigenous peoples, civil society organisations, and reviewing credible media sources).

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<sup>7</sup> There is also the need to use a coherent language to refer to the concept of company in all the articles of the proposal, which is not constant in the use of "group", "branch", "subsidiary".

Ultimately, we expect both the Batteries Regulation and the CRMA to be consistent and legally bound by the standards of the CSDD. Considering their specialised scope, both must take into account and expand due diligence considerations following the common standards.

## **National Legislations of the Member States. The experience of France and the new standards of Germany**

The new European directives are part of a global context in which the scope of CSR and ESG laws is growing. Since 2011, when the UN Guiding Principles on Business and Human Rights were approved, due diligence has become a cornerstone principle of the current debate on Business and Human Rights.

In the EU, French companies were the first required to put in place measures to prevent and identify violations of human rights and the environment in 2017. Since then, several Member States such as Germany and the Netherlands have equipped themselves with equivalent tools. These laws go beyond the voluntary recommendations in the aforementioned soft law instruments. They set forth concrete obligations on companies' implementation of vigilance or due diligence procedures to prevent, mitigate, monitor and correct impacts on human rights, environment and corporate governance in their activities and value chain.

These laws represent a real leap forward in regulating the relationship between business and human rights. Notably, the positive aspects of these laws are that: a) they treat due diligence as an ongoing process; b) most severe human rights abuses are included; c) they provide criminal proceedings in case the law is not enforced; d) they have an extraterritorial effect.

However, these laws are far from perfect.

The French law<sup>8</sup>, for example, only applies to companies with more than 5,000 employees in France, (or 10,000 worldwide): a large number of companies therefore escape these obligations, particularly companies in the extractive sector, such as Perenco.

[Perenco](#) is a multinational company -worth 7 billions- specialising in the exploitation of oil wells at the end of their life. Although little known to the general public, numerous reports denounce serious environmental and human rights violations in the various countries where the group operates. Since Perenco do not fall within the scope of due diligence -it has less than 10.000 employees worldwide- Friends of the Earth France and Sherpa had to [invoke civil liability](#) to bring the company before the Paris civil court at the beginning of November for pollution associated with the group's oil activities in the DRC.

The Perenco case can be emblematic of the impunity of corporate groups whose activities have a negative impact on the environment and community rights but which do not fall within the scope of due diligence law.

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<sup>8</sup> LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. Link: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>

Another problem is that the scope of these laws do not cover the whole supply chain.

In France, comprehensive due diligence obligations only apply to the company's business operations and direct suppliers, but not to indirect suppliers. In the German<sup>9</sup> case indirect suppliers of companies are included but only on an ad hoc basis - only when companies acquire 'substantial knowledge' of a potential human rights violation.

This restriction is incompatible with the preventive idea of the UN Guiding Principles. It is well known that most human rights violations occur at the very beginning of supply chains, i.e. in the area of indirect suppliers. Without a systematic and preventive analysis of possible risks, including those not publicly known, the human rights of all will not be respected.

Also, the high burden of proof still lies with the plaintiffs, so access to justice for victims remains a real obstacle course. In particular, it might be challenging for the victims to satisfy the burden of proof especially with regard to crimes committed abroad or to prove aiding and abetting for crimes committed within a subsidiary or within the supply chain. In addition, with regard to unintentional crimes it might be challenging to prove the causal link.

Finally, a number of specific issues constituted a systematic problem for the laws examined, including: lack of adequate stakeholder consultation (specially indigenous and vulnerable groups); failure to disclose the results of actions taken to mitigate risks or remedy violations; lack of transparency; and failure to cover all human rights abuses.

## **What is the situation in Italy?**

Within the past few years, Italian investments in the green energy sector have surged and materials like cobalt, lithium and rare earths have featured heavily in international headlines due to their strategic importance to green energy.

Efforts have been made worldwide to address these issues, mainly through responsible supply chain management initiatives and through laws and regulations. We are now at a time when this effort is being renewed in particular by the European Union, as we saw above.

However, Italy in this context is behind.

The most relevant Italian legislation on Business and Human Rights is the Italian Legislative Decree No. 231/2001 '*Regulations on the administrative liability of legal persons, companies and associations*'<sup>10</sup> and it can be considered a precursor to

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<sup>9</sup> Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (*unofficial translation: Law on Corporate Due Diligence in Supply Chains*).Link: [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl121s2959.pdf#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl121s2959.pdf%27%5D\\_1669815419233](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D_1669815419233)

<sup>10</sup> "Disciplina della responsabilita' amministrativa delle persone giuridiche, delle societa' e delle associazioni anche prive di personalita' giuridica. Link: <https://www.parlamento.it/parlam/leggi/deleghe/01231dl.htm>

legislation on HRDD, although it was adopted a decade before the Guiding Principles and with entirely different purposes.

The decree [provides](#) that legal persons, including corporations, can be held liable -and thus financially or criminally sanctioned- in connection with certain crimes that are committed or attempted in Italy or abroad in the interest or to the advantage of the Company. Although the law does not provide for a mandatory due diligence process, it aims to encourage companies to have corporate governance structures and risk prevention systems in place to prevent crimes. Notwithstanding that it is not specifically directed at the protection of human rights, the scope of the law has been expanded over the years and currently includes specific human rights violations, such as slavery, human trafficking, forced labor, prostitution and child pornography, female genital mutilation, and environmental crimes.

Twenty years after the approval of Legislative Decree No. 231 of 2001, the Ministry of Foreign Affairs has recently set up a working group with the CNPDS (National Centre for Prevention and Social Defence Foundation), Confindustria and Assonime. The aim is to measure the effectiveness and consistency of regulations on administrative liability for crimes of collective entities within the country and to assess the appropriateness of any reforming measures as written in the second National plan on Business and Human Rights 2021-2026<sup>11</sup>, presented in December 2021.

## **Standards to tackle child labour. A comprehensive human rights due diligence**

The history between mining, conflict and abuse is long and the relationship is complicated. The potential for conflict always exists for the mining sector, depending on the impact it has on communities, economies and the environment.

The EU due diligence must be sensitive to the social, economic, political and environmental repercussions of its increased demand of critical materials, such as cobalt, if it is to protect and ensure an energy independent and green future for all.

**It is critical that the various legal instruments in place include the following elements to address the extensive use of child labour directly or indirectly related to cobalt mining.**

### **1. Zero-tolerance on child labour and enforcement mechanisms**

In line with the OECD guidelines for Multinational Enterprises<sup>12</sup>, a comprehensive EU due diligence framework should pursue a zero-tolerance policy on child labour.

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<sup>11</sup> A strategic document prepared by an ad hoc working group to which numerous ministries and institutions have contributed. Link:

[https://cidu.esteri.it/comitatodirittiumani/it/informazione\\_formazione/secondo-piano-d-azione-nazionale](https://cidu.esteri.it/comitatodirittiumani/it/informazione_formazione/secondo-piano-d-azione-nazionale)

<sup>12</sup> OECD Guidelines for Multinational Enterprises. *Practical actions for companies to identify and address the worst forms of child labour in mineral supply chains*. Link: <http://mneguidelines.oecd.org/child-labour-risks-in-the-minerals-supply-chain.htm>

On this line we propose that due diligence preventive measures should always be demanded and put in place in contexts where violations of human rights are widespread and known as it is the case of the mining sector in DRC. This would mean that no business relation that includes mining activity from high-risk areas in its value chain, particularly in areas where the worst forms of child labour are intrinsic to the sector, can start unless due diligence preventive measures are already in place. Moreover, the suspension of activities should be specifically related to the actual implementation of preventive and mitigating measures.

On the same line, the termination of business relations should not be considered a last-resort decision or conditioned measure when child labour is involved. Otherwise the directive would disregard the perpetuating effect of business relations on this problem and the ability of companies to incentivize a change in practice.

At national level, the legislation should acknowledge the aggravated nature of child labour and include it in the list of human rights abuses that trigger liability.

## **2. Mandatory due diligence based on context-related risk of human rights abuses in value chains**

All of the above-mentioned legislative initiatives follow an economic pattern in determining the mandatory application of due diligence processes by companies. The loopholes and legal inconsistencies that can occur in the application of the terms such as, "company", "established business relation", "net turnover", "number of employees" still leave room for business activities that end up with end products affected by human rights abuses.

Regardless of the size of the company, if the value chain and business involves interests in high-risks contexts, due diligence has to be mandatory and comprehensive of all the steps.

The same applies to the debate of 'established business relationships', which risks leaving aside short-term, new and/or informal business relationships that are characteristic for the upstream of the value chain.

In the case of mining extraction and human rights abuses, the "upstream" process of the value chain is precisely the critical moment that is currently out of control due to the informality of this sector in the country of origin and the element of corruption and weak governance. In the DRC, cobalt extraction by ASM plays a significant role in national mineral production and economic activity. In particular, the artisanal miner needs to be seen as a swing producer, i.e. one who can be 'on or off' or switch from producing one commodity to another as market conditions change, given how widely informal business is. For example, the sale of minerals in Kolwezi (DRC) is done in three ways: 1. artisanal miners have the possibility to sell directly to traders if they lack the means of transport to bring the minerals to the sales points; 2, artisanal miners can organise themselves with their own means of transport to get the minerals to the sales points; and 3, the company can send their traders and informants to the mines to buy directly and collect the minerals from the sites.

The static concept of “established business relation” would have not captured this flexibility of the cobalt mining market at the top of the upstream chain.

### **3. Guarantee of full traceability of value chain due diligence on battery-powered products**

Following the experience of the EU Conflict Minerals Regulation, Critical Raw Materials such as cobalt should establish a risk-based regulatory framework that demands full transparency of the value chain.

Therefore, economic operators and companies that introduce cobalt-containing products have to be required to carry out third-party audits of supply chains and make their annual reporting easily available to the public. The identity of these independent third party verification mechanisms should be previously validated by the European Commission based on the common reporting standards.

A Supervisory Authority at national level, with defined responsibilities and composition, should act as guarantor of the due diligence compliance. It should have a clear role of control and enforcement of the companies' annual reports.

### **4. Protect and support rule of law and good governance in strategic partnerships with third countries**

The European Commission has a critical role in the promotion and establishment of business relations, investments, and other kinds of partnerships with third countries that promote good governance practices and responsible sourcing policies.

On the one hand, considering the prevalence of child labour in the mining sector in Democratic Republic of Congo, the expansion of the subject of the CSDD to include the ‘*respect of the rule of law and good governance*’ would serve to tackle structural problems of corruption and weak governance. Even more, it should be borne in mind that in this case, the circumstances of the context promote malpractice by companies in order to do business with the authorities, which generates a vicious circle of corruption that perpetuates the same problems.

### **5. Engagement of artisanal miners as key stakeholders in the due diligence process**

In the mining sector due diligence processes, stakeholder engagement is particularly relevant given the close proximity to and impact on local communities through the use of resources such as water, energy, and land.

It is also intrinsically related to the identification and adequate implementation of preventive and remedial measures when human rights abuses happen. The establishment of functioning communication channels with the people directly impacted by abusive businesses is the only way to break the cycle of silence and provide international companies with tangible proof to efficiently and effectively tackle the abuses in their production chains.

At a higher level, the mandatory engagement of artisanal miners in the due diligence process would bring one step closer to the objectives of the localisation agenda through the private sector.

## **6. Grievances processes. Response times and relevance of complaints in the due diligence cycle**

The grievance mechanism could actually inform the constant assessment of value chains in order to act as an “internal warning system” and the identification of preventive and mitigation actions. However, this timeframe should not be left to the discretion of companies and in any case at the very least should not exceed the one-year deadline already set by the directive for the production of due diligence reports.

Moreover, the implementation of grievance mechanisms and related consequences should not exclude the admissibility of civil liability of corporations under the national law that will transpose the future Directive.

## **Conclusion**

As the next few years will be determinant for Europe’s energy independence and sustainable development, it is crucial to set a real commitment to respecting and guaranteeing human rights in order to achieve those objectives. Now more than ever, it is clear that mandatory human rights due diligence in business is not optional nor redundant for a future that does not replicate the mistakes of the past. The integral reform of EU’s due diligence and green transition framework offers the opportunity to turn into practice internationally agreed standards. Specific roles must now be assumed: that of states as guarantors of human rights, that of businesses to respect them, and that of society as a whole to safeguard them and provide mechanisms for redress when they are harmed.