Research Article

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Operationalising the UN Guiding Principles on Business and Human Rights through Human Rights Due Diligence: A Critical Assessment of Current States Practices

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Abstract

The past one decade had witnessed how the UN Guiding Principles on Business and Human Rights (UNGPs) shaped the global standard for responsible business, while it had also indicated the ineffectiveness of implementation. At present, the potential of human rights due diligence to operationalise the UNGPs tends to be recognised by both state and non-state actors. States around the globe are undertaking various approaches to institutionalise human rights due diligence to fulfil their duty to protect under international human rights law. Against this backdrop, the paper aims to explore current practices of human rights due diligence institutionalisations and provides a holistic assessment of different models adopted by state actors. The research result argues that among the three major models, i.e., NAPs Model, mHRDD Model and BHR Treaty-based Model, the NAPs Model is a more optimal solution to operationalize the UNGPs. This judgment bases on not only the innate merits of the NAPs Model but also on its potential to avoid adverse impacts resulting from unilateral legislation and to foster consensus for a business and human rights treaty.

Keywords: *business and human rights, human rights due diligence, national action plans, mandatory human rights due diligence, business and human rights treaty*

1. Introduction

In 2011, following a considerable amount of intensive and extensive consultations with multi-stakeholders (Ruggie, 2013), the United Nations Guiding Principles on Business and Human Rights (UNGPs) was endorsed unanimously by the UN Human Rights Council (United Nations Guiding Principles on Business and Human Rights, 2011) and has provided the first time with an 'authoritative international standard in business and human rights (Nadia, 2021). The UNGPs consist of three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights, and victims' access to an effective remedy. During the past one decade, the UNGPs indeed have raised awareness of human rights protection in the realm of economic globalization, and numerous UNGPs-based international guidelines and standards have been established, for instance, the OECD Guidelines for Multinational Enterprises (Nadia, 2021), the FIFA's Human Rights Policy (FIFA's Human Rights Policy, 2017), the ISO 26000 (Nadia, 2021) to name but a few. However, the failure of sufficient and effective implementation makes the UNGPs, to a large extend, stop on paper (Nadia,

2021). Meanwhile, the significance and potential of human rights due diligence - as a core instrument to operationalize UNGPs (FIFA's HumanRights Policy, 2017), have been recognized by multi-stakeholders including states, international organizations, civil society organizations and business entities.

Human rights due diligence under the second pillar of the UNGPs is an ongoing and context-dependent process that all business entities are expected to conduct to fulfil their responsibility to respect human rights. It requires all business enterprises, regardless of their size, sector, operational context or location, ownership and structure (Supran, 2021), to assess actual and potential adverse human rights impacts, integrate and act on the findings, follow up on responses, and account for how identified impacts are addressed (Supran, 2021). Also, given that the human rights risks may change over time and vary from operational contexts, human rights due diligence should be an ongoing endeavour undertaken at regular intervals and launched at the very initial stage of the development of a new business activity or relationship (Supran, 2021). In addition, human rights due diligence is a context-based process that provides business entities with enough policy space to adopt context-suited human rights due diligence strategies that are proportional to their size and circumstances, (Supran, 2021) to evaluate human rights risks, (Supran, 2021) prevent and mitigate adverse human rights impacts (2021). Moreover, the context-dependent criterion demands business undertaking to apply additional standards apart from the minimum requirements (Supran, 2021) according to different business circumstances and the need to pay extra attention to specific groups or populations (Supran, 2021). Human rights due diligence has a broader spectrum covering negative human rights impacts that the business enterprises may cause or contribute to through own activities, or which may be directly linked to its value chains or business relationships (Supran, 2021). It is such a feasible mechanism that could significantly facilitate the substantive operationalisation of the UNGPs and provides tangible references for the ever-increasing amount of benchmarks aiming at measuring responsible business conduct around the globe (Supran, 2021).

Although the realisation of human rights due diligence relies finally on the concrete actions of business enterprises, it could not be ignored that human rights due diligence is both a states' duty to protect and corporations' responsibility to respect human rights. It is not only because human rights due diligence *per se* is a combination of states' due diligence obligation under international law and corporate due diligence practices, (Fasciglione, 2016) but also the requirements of international law and the UNGPs (Surya and Bilchitz, 2013). To date, there is a growing tendency for states to implement the UNGPs by establishing human rights due diligence systems through policies, initiatives to draft a business and human rights treaty and domestic legislation, which are not mutually exclusive. However, the scholarship focusing on states' practices of human rights due diligence is not as much as that touching on corporate responsibility to comply with human rights due diligence requirements (Surya and Bilchitz, 2013). And the existing literature focusing on states seems insufficient to depict a comprehensive picture of the current development of human rights due diligence practices at the domestic level with or without extraterritorial effects.

To be more detailed, research on states' efforts to the promotion and implementation of human rights due diligence is scattered, fragmented between national human rights action plans (Felice and Graf, 2015) mandatory human rights due diligence legislation (Feliceand Graf, 2015) and the development of a business and human rights treaty (De Schutter, 2015) with few studies comparing the three or more. Against this backdrop, the paper adopts normative and comparative research methods to explore current state practices of human rights due diligence institutional building and provides a holistic assessment of different models by critical analysis (Felice and Graf, 2015). Given the function of human rights due diligence is to make business enterprises accountable for human rights abuses and the purpose of this research, the following analysis of different models adopts a three-component framework, i.e. the normative quality, scope of application, and depiction of trends. The paper is thus organised as follows. After this introduction, the second part argues that human rights due diligence is a state's duty to protect under international human rights law and explains the rationales for states to institutionalize human rights due diligence. Then the third to the fifth part of

the paper explore and classify different models followed by states to realising human rights due diligence, namely, the National Action Plans Model, the Mandatory Human Rights Due Diligence Model and Business and Human Rights Treaty Model, respectively. Before a brief conclusion and suggestions for future research, the sixth part consists of comparative analysis and critical evaluation of the mentioned models and puts forwards possible paths to maximize the instrumental values of human rights due diligence.

2. Human Rights Due Diligence as State Duty to Protect

States, as the main duty-bearers of international human rights law, are obligated to undertake the duty to respect, protect and fulfil human rights (Economic and Social Council, Report on the Right, 1987). The duty to protect requires state actors to engage in the protection of human rights, including against private actors, e.g., transnational corporations, without having to guarantee success (Schabas, 2015). Under international human rights law, the term 'due diligence' is referred to 'describe the standard of conduct necessary to comply with a duty to protect (Schabas, 2015) i.e., a standard used to determine whether a state implement its duty to protect human rights. In the context of business and human rights, state duty to protect requires states to take appropriate measures to foster business respect for human rights, which in turn relies on the establishment and operation of human rights due diligence. Therefore, as a consequence of legal reasoning, fostering corporate human rights due diligence is a state duty to protect under international human rights law (Schabas, 2015). The appraisal of what is appropriate content and extent of the 'due' of human rights due diligence depends on the legitimate expectations on the relevant actor's behaviour, and such expectations, in turn, rely on factors embedded in the actor itself as well as the social, political and legal context. This indicatesthe reason why the UNGPs call on states to adopt a smart mix of measures to promote corporate human rights responsibility, also is a legitimate basis for diverse states' practices in terms of implementing human rights due diligence which is addressed in the following sections.

So far, it is for sure that human rights due diligence is a portion of a state duty to protect. And the rationale behind the state's actions is also one that deserves to be probed. In addition to the fulfilment of obligations under international human rights law, a host of other imperative justifications make it necessary for states to introduce measures to advance human rights due diligence. First of all, human rights due diligence is a requirement for the transformation of state functions in a risk society where wealth and risk go hand in hand, and the risks have been globalised along with the process of economic globalisation (Beck, 1992). The law should not just focus on remedies *ex post* but should also take more proactive and preventive measures *ex ante*. Human rights due diligence is a duty to mitigate risk that is needed in current 'risk society' to control or contain risks to prevent another actor or public interest from being harmed. Secondly, fostering corporate human rights due diligence is a necessary response to civil society's clamour for enhanced corporate accountability and responsible business. From the early stage of the big wave in adopting codes of conduct in the 1990s (Anke, 2008), to current wave in enacting human rights due diligence laws especially among the EU countries (Gerard, 2014) civil society has played a vital role. Moreover, civil society is continuing to clamour for more proactive action by the government to meet its obligations to protect human rights as set out in the UNGPs (National Action Plan on Business and Human Rights of the Netherlands, 2013). Thirdly, an instructive environment for establishing and improving corporate human rights due diligence benefits national companies' global operation and extension. Given 'the responsibility to respect human rights is a global standard of expected conduct for all business enterprises and the rapid development of ESG (environment, social and governance). Investment, and corporate social responsibility rating mechanisms, a well-established human rights due diligence could improve a company's social performance and enhance its global competitiveness. It is thus obvious that government should undertake more actions to encourage, stimulate and facilitate corporate human rights due diligence, *i.e.,* to fully and proactively discharge its share of human rights due diligence obligation.

3. National Action Plans Model

National Action Plans (NAPs) in the realm of human rights entered into the international community since the 1993 Vienna Human Rights Conference (Azadeh, 2014), which could be understood as governmental-proposed policy instruments that express explicitly a government's priorities and orientation of future actions to facilitate fulfilment of legal obligations or implementation of policy commitments surrounding a specific issue (O'brien, Methven et al., n.d.). Given its potential to provide for greater international and interdepartmental coordination and cooperation toestablish an inclusive process to prioritize and set up national business and human rights policies, the NAPs was introduced to the field of business and human rights in 2016 (UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights, 2016). Thus, a National Action Plan on Business and Human Rights (NAPs-BHR), or to some countries, the National Action Plan on Implementing the UNGPs is both a national policy strategy envisages a state's orientation and road map to protect against adverse human rights impacts by business enterprises in conformity with the UNGPs. Currently, a host of states encourage or require business enterprises within their jurisdictions to build up or improve human rights due diligence to address adverse human rights impacts resulting from business activities or relationships. Therefore, the NAPs-BHR based pathway to put in place human rights due diligence could be classified as an independent model to consider states' practices. This part aims to elucidate the characteristics of the National Action Plans Model (NAPs Model) by investigating the normative quality, scope of application and trends around the world.

The normative quality of NAPs-BHR tends to be guiding and soft norm rather than hard norm unless a state refers it to a legislative instrument and grants it binding force. Many factors combine to determine its soft law attributes. First, the normative source of NAPs-BHR is the policy established by administrative institutions, not domestic legislators. Most of the public institutions in charge of NAPs-BHR are foreign affairs departments (the Foreign and Commonwealth Affairs of the United Kingdom, the Italian Ministry for Foreign Affairs and International Cooperation, the Irish Department of Foreign Affairs and Trade, the Dutch Ministry of Foreign Affairs), although exceptions could be observed, e.g., the Ministry of Corporate Affairs of the Government of India, a specific Inter-ministerial Working Group of French Government, Inter-Ministerial Committee on Japan's National Action Plan on Business and Human Rights, at least in nature they are all administrative institutions. Second, the non-legally binding attribute of UNGPs (Ruggie et al., n.d.)- the normative basis of NAPs-BHR, also contributes to its soft norm nature. States published NAPs-BHR in general referred directly the UNGPs as the normative basis (Morris et al., n.d.) and the latter does neither constitute a legally binding document nor be understood as creating any new international law obligations (O'brien et al., n.d.). The UNGPs require states to undertake 'appropriate steps to prevent, investigate, punish and redress such (human rights) abuse through effective policies, legislation, regulations and adjudication'; and to 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. In other words, UNGPs uphold a smart mix approach by calling on states to adopt hard or soft laws, domestically and/or internationally to meet their duty to protect in the realm of business and human rights. The soft norm nature not only provides policy space for states to establish human rights due diligence institutions but also effects the scope of application of such institutions.

Under the NAPs Model, the human rights due diligence requirement is widely applicable mainly in terms of the wide range of the subjects applied and the topics covered. First, the wide range of applicable subjects is a fundamental principle of UNGPs which require 'all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure' to respect human rights, put differently, 'the responsibility to respect human rights applies fully and equally to all business enterprises. The NAPs-BHR follows essentially the same position and requires all businesses to put in place or perfect human rights due diligence policy. For example, Indian National Guidelines on Responsible Business Conduct requires all businesses to put in place human rights due

diligence to identify, prevent, mitigate and account for how then address adverse human rights impacts (Ministry of Corporate Affairs of the Government of India, 2019); Japanese National Action Plan on Business and Human Rights expects Japanese enterprises, regardless of their size and sector of industry to introduce the process of human rights due diligence (Inter-Ministerial Committee on Japan's National Action Plan on Business and Human Rights, 2020), Luxembourg fully subscribes to UNGPs and expects companies to adopt particularly the due diligence process based on UNGPs (Ministry of Foreign and European Affairs of Luxembourg, 2018). Then, the widely covered human rights topics are another highlight of the human rights due diligence regime under this Model. The NAPs-BHR requires business entities conduct human rights due diligence in accordance with the minimum as well as the context-based extra standards defined by the UNGPs. The scope of human rights due diligence thus goes far beyond some specific human rights issues like forced labour, child labour, environmental pollution and covers civil and political rights, economic, social and cultural rights, environmental rights, the rights to minorities, women, children, persons with disabilities, indigenous people and so on. The flexibility and wide application scope of the NAPs Model in terms of human rights due diligence institutional building seems to be promising to provide a path to mitigate the governance gap in business and human rights and seems to be a big hit among states.

Since the United Kingdom took a lead in launching the first NAPs-BHR in September 2013 (The Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom, 2016), at least 28 states to date had published NAPs-BHR and more than 26 states are drafting or are going to draft NAPs-BHR (the United Nations Human Rights Office of the High Commissioner and National Action Plans on Business, 2021). The establishment of NAPs-BHR has become a burgeoning phenomenon supported by the United Nations, European Unions and other international organizations (O'brien, Methven et al., n.d.). Although the UN Working Group suggests states to establish stand-alone NAPs-BHR to systematically demonstrate a state's position of business and human issue, it also 'recognizes that it might be meaningful in particular national contexts to initiate and situate the NAP(s) within the context of other Government strategies. Thus, in general, states tend to develop stand-alone NAPs-BHR to indicate their position and the future course of action on human rights due diligence, so as to lay the groundwork for further actions taking various forms of policy, law and/or international treaty, to operationalize human rights due diligence. For instance, the Thai Government proposed a scheme in the NAPs-BHR to incorporate human rights due diligence into corporate annual reporting and disclosure framework to advance corporate human rights due diligence practices (Rights and Liberties Protection Department of Ministry of Justice of Thailand, 2019). Italy planned to review and evaluate legislative reform to incorporate duty of care or due diligence provisions to the existing commercial and civil law (Italian Ministry of Foreign Affairs and International Cooperation, 2016); China conveys an initiative to constructively participate in the negotiation process on a business and human rights treaty (The State Council Information Office of the People's Republic of China, Human Rights Action, 2021). Some scholars even argued that the launch of NAPs-BHR has become a key indicator of a country's performance of implementing the UNGPs (Cantú).

4. Mandatory Human Rights Due Diligence Model

Comparing to the soft norm nature of human rights due diligence arrangement under the NAPs Model, Mandatory Human Rights Due Diligence Model (mHRDD Model) embraces a hard-law solution and legislates human rights due diligence through domestic laws. Therefore, the mHRDD Model could be perceived as the enacting of domestic laws to ensure corporations meet specified standards of behaviour and act with due diligence in specific areas. Although the content and extent of published or proposed legislation are not identical, the California Transparency in Supply Chains Act of 2010 (California Act), Unites States Dodd Frank Act on Conflict Minerals, EU Directive on Non-Financial Reporting, United Kingdom Modern Slavery Act of 2015 (UK Modern Slavery Act), French Law on Duty of Care of 2017 (French Due Diligence Law), Dutch Child Labour Due Diligence

Law of 2019 (Dutch Due Diligence Law), European Parliament draft Corporate Due Diligence and Corporate Accountability Directive of 2021 (EU Draft Due Diligence Directive), German Act on Corporate Due Diligence Obligation in Supply Chain Law of 2021 (Kettengesetz, German Supply Chain Law) and so on are indeed the cases of legislating human rights due diligence through domestic laws (or EU laws). In view of the limited space available and the purpose of the paper, only the most representative legislation is selected below to illustrate the normative quality, scope of application and trends regarding the mHRDD Model.

Firstly, the normative quality of mandatory human rights due diligence instruments are legally binding laws given their corresponding sources and legislative procedures. This domestic legislation on human rights due diligence imposes clear legal obligations on specific types of businesses, evaluates business conduct against national human rights standards and provides for legal sanctions for non-compliance and violation. For instance, California Act requires companies subject to its scope of application to disclose actions carried on to eradicate slavery and human trafficking from their direct supply chain for tangible goods offered for sale, and the disclosure shall at a minimum covering companies' engagement in the verification of product supply chains, conduct audits to evaluate the compliance of suppliers with company standards, maintain internal accountability standards and procedures and so on; if a company concerned violates the disclosure requirements, the Attorney General may bring an action for injunctive relief (California Transparency in Supply Chains Act of 2010). UK Modern Slavery Act also demands commercial organizations of certain size to prepare a slavery and human trafficking statement that indicates steps taken or not to avoid the occurrence of slavery and human trafficking in own business as well as along the supply chain (United Kingdom Modern Slavery Act of 2015). The components of such a statement include but not limited to internal policies in relation to slavery and human trafficking, due diligence processes concerned, steps taken to assess and mitigate related supply chain risks, training arrangement for staff (United Kingdom Modern Slavery Act of 2015). If the duties imposed are not observed, the Secretary of State may lodge civil proceedings against the commercial organisations in question (United Kingdom Modern Slavery Act of 2015).

In addition to disclosure obligations on due diligence process taken by a company, France, the Netherlands and Germany obligate a more concrete and demanding due diligence policy and process. French Due Diligence Law imposes a duty on specific business entities to establish, publish, implement and report on the implementation of an annual due diligence plan (plan de vigilance). In case of noncompliance, the competent court may at the request of any person with *locus standi* enjoin the company in question to comply with the obligations provided for in this law, where appropriate under a penalty payment (LOI n, 2017). In the same regard, Dutch Due Diligence Law demands companies covered to submit a statement to the designated authority declaring that they have established child labour due diligence based on the UNGPs along supply chains, and when companies violate due diligence obligations or fail to act sufficiently in line with due diligence, they may face administrative or even criminal penalties (Mvoplatform, 2019). German Supply Chain Law imposes due diligence obligations on covered companies and their entire supply chains by requiring the establishment of due diligence process including policy statement, risk analysis and management, grievance mechanism, public reporting and so forth; infringements of the law may result in fines (*SupplyChainLaw,* 2021*)*.

Secondly, thanks to the certainty and predictability of the hard law, the scopes of application of domestic human rights due diligence legislation are relatively concrete and definitive. In spite of some emerging alterations, most legislation in this respect demands companies that meet certain criteria and are involved in listed human rights issues to obey human rights due diligence. UK Modern Slavery Act binds companies including subsidiaries engaged in business activities in the UK with a gross turnover of £36 million or more in relation to modern slavery and human trafficking. Dutch Due Diligence Law applies to companies registered in the Netherlands and companies from anywhere in the world that deliver products or services to the Dutch market twice or more per year, and the companies covered have to carry out due diligence regarding exclusively child labour issue

along supply chains. Then, the French Due Diligence Law regulates companies incorporated or registered in France for two consecutive fiscal years that have at least 5,000 employees themselves and through corresponding French subsidiaries, or employ at least 10,000 staff themselves and through corresponding subsidiaries within France and around the world. And the *ratione materiae* of the French Due Diligence Law covers human rights and fundamental freedoms, human and environmental health and security. German Supply Chain Law imposes due diligence obligations on companies with more than 3,000 employees (from 2023 onwards) and companies with more than 1,000 employees (from 2024 onwards), and covers mainly labour rights topics but also includes environment-related obligations to protect human health. Meanwhile, it is worth noting that the EU Draft Due Diligence Directive is a major breakthrough in terms of applicable socpe, as it applies mandatory due diligence not only to almost all enterprises and their value chain entities, but also extends its jurisdiction to very general issues such as human rights, environmental protection and good governance (European Parliament resolution of 10 March 2021, 2021).

Thirdly, the trends of the mHRDD Model tend to follow the logic of from procedural standard to substantive standard, and from narrow but specific scope of application to the general but equivocal one. The former could be understood as the shift from 'the first generation of human rights reporting requirements (Ruggie) to the second generation of mandatory human rights due diligence. Phrase it more detailed, domestic human rights due diligence legislation has gradually evolved from the requirement of mandating public disclosure of non-financial informationconcerning human rights issues to the obligation of instituting substantive due diligence policies and actions accompanying with civil, administrative and/or criminal sanctions for noncompliance.As regards the first logic, the French Due Diligence Law could be viewed as a watershed of such a significant shift which according to some scholars is a historic step towards making globalisation work for all (Cossart; Chaplier; Lomenie and supran., n.d.). Legislation after the French Law obligate companies to establish substantive human rights due diligence plans, and provided with compulsory elements, concrete requirements on actions and penalties for noncompliance. The Dutch Due Diligence Law, German Supply Chain Law and EU Draft Due Diligence Directive are illustrative examples of this trend. Then, with respect to the second logic, the scopes of application concerning mandatory human rights due diligence legislation have gradually extended — from forced labour to human rights in general, environmental issue and good governance; from a limited number of companies to an increasing number of companies and their full value chains. Taking the EU Draft Due Diligence Directive as an example, it aims to regulate all business entities who engage in business activities within EU jurisdiction and their worldwide suppliers and consumers, thus using the companies domiciled or registered in EU as a node to bring the vast amount of world's business enterprises under EU's jurisdiction (European Corporate Governance Institute, Commentary, 2021).

5. Business and Human Rights Treaty Model

Although the endorsement of the UNGPs did make a positive difference in terms of business and human rights, years after that the lasting governance gap remains. As a response to the unsolved challenges, initiated by Ecuador and South Africa, the UN Human Rights Council determined to establish an open-ended intergovernmental working group on transitional corporations and other business enterprises (OEIGWG) to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (BHR Treaty) (Human Rights Council, 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 2014). The five draft BHR Treaty documents that have been published position human rights due diligence as a core component (Zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, 2018). Therefore, the Business Human Rights Treaty Model (BHR Treaty-based Model), for the purpose of the paper, could be understood as the establishment of human rights due diligence institutions through a BHR Treaty.

Meanwhile, bearing in mind that states and other stakeholders have expressed their views on the content of the Second Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises in 2020 (Second Draft), an analysis based on the Second Draft would provide a more informed appreciation of the positions and attitudes of the parties to the BHR Treaty (Third Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, 2021). The paper, thus, mainly focus on the Second Draft to discuss the normative nature, scope of application as well as trends of the BHR Treaty-based Model.

First of all, as its title indicates, the normative nature of the BHR Treaty is a legally binding norm. The purpose of the BHR Treaty is 'to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, phrase it more detailed, 'to clarify and facilitate effective implementation of the *obligation of States* to respect, protect and promote human rights in the context of business activities, as well as the *responsibility of business enterprises* in this regard. Thus far, it is clear that the BHR Treaty as an international legally binding instrument does not intend to bind business enterprises directly, given the different wordings used - 'obligation of States' and 'responsibility of business enterprises', but through the way of directly enhancing states' obligations to indirectly ensure business entities to implement human rights due diligence. In other words, although the Second Draft makes human rights due diligence an obligation, it does require corresponding domestic legislation to make it effective so as to impose mandatory human rights due diligence obligations on business enterprises through domestic law. Meanwhile, the BHR Treaty aims to provide a common basis for domestic legislation on human rights due diligence. For example, Article 3 and Article 6(1) of the Second Draft delimits eplicitly the scope of application; Article 6(2) and 6(3) articulate mandatory components of human rights due diligence institution; Articles 6(4) and 6(5) require state parties to take appropriate actions to ensure compliance with mandatory human rights due diligence, in particular, to facilitate small and medium-sized companies to act properly. Moreover, Article 6(6) and Article 8 demands states to design commensurate sanctions for noncompliance which include corrective action and possible criminal, civil and administrative liability. With a view to ensuring international coherence and consistency in terms of BHR Treaty implementation, Article 9 of the Second Draft defines adjudicative jurisdiction of actions brought by victims, Article 11 provides rules of applicable law, Article 12 and Article 13 address the issues of mutual legal assistance and international cooperation respectively. The BHR Treaty-based Model, therefore, intends to promote mandatory human rights due diligence within signatory states them with a general and internationally binding standard for establishing domestic human rights due diligence regime.

Then, the scope of application of the BHR Treaty-based Model is modest comparing to the other two models. As regards the subjects, Article 3 and Article 6(1) of the Second Draft mandate state parties to regulate the activities of all business enterprises, including but not limited to transnational corporations and other business entities that undertake business activities of a transnational character, domiciled within their territory or jurisdiction, or otherwise under their control. 'Business activities of a transnational character' according to Article 1(4) refers to business enterprise that undertakes in more than one state or jurisdiction, or undertakes in a state through its business relationship, and undertakes in one state while effects human rights in another state. Although, some state actors and stakeholders worry about the actual application scope of the Second Draft covers those purely domestic business entities, considering that Article 6(3) read as 'State Parties *shall* ensure that human rights due diligence measures undertaken by business enterprises shall include: […] f. Integrating human rights due diligence requirements *in contracts regarding their business relationship* and making provision for capacity building or financial contributions, as appropriate; […]'(emphasis added). However, taking into account the general and specific provisions regarding the scope of application, and the mandate of the OEIGWG, the paper argues that the Second Draft has a defined scope of application - transnational corporations and other business enterprises that undertake business activities of a transnational character. Article 6(3) would not

definitely impose mandatory human rights due diligence to 'business relationships', the content and normative nature of such 'integrating' depend on the content of the 'contracts' as well as the explicit statement of the Second Draft in line with Article 3(1).

As for the covered issues, Article 3(3) states that the Second Draft 'shall cover all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights (UDHR), any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law'. On an optimistic note, the dynamic approach of this provision demonstrates due respect for national sovereignty and the level of human rights protection in a country, as the human rights matters covered by the provision are determined in line with the human rights treaties ratified by a country. However, it cannot be ignored that the dynamic nature of the provision entails a great deal of uncertainty - even if the concrete rights and freedoms corresponding to the UDHR and the human rights treaties ratified by a state could be identified, the scope of international customary law is quite ambiguous (Bantekas, Oette, 2020). Therefore, the subjects of the Second Draft as argued above is delimited but the human rights matters covered seem to be uncertain and vague.

Finally, in terms of trends, the BHR Treaty is favoured mainly by the third world countries from Asia, Africa and Latin America, with dialogue and cooperation as the fundamental approach. However, there are considerable divisions among states over crucial issues such as the scope of application. Although in recent years, a number of developed countries have attended the negotiating sessions and the EU as a whole has submitted its views and comments on several occasions, the negotiation and elaboration of the BHR Treaty drafts have been carried out mainly through multilateral consultations among the Asian, African and Latin American countries. Following the release of the Second Draft, there was much controversy over the provisions relating to human rights due diligence, but states did not oppose turning human rights due diligence mandatory through an international legally binding instrument. For example, some states advocated that the BHR Treaty should only apply to businesses of a transnational characteristic and not to purely domestic enterprises, while others suggested that it should apply to all types of business enterprises (UN Human Rights Council, Report on the Fifth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, 2020). Also the proposal for the Second Draft to cover 'all internationally recognized human rights and fundamental freedoms' was disputed by many delegates, from those who considered it too broad and vague to those who appreciated the proposal. As the representative of China noted, 'it is still premature to conduct textual amendments based on the second revised draft. There are quite a few fundamental issues that need to be addressed in the current draft. It may therefore be predicted that while the prospects for a BHR Treaty are promising, considering that, the OEIGWG has updated several draft documents for five years consecutively and that there is growing support for the elaboration of a BHR Treaty, the negotiation process will not be done overnight and there is currently a long way to go.

6. Comparative Analysis and Evaluation

As evidenced by states practices worldwide, many states have already built-up human rights due diligence systems to achieve business for good, and the approaches adopted vary from state to state. NAPs-BHR Model, mHRDD Model and BHR Treaty-based Model are the three widely practised models of human rights due diligence institution building. In general, the NAPs-BHR Model applies to the largest number of business enterprises and the BHR Treaty-based Model covers the most human rights issues among the three models, but this conclusion is subject to a case-by-case analysis. It is true the three models are not mutually exclusive and have own merits and demerits, but this paper argues the NAPs Model seems to be more promising and fundamental in the coming years given the provisionally unsolvable drawbacks of the mHRDD Model and the BHR Treaty-based Model.

The NAPs Model tends to become a widely recognized and practised common option for countries to institutionalize human rights due diligence, especially after obtaining supports from the UN, EU and some civil society organizations. Although the non-legally binding model faces the challenges of cosmetic compliance (O'Brien, Ferguson and McVey, 2019), the merits are also obvious. Firstly, the normative nature of NAPs-BHR ensures governance space for decision-makers to adopt optimal governance portfolio to strike a balance between economic advancement and human rights protection according to the domestic context (Mihir, 2017), and provide a trial platform for governments to explore 'best suiting shoes' of the strategy to implement human rights due diligence (O'Brien, Ferguson and Mcvey, 2021). Secondly, most of NAPs-BHR uphold and reflect the smart mix approach and cooperative governance method embedded in UNGPs, therefore making human rights due diligence more acceptable for business enterprises and fostering easily a corporate culture to respect human rights. In addition, more and more concrete guidelines of implementation of human rights due diligence and criteria to evaluate the effectiveness of corporate actions concerned have been published by governments, which not only facilitates business entities to operationalise human rights due diligence but also provides criteria for social auditing and surveillance on corporate actions. Last but not least, the UNGPs are the shared basis among states which could cement the existing consensus and underlay bedrock for future common actions in terms of business and human rights. Hence, in view of the recent development, the NAPs Model seems to have a considerable malleability and potential to operationalize UNGPs on a global scale through the institutionalization of human rights due diligence, and could serve as the very first step towards more effective protection of human rights (Cantú).

Taking forms of domestic legislation and requiring businesses of certain sizes to disclose non-financial information and/or put in place substantive human rights due diligence, the mHRDD Model could be perceived as a unilateral approach to build up human rights due diligence institutions. While domestic law can make human rights due diligence a legal obligation and contribute to the realization of 'substantive human rights due diligence', the current limited legislative practices and emerging evaluations on such unilateral legislation suffice to suggest the functional limitations and political tendencies of this model (Quijano and Lopez., n.d.). To be more detailed, firstly, the fragmentation of domestic legislation, with varying degrees of compulsion and scope of application, will give rise to the risk of 'race to the bottom' in human rights due diligence institutional settings as what had happened in the realm of global regulatory competition (David, 2007). Second, although domestic legislation provides for legal liability and sanctions, at present, with the exception of the French Law which allows victims to bring civil actions based on a breach of the corporate due diligence duty, domestic legislation only provides for administrative or criminal penalties, with the fines ultimately going into the public purse rather than into the 'pockets' of the victims, therefore does not ensure effective remedies for victims. Furthermore, human rights due diligence legislation in Europe and the United States is based on national 'human rights standards' that are favourable to the country of legislation, which may turn human rights due diligence into an unequal and unilateral human rights sanction mechanism (Unilateral Economic Sanctions, International Law, and Human Rights, 2019), allowing these countries to achieve economic and political objectives and consolidate the current unequal international economic order through the transmissibility of supply chains. Finally, such legislation also represents a tendency to expand the 'privatization of public law' of unilateral human rights sanction mechanism, that is, directly applying international human rights law to domestic enterprises meanwhile indirectly using such law to regulate supply chain enterprises abroad, especially in third world countries. The 'privatization of public law' in practice provides domestic companies with 'legitimate power' to intervene the market by granting them the 'private power' to enforce public (international) law. Such kind of 'private power' further enables domestic enterprises to arbitrarily sanction suppliers in the name of 'human rights'. So as to facilitate transnational corporations in the countries of legislation to internalise the economic benefits of human rights due diligence while externalise the economic burdens and risks. Therefore, mHRDD Model may not only fail to address the lasting accountability gap in business and human rights but

also increase the instability of global supply chains and finally exacerbate inequalities in economic globalisation.

Apart from the mHRDD Model, the BHR Treaty-based Model has the identical ambitiousness to impose mandatory human rights due diligence on business enterprises. But the approach and policy goals differ between these two models. BHR Treaty-based Model aims to build unified, at least to some extent, international rules for human rights due diligence with an approach of international dialogue and cooperation between states, thus could be viewed as a multilateral solution to advance the worldwide institutionalisation of human rights due diligence. Although such model has favoured by multiple actors, including state actors, non-state actors and scholars much more efforts and time are still required to endorse an international treaty. To elaborate more, this Model is conducive to the establishment of a human rights due diligence institution that is widely applicable to state parties and makes the voices of developing countries be heard, thereby preventing 'race to the bottom' caused by the fragmentation of national legislation, leading to a more equal international economic order, and fostering a fair and reasonable policy environment for business and human rights through collective action. However, an international legally binding instrument would not be established within a short time frame, and it would be more challenging against current backdrop. On the one hand, the treaty process is not unproblematic. The scope of application proposed in the Second Draft is already out of line with mainstream international practice, creating a great deal of uncertainty about the implantation of the treaty, which will not only make it difficult for states to reach consensus, but will also place a heavy burden on businesses, thus effects some divisions among developing countries. On the other hand, numerous developed countries are hesitant or even directly reject to move towards a BHR Treaty on account of their own economic interests and the need to maintain hegemony over international rulemaking. Consequently, while a BHR Treaty with human rights due diligence institutions is desirable, its outcome is still unknown.

In summary, among the three distinct models practiced by states to devise human rights due diligence institutions, the NAPs-BHR Model is a more optimal solution to operationalize the UNGPs. This judgment bases on not only the own merits of the NAPs-BHR Model, but also its potential to avoid adverse impacts resulting from unilateral legislation and to foster consensus for the potential BHR treaty. However, no matter what format a state follows to build up NAPs-BHR, it should ensure the conformity of NAPs-BHR with the fundamental criteria provided by the UN Working Group and state's legal obligations at both domestic and international levels. Also, a consistent multi-stakeholder involved follow up process and a more robust social monitoring mechanism should be considered to optimize the function of human rights due diligence under the NAPs-BHR Model.

7. Conclusion

In this article, we set out to explore the state-of-the-art and make a critical assessment of states' efforts to institutionalize human rights due diligence which is the kernel to operationalize the UNGPs. Through the reasoning of human rights due diligence as a component of state duty to protect under international human rights law, this article has indicated the necessity for states to institute human rights due diligence regimes. Then, in an attempt to classify various state practices conceded, three major models have been identified, i.e., NAPs Model, mHRDD Model and BHR Treaty-based Model. Basing on the in-depth considerations of the three models in terms of their respective normative nature, the scope of application, and trends of development, the critical assessment has figured out a number of promising avenues, but also significant pitfalls. In short, despite it has shown strong momentum in some developed countries, the mHRDD Model might not suffice to ensure an equal and fair application of human rights due diligence. Moreover, it might bring turbulences to global value chains. The BHR Treaty-based Model also fall short, notably given the difficulty of bridging divides among developing countries and between developing and developed countries. Therefore, this article favours a NAPs-BHR Model and views it as a more optimal solution to operationalize the UNGPs. This judgment bases on not only the own merits of the NAPs-BHR

Model but also on its potential to avoid adverse impacts resulting from unilateral legislation and to foster consensus for the potential BHR treaty. However, due to space and personal capacity constraints, this article failed to cover all national human rights action plans related and human rights due diligence legislation as sources of analysis. Even so, this paper may offer a practical framework for future research to enable legislators, academics and practitioners to better understand human rights due diligence as a state duty to protect, and thus to formulate a more comprehensive and systematic study.

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