

EDITORIAL

## Business and Human Rights in Central and Eastern Europe: Trends, Challenges and Prospects\*

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### Abstract

This Special Issue denotes the first comprehensive attempt to place business and human rights-related (BHR) developments in the Central and Eastern Europe (CEE) region on the map of global discussions in BHR. The CEE is a geographical area that is historically, politically, socio-economically, geo-strategically and culturally distinct from other regions, including Western Europe. Hence, this Special Issue explores the region's specific elements and factors and how they affect and influence the implementation and embedding of human rights in the practice of business enterprises in the region. The 'Scholarly Articles' and 'Developments in the Field' pieces collected in this issue highlight the promising and not-so-promising developments and practices of state institutions, business enterprises, and other actors. It documents the current situation in the region and outlines ideas and prospects for addressing the identified challenges over the next decade. As an introduction to the Special Issue, this editorial outlines the region's leading trends and prospects in BHR. It reflects on persisting challenges and notes the region's progress in BHR awareness, knowledge and capacity in recent decades.

**Keywords:** Eastern and Central Europe; Regional trends; Rule of law; Corporate Accountability; business and human rights awareness; social expectations

### 1. Introduction

For the first time, the *Business and Human Rights Journal* dedicates an entire issue to business and human rights (BHR) developments in Central and Eastern Europe (CEE) in a first comprehensive attempt to place them on the map of global discussion in this field.

There is a natural reason for this relative lack of presence of the region in the global discussions on the topic. It is hardly contested that the level of BHR awareness and the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) in CEE countries<sup>1</sup> – both by states and companies – remains extremely low. Only in recent

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<sup>1</sup> Bulgaria, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic, Slovenia, Estonia, Latvia, Lithuania, Ukraine, Belarus, Moldova, Russia, Armenia, Georgia, Azerbaijan, Croatia, Bosnia and Herzegovina,

years have the UNGPs gained slightly more traction in some countries of the region, by impacting normative frameworks and being linked to sustainable and economic development efforts. Yet there are only a few positive examples of National Action Plans (NAPs) being adopted on BHR in the region (Czech Republic, Lithuania, Poland, Slovenia) or BHR chapters being included in NAPs on Human Rights (Georgia and Ukraine). However, the implementation of such NAPs are not stories of success yet, as effective supervision has often been lacking.

Similarly, the effectiveness of the OECD National Contact Points (NCPs) in promoting the OECD Responsible Business Conduct (RBC) standards and providing a trustworthy complaints mechanism leaves much to wish for. While the Polish OECD NCP sets the bar relatively high - having proven to be able to handle impartially even in cases concerning state-owned enterprises (SOEs) and also leading on translating the OECD RBC standards into Polish and promoting them - one cannot say that there are many NCPs that are as active in the region. In many of the countries, the discussion on the implementation of the UNGPs<sup>2</sup> and OECD standards was driven almost solely by civil society and academia, who often were also the first to translate the UNGPs<sup>3</sup> and other related standards<sup>4</sup> into the local language to make them more accessible to the local audience and boost uptake at the national level.

Before discussing specific elements and factors that affect the implementation and embedding of human rights in the practices of states and business enterprises in the region, let us start by sketching the operational context, which provides the backdrop of the many decisions (not) taken.

Widening disparities alongside poverty, inequality, intersectional discrimination, the digital divide, disruptive emerging technologies, the escalation of climate change and other environmental problems, the resurgence of infectious diseases and trends such as corporate deregulation and 'business friendly' public governance, a lack of policy coherence and a solid political will to implement the UNGPs and a growing imbalance of the state-business nexus – these challenges characterize many of today's societies. In addition, the region faces other significant threats that can not only hinder further development and uptake of BHR standards, but can even lead to the reversal of previous progress made.

Understanding the various historical experiences, geo-strategic, socio-economic, and political contexts and cultures in the region is thus critical for understanding the region's trends, challenges and BHR prospects. They affect and often determine how and why companies function and act as they do. Thus, it is critical to choose the right tools and approaches to boost RBC, which can – in the longer term – result in the rewriting of the

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Serbia, North Macedonia, Albania, Kosovo (all references in this paper to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999)).

<sup>2</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

<sup>3</sup> For example in Poland, where the translation was done by the Polish Institute for Human Rights and Business or in Ukraine, where the UNGPs were translated at the initiative of the Yaroslav Mudryi National Law University in collaboration with the Ministry of Justice of Ukraine. See Polski Instytut Praw Człowieka i Biznesu, Friedrich Ebert Stiftung and NSZZ Solidarność, *Wytyczne dotyczące biznesu i praw człowieka: Wdrażanie Dokumentu Ramowego ONZ "Chronić, Szanować i Naprawiać"* (Częstochowa: PIHRB, 2014); Ministry of Justice of Ukraine and Yaroslav Mudryi National Law University, *Керівні Принципи Щодо Бізнесу і Прав Людини. Реалізація Рамкової програми Організації Об'єднаних Націй 'Захист, повага і засоби захисту'* (Kharkiv: Ministry of Justice of Ukraine and Yaroslav Mudryi National Law University, 2018).

<sup>4</sup> Beata Faracik, 'Language for action: Translating the reporting framework into Polish to improve company practice', *shift practice*. Commentary, (21 September 2015), <https://www.ungpreporting.org/reporting-framework-polish/> (accessed 20 December 2023).

social contract to one that is more just, inclusive, based on the principles of solidarity and participation, and indeed ensures that no-one is left behind. Notably, the last element – leaving no-one behind – strikes a chord in the region, where the transition to capitalism in its (often described as) ‘Wild West’/American style has left many behind, fuelling conflicts and nostalgia for the times when people did not have much but at least were equal in not having much.

Regarding economic data, the region geographically belongs to the Global North; yet although it has grown economically, it still lags behind most of the Global North’s economies regarding average wealth and income. Some countries have become members of OECD in recent years, although they have lagged behind the wealthiest member states. Although it has been almost 35 years since the political and economic ‘wind of change’ of 1989 resulted in the end of the Cold War and the transition of countries of the former Soviet bloc from centralized economies to capitalist economies, one of the significant traits of the CEE region seems to be a state of being stuck in transition.

Positioned between the West and East, between Western and Eastern Christianity and Islam, between Western democracies and Russia that is unwilling to let go of its influence, not to say its grip, over the region, between market and command economies – CEE seems to be on a pendulum bouncing between young but stable liberal democracies based on the rule of law on the one pole and strong authoritarian sentiments on the other, making many of the young democracies in the region still very fragile.<sup>5</sup> The way of exercising power offers no legal stability. Often unprecise and contradictory legislation, poor oversight over SOEs, and a system of subsidies to support sectors that are among the core contributors to climate change without a plan on how to phase out the dependency on them are all still relevant characteristics of many countries in the region. In some of them, oligarchic power structures, often created in the 1990s, on the back of the privatization of the state monopolies and large SOEs, still guarantee oligarchs the ability to monopolize market positions in the mining, processing, energy industries or the public services sectors. In addition, business behaviour often aggravates the problem of social injustice, with corruption scandals regularly shaking up governments in the region. All of these elements together create a volatile, risk-prone operational context that acutely affects how companies run their operations. This context is currently further exacerbated by the war waged by Russia on Ukraine since 2014 and other conflicts in the region.

States experiencing problems in economic development seek to stimulate business activity by granting freedom of entrepreneurship, declaring the minimization of government intervention, taking a course toward deregulation, and striving for a market economy. Most countries also provide support for large exporters because of the state’s interest in foreign exchange earnings and foreign investors, without any equal state support for local small enterprises, etc. These principles become part of the state’s national policy.

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<sup>5</sup> Examples include Hungary and Poland, where after over 20 years of building rule of law-based democracies, political power has been taken over – in legitimate elections – by parties with open authoritarian aspirations, ‘buying’ support of their clientele with well-paid positions in SOEs and various state institutions, dismantling the system of checks-and-balances and the tripartite division of power, and using state propaganda to promote ‘the only correct narrative’. See, for instance, Adam Bodnar, ‘Polish Road toward an Illiberal State: Methods and Resistance’ (2021) 96:4 *Indiana Law Journal* 1059–1087; Jernej Letnar Čerňič and Gorazd Justinek, ‘Business and Human Rights in State-Owned Enterprises – The Case of Slovenia’ (2022) 9:4 *International Journal of Public Sector Performance Management* 382–398; Anna Śledzińska-Simon, ‘“Cadres” in Post-communist Transition: Shifting the Loyalty Standards’ in Cheng-Yi Huang (ed.), *Public Service after Regime Change: Constitutionalizing Transitional Justice: How Constitutions and Constitutional Courts Deal with Past Atrocity* (London: Routledge, 2022) 198–221.

They permeate all areas of state regulation and become part of corporate ideology as well as the public perception of the role of business. The UNGPs' slow uptake in the region cannot be adequately understood without considering this.

## II. Common Trends and Unique Challenges

Despite the region being the smallest one in membership among the five regional groups in the United Nations, it is very diverse, and as a result, it is challenging to draw typical BHR patterns. Nonetheless, there are some common traits of the region, as post-socialist societies are found to 'continue to experience unstable democratic and human rights contexts' and 'prevailing paternalistic approaches to ensuring respect for human rights' (it is commonly identified only with the state's duty);<sup>6</sup> considerable state involvement in business through SOEs as essential players in the national economy;<sup>7</sup> 'collision of public, state, and business interests; the weak rule of law and weak institutions; and prosecution of human rights defenders'.<sup>8</sup>

### *Weak Rule of Law Environment*

All the countries of the CEE region were part of the communist-socialist non-democratic so-called Soviet bloc before the end of the 1980s, where the rule of law and fundamental, in particular, civil and political human rights were suppressed. Regarding business, state government centrally planned the countries' economies, while private business initiatives were at best tolerated if not actively discouraged (although regional differences existed). The remnants of such an economic model are still visible in the current-day economies in the region, with a high level of bureaucracy and the fact that SOEs still are the essential players in most countries, particularly in the energy, extractive, transport and telecommunication sectors. For them, the 'transition to capitalism' has often meant transforming former monopolistic SOEs into 'a strong oligarchic economic structure, where the market is often artificially monopolized, and competition is limited'.<sup>9</sup>

Such power structures and connections, as was mentioned already, make many of the young democracies in the region still very fragile. With the rule of law having been under pressure for several years, the 'return to democratic standards' is riddled with challenges, such as a lack of stability and certainty of some of the courts' judgments – as evidenced by Poland's struggle after the 2023 elections to restore the rule of law in the context of a severely compromised justice system.<sup>10</sup>

<sup>6</sup> 'Business and Human Rights: Key Challenges for New Democracies' (Panel Discussion: Programme and Draft Resolution, Yaroslav Mudryi National Law University, Kharkiv, 25 September 2019).

<sup>7</sup> According to the OECD study, '[c]ompared with most countries, Ukraine has a significantly large SOE portfolio, with 3,293 SOEs reported at the central level of government. Out of these entities, 1,535 were operational, and 1,063 were profitable, with an overall profit of UAH 52.1 billion in 2019', Organisation for Economic Co-operation and Development, *OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine* (Paris: OECD, 2021) 27.

<sup>8</sup> Jernej Letnar Čerňič, 'Mapping Business and Human Rights in Central and Eastern Europe', *Cambridge Core Blog* (11 December 2020), <https://www.cambridge.org/core/blog/2020/12/11/mapping-business-and-human-rights-in-central-and-eastern-europe/> (accessed 20 December 2023).

<sup>9</sup> United Nations Development Programme, *The Status of the Implementation of the UNGPs on Business and Human Rights in Eastern Europe and Central Asia* (Istanbul: United Nations Development Programme, 2023).

<sup>10</sup> Iustitia Stowarzyszenie Sędziów Polskich, 'The neo-judge ruling does not exist. The Supreme Court fully implements the judgments of the CJEU and the ECtHR', 23 November 2022, <https://www.iustitia.pl/en/4562-the-neo-judge-ruling-does-not-exist-the-supreme-court-fully-implements-the-judgments-of-the-cjeu-and-the-ecthr> (accessed 20 December 2023); See also Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15 *Hague Journal on the Rule of Law* 353–384.

Most countries in the region have to undertake active efforts to ensure and respect the rule of law, including strengthening the relevant state institutions and clearing them of the vested interests from which they currently suffer. Unfortunately, corruption and other scandals that regularly shake the region – which are just one visible reflection of how businesses and governments collude to advance private interests – prove that the road to stable, mature democracies requires time and imagination to bullet proof the tripartite division of power and ensure independence of the justice system from political pressures.

Additionally, the ongoing war in Ukraine and other tensions in the region evoke a sentiment among the population for strengthening state power because of people's increasing fear of insecurity and hope that a 'strong' leader could prevent it.

### **Weak Public Governance**

A number of BHR challenges in the CEE region result from weak state institutions and insufficient checks and balances. Various scandals in the region prove that spending millions from state coffers is subject to less scrutiny than small grants for CSOs. In addition, states have often struggled to exercise their duty to protect human rights in the private sector and even in SOEs.

The regulatory framework in place in many countries of the region is affected by a lack of policy coherence that can result in gaps in the regulations and their effective enforcement, thus leaving those affected by, among others, inadequate working conditions, modern slavery and exploitation, in particular those working in the informal sectors and migrant workers, to their own devices. Oversight concerning compliance with international BHR standards is basically non-existent. There is also strong resistance to follow some Western states and make corporate sustainability/non-financial reporting obligatory not only for the biggest, but for all SOEs. While labour inspectorates do exist across the region, they have struggled to change labour practices due to a shortage of staff, and in some cases, state-imposed moratoria on labour law inspections. Similarly, enforcing data protection regulations has also been a challenge in the region.

The weakness of state institutions has also been reflected in their failure to protect individuals against environmental degradation and climate change.<sup>11</sup> Ensuring a right to a clean, safe, healthy and sustainable environment has been a struggle in the region, both due to the negative impact of industrial activities as well as weak waste management. Even where environmental and human rights laws are well developed, corruption, nepotism and clientelism further impede their enforcement.

### **Irresponsible State-Business Nexus**

In many societies of the region, business behaviour aggravates the problem of social injustice. The phrase often heard in the 1990s – 'we need to catch up with the West' (with catching up being defined purely by economic indicators) served, and still serves, as an explanation and justification for decisions and processes that do not prioritize human wellbeing. Sustainable public procurement practices still make up only a small percentage of the public procurement overall, with barriers being rather of a non-legal nature than caused by regulatory limitations.<sup>12</sup>

<sup>11</sup> ECtHR, *Pavlov and Others v Russia* no. 31612/09 (2022).

<sup>12</sup> Beata Faracik, 'Non-Legal Barriers to Sustainable Public Procurement in Poland' (2018) 13:3 *European Procurement & Public Private Partnership Law Review* 184–197.

In former Soviet states, powerful business groups ('oligarchs') were often either created by or benefited from privatization policies in the 1990s. Some of the most profitable enterprises were and still are often built on close ties with the state ruling elites by the 'oligarchs'. Such companies often profit from privileges such as a monopoly market position in the mining, processing, or energy industries and the public service sector. Large exporters are provided state support because of the state's interest in foreign exchange earnings, without any equal support for small enterprises, etc.

While SMEs might dominate by number, their voice is hardly heard when oligarchs occupy the stage with substantial political influence and the ability and power to convert this political influence into extra revenues, privileges or benefits.<sup>13</sup> The main factors distinguishing oligarchs from ordinary businesspeople are their active participation in political processes and their use of influence over government institutions for their gains.<sup>14</sup> As a result, public institutions transform their procedures to meet private corporate interests at the expense of public goals, cementing economic power and translating it into political power. Such a system is not really compatible with the rule of law because the actors, whose business growth strategies are built mainly around close relations with the government, are far less interested in the rule of law being in place. The oligarchy ineffectively distributes resources without regard for the interests of society; it diminishes competition and increases economic losses; it weakens institutions; and it maintains a high level of corruption and inequality.

### **'Business Friendly' but not a Human Rights-Oriented Economy**

Most of the states in the region faced economic problems in the early days of the market economy and in order to spur economic development chose to stimulate business activity by granting freedom of entrepreneurship, declaring the minimization of government intervention, taking a course toward deregulation, and striving for a market economy. In these societies, deregulation (which often does not relieve the business from pressure from the state but exempts business from obligations concerning rights-holders) and 'business friendly' public governance are to be interpreted as 'anything goes' for business.<sup>15</sup>

As many countries in the region base their competitive advantage almost solely on (1) low labour costs, on 'disposable humans' and 'leased workers', and (2) the belief in the magical results of the invisible hand of the free market, this makes for a recipe for adverse impacts on human rights due to company activities. This approach exacerbates negative trends, such as 'pushing' employees into business-to-business (B2B) work arrangements (a B2B contract is established between two entrepreneurs; however, this form is often abused by employers who impose a B2B type of collaboration to avoid obligations arising from employment law and to enable easy termination of such contracts)<sup>16</sup>, and reinforce a

<sup>13</sup> Olena Uvarova, 'The Challenge of Building the Rule of Law in Oligarchic Economies: Podcast with Dmytro Vovk', *Rule of Law and Corporate Actors* (10 July 2023), <https://ruleoflawbiz.org/the-rule-of-law-and-corporate-actors-vovk/> (accessed 20 December 2023).

<sup>14</sup> Jan Drahokoupil and Martin Myant, 'Putting Comparative Capitalism Research in its Place: Varieties of Capitalism in Transition Economies' in Matthias Ebenau, Ian Bruff and Christian May (eds.), *Critical Comparative Capitalisms Research* (London: Palgrave Macmillan, 2015). Dumitru Alexandru Bodislaw, 'Oligarchy versus Democracy and Regulation versus Deregulation under the Globalization Effect' (2012) 5:570 *Theoretical and Applied Economics* 33–46.

<sup>15</sup> United Nations Development Programme (2023), note 9.

<sup>16</sup> See, e.g., Barbara Belina vel Bylina, 'Risk of reclassification of B2B contract with former employee', *HRLaw.pl, Labour and Employment Law Blog* (2 December 2019), <https://hrlaw.pl/en/risk-of-reclassification-of-b2b-contract-with-former-employee/> (accessed 20 December 2023). See also publications of the Centre for Atypical Labour Relations at the Faculty of Law and Administration of the University of Łódź, 'Kontakt', <https://www.wpia.uni.lodz>.

pathological system through, among other aspects, public procurement driven in practice still mainly by price, etc.

### **Lack of Social Expectations for Corporate Responsibility to Respect Human Rights**

Given all the above, it is hardly surprising that societal expectations of good corporate behaviour are not overly high across the region. Given the overall low average income of the population, standards are not set high enough for consumers.<sup>17</sup> In this context, until recently, companies hardly did much more than what was required by the law and preferred to engage in philanthropy rather than roll out a strategic approach to implementing the UNGPs on the ground.<sup>18</sup> If we add to it the long absence of free private business initiatives, limited or lack of (depending on the country) competition in critical sectors, and a large share of state participation in the economy, we would not be surprised by the lack of a tradition for business to take into account anything else but its own financial interest and the lack of expectations of society for responsible business behaviour and respect for human rights.

This situation is partially caused by the fact that in the past, the idea of human rights was subordinate to state policy; collective interest prevailed over the individual/private; legal regulation was based on the principle of the supremacy of the state will but not on the rule of law principle. With basic economic and social rights being secured by the state, civil society movements and individuals were thus focused on the fight for civil and political rights, of which the societies in the region were largely deprived. While the fall of undemocratic regimes allowed civil society and its organizations to strengthen and develop, their main focus remained the same during the transition period, as there was the need to develop a new rule of law-based constitutional architecture. With many of the countries in the region still having a way to go before they will be considered mature democracies, many human rights CSOs still consider the state (and often rightly so) the main threat to human rights. Given that the funding that supports independent CSOs is also geared mainly towards efforts

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[pl/struktura/centra-naukowe/cnsz](https://pl/struktura/centra-naukowe/cnsz) (accessed 20 December 2023). See also Tonia A Novitz, 'Gig Work as a Manifestation of Short-Termism: Crafting a Sustainable Regulatory Agenda' (2021) 50:4 *Industrial Law Journal* 636–661; Rutvica Andrijevisevic and Tonia Novitz, 'Supply Chains and Unfree Labor: Regulatory Failure in the Case of Samsung Electronics in Slovakia' (2020) 6:2 *Journal of Human Trafficking* 195–208.

<sup>17</sup> Katarzyna Nowak, 'Polski konsument odpowiedzialny na niby?', *Grupa ANG – News* (January 2018), <https://grupaang.pl/2018/01/23/polski-konsument-odpowiedzialny-na-niby/> (accessed 20 December 2023). According to the study reported in the article, 68% of Poles declared themselves as responsible consumers – this is mainly evidenced by thoughtful purchases and purchasing only necessary products. However, 40% of respondents stated that it is not worth giving up the desired purchases, even if the company producing the desired product forces children to work in difficult conditions. According to the study, Polish consumers considered activities related to consumerism more important than social responsibility activities. Experts point out the need to educate members of society, both about their own finances as well as social responsibility. We are not aware of similar studies being carried out in other countries of the region. However, one can expect that, given the overall level of awareness, their findings would not be much different.

<sup>18</sup> This is also reflected in corporate reporting. As pointed out in Beata Faracik and Agata Meżyńska, *The Current Use of Metrics in Company Human Rights Reporting – Poland*, Valuing Respect by Shift, (2019) 9:

'The human rights related issues that companies report most frequently fall into two categories: first, issues traditionally linked to corporate social responsibility (such as philanthropy and stakeholder engagement); and second, areas that are regulated by Polish law (for example, health & safety, anti-corruption and equal treatment/prohibition of discrimination) whereby companies have monitoring systems in place to meet the requirement to report specific data. (...) Corporate philanthropy is rarely – if ever – part of a company's effort to prevent and mitigate human rights risks connected with their own business.'

aimed at securing the first generation of human rights, it is unsurprising that apart from trade unions, only a few CSOs focus their activities and efforts on advocating for the corporate responsibility to respect human rights.

One also finds very few CSOs in the region that work on business accountability for human rights violations, low respect for and violations of workers' rights (beyond trade unions), and limited business and human rights awareness in society. There are a few examples of governments and enterprises engaging in dialogue on what constitutes responsible business conduct and working together, including through multi-stakeholder initiatives, to develop guidance on various aspects of RBC. With BHR education not present in high schools' curricula and higher education, even as far as law and business schools are concerned, young people entering the market and later moving to managerial positions are hardly ever exposed to RBC ideas and values during their formative years. This leads to lawyers, including corporate lawyers and company managers in most of the region's countries, not being well equipped with a BHR understanding and the respective tools at the start of their careers. More awareness raising and capacity building on BHR issues is needed to fill the gap, which currently risks being filled in by self-proclaimed ESG experts, with little if any understanding of the BHR specifics. Very limited dialogue between various stakeholder groups and a lack of common language and common goals are particularly felt in times of global emergencies (armed conflicts, pandemics, climate change), in which only a multi-disciplinary dialogue can ensure a full understanding of the relevant challenges and help devise sound legal and policy solutions.

### *Low BHR Awareness and Poor Access to Remedy*

As mentioned, this situation is not helped by the low legal, and in particular BHR, awareness and low empowerment of the members of the region's societies. Long taught not to stand out, as this might lead to trouble with the state, people carried this attitude into the new system. At the same time, school education systems need to be more robust to boost citizenship education and empower future generations by making them aware of their rights and duties *vis-à-vis* others. Paired with the limited number of CSOs working on BHR described above and given the currently limited understanding of human rights generally, driving the BHR agenda in the region remains an uphill battle. Thus, more BHR-focused events, research projects and initiatives must happen in the region to boost awareness and intra-regional cross-fertilization in this field.

The efforts of non-governmental organizations, trade unions, and other civil society organizations aimed at raising awareness must be boosted and scaled up. Without their engagement and use of the channels offered, e.g., the OECD NCP-based complaints mechanism and other access to remedy avenues will remain dormant, particularly given the current inefficiencies of the justice systems across most jurisdictions of the region. State institutions are often unwilling and unable to protect rights-holders against businesses' actual and potential adverse impacts. There is a gap between normative standards and their application in state institutions, public administration and the private sector. In many cases, state institutions do not exercise proper control over state-owned enterprises that interfere with the enjoyment of human rights. Moreover, state institutions have often turned a blind eye to alleged business-related human rights abuses by SOEs to promote private interests.

Ensuring access to justice for victims of business-related human rights abuses has also been a struggle. In most countries, the judiciary must be more fair, independent and impartial. Many rights-holders in the region do not have access to independent judicial



institutions that they would trust to handle their grievances or complaints fairly.<sup>19</sup> If the court hears the case for unfair dismissal only a year after submission, and judgment is issued only after two to three years, it is hard to talk about effective access to remedy. Apart from a few exceptions, supervisory state institutions such as National Human Rights Institutions (NHRIs) and Ombudsperson offices have yet to exercise leverage to change business and human rights positively. With such a situation, which is particularly comfortable for business enterprises as they have more time and a better financial situation than the affected individuals, companies can hardly set up effective grievance mechanisms that could step up where the state judicial and non-judicial access to remedy mechanisms fail. Thus, only a few companies have established truly effective operational-level grievance mechanisms. Even if they have ‘Speak Up’ lines, many purposefully refrain from promoting them among the workforce to avoid submitting complaints that the headquarters could notice. This also points to the misperception as to the role that internal grievance mechanisms could play for victims and companies, giving them a chance to solve the issues internally.

To sum up, several characteristics and trends can be noticed as relevant across the region:<sup>20</sup>

- A lack of awareness and skills regarding human rights and business, which are needed for the implementation of BHR standards in practice among all actors – including state and local authorities and the corporate sector. In most cases, the lack of awareness plays a crucial role in the failure to prevent the risk of human rights violations. Also, most rights-holders and (affected) communities lack knowledge concerning their human rights and/or cannot claim their rights in case of business-related negative impacts.
- Policy incoherence at the national, local and corporate levels, and a lack of capacity to ensure the substantive (not just formal) compliance of national, local and corporate policies and practices with human rights standards and the principle of respect for human dignity;
- Increasing requests for RBC from the international community, in particular from companies integrated into global and European markets, from investors, and from civil society;
- A lack of effective state and non-state judicial, quasi-judicial and non-judicial remedies, particularly operational-level grievance mechanisms, to prevent human rights abuses and protect affected individuals and communities;
- Respect and implementation of the BHR standards depends heavily on a particular country’s general human rights situation and the rule of law;<sup>21</sup>

<sup>19</sup> UN Working Group, ‘Consultation for Central and Eastern Europe and Central Asia’, co-organized by the Polish Institute for Human Rights and Business (Poland) and Yaroslav Mudryi National Law University (Ukraine) on 21 April 2021.

<sup>20</sup> See also United Nations Development Programme, *Business and Human Rights in Ukraine: Accelerating Sustainable and Equitable Development through Implementation of the UN Guiding Principles on Business and Human Rights* (Kyiv: UNDP, 2022), <https://www.undp.org/ukraine/publications/business-and-human-rights-ukraine-accelerating-sustainable-and-equitable-development-through-implementation-un-guiding> (accessed 20 December 2023).

<sup>21</sup> See more in detail Jernej Letnar Čerňič, ‘Business and Human Rights in Slovenia’, *Cambridge Core Blog* (16 April 2019), <https://www.cambridge.org/core/blog/2019/04/16/business-and-human-rights-in-slovenia/> (accessed 20 December 2023); Jernej Letnar Čerňič and Nicolas Carrillo-Santarelli (eds.), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Cambridge, Antwerp, Portland: Intersentia, 2018); Jernej Letnar Čerňič, ‘Contours of National Action Plans on Business and Human Rights in Central and Eastern Europe’ (2021) 1 *Philosophy of Law and General Theory of Law* 174–186.

- Both states and companies have not been able or willing to fully protect against all sorts of discrimination, including gender and LGBT+ rights. All stakeholders should do more to combat direct and indirect discrimination against vulnerable groups.
- Other areas where both state-owned and private companies have equally negative records regarding interference with specific rights include property rights and the land rights of vulnerable communities, which have sometimes led to displacements and the loss of their socio-economic livelihoods.<sup>22</sup>

On the other hand, corporations based in and outside the region are starting to be affected by national due diligence laws adopted by *inter alia* Germany and France, as their business partners – subject to those regulations – start requesting various information from them to be able to meet their obligations under such national laws. Some positive impacts of EU-based investors in the Western Balkans and other regions have led to change towards more responsible business practices. Complying with health and safety requirements has been another struggle in the region, particularly in the extractive, construction and manufacturing industries. Yet it should be mentioned that the EU funds and safety regulations that CEE countries had to adopt as part of the accession process have resulted in a significant drop in the number of death cases. At the same time, ensuring freedom of association and collective bargaining has been an ideological goal, yet they are still to be fully respected on the ground.

### III. Drivers of the BHR Discussion in the Region

Given this background, it is hardly surprising that serious discussions about corporations' role in society and their responsibility to respect human rights are still relatively new in the region. Until the EU Green Deal legislation package was adopted at the EU level, which affects countries in the CEE region both directly and indirectly (as EU member states as well as via company practices and obligations placed on business partners via contracts), there was very little interest of market players in BHR or RBC standards. This is not to say that all businesses behaved irresponsibly or that responsible business practices were unknown. Yet there needed to be more conscious discourse and alignment of business policies and practices with international BHR standards or readiness to undertake human rights due diligence (HRDD) to assess how a company's actions (and inactions) affect rights-holders and other stakeholders. Only now, with ESG-related discussions and legal obligations, do we see a more significant number of auditors, corporate law firms, and ESG/sustainability/CSR advisors (although very few BHR consultants/experts) expressing interest and talking about corporate sustainability due diligence in the context of EU regulations.

Of particular relevance here is the EU Taxonomy regulation,<sup>23</sup> the EU Sustainable Finance Disclosure Regulation (SFDR),<sup>24</sup> the EU Corporate Sustainability Reporting Directive (CSRD)<sup>25</sup> and its delegated act that comprises the European Sustainability Reporting

<sup>22</sup> ECtHR, *Osmanyan and Amiraghyan v Armenia* no. 71306/11 (2018).

<sup>23</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (text with EEA relevance), PE/20/2020/INIT, OJ L 198, 22.6.2020, 13–43.

<sup>24</sup> Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, PE/87/2019/REV/1, OJ L 317, 9.12.2019, 1–16.

<sup>25</sup> Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, PE/35/2022/REV/1, OJ L 322, 16.12.2022, 15–80.

Standards,<sup>26</sup> and – should it be adopted – the Corporate Sustainability Due Diligence Directive.<sup>27</sup> These legal acts require nothing less than having in place due diligence processes as laid out by the UNGPs and OECD Guidelines for Multinational Enterprises on Responsible Business Conduct to ensure respect for human rights covered by the International Bill of Rights and eight Fundamental ILO conventions. In line with the taxonomy and the SFRD, only by ensuring that the minimal guarantees are met will the company qualify for access to capital on better terms.

Naturally, the ‘Brussels effect’ has a greater impact on the member countries of the EU of the CEE region. Yet even there, the understanding of what proper HRDD entails is limited and often ignores such core elements as meaningful and effective stakeholder engagement and the active, free and effective participation of people in the decision-making processes affecting them.

Another reason for greater interest in the BHR agenda is the Russian Federation’s full-scale invasion of Ukraine that raised significant attention to RBC at times of war and heightened HRDD.<sup>28</sup> It also advanced the subject of the public discussion on the question of business’ role in tackling the consequences of forced migration (both internally displaced people and refugees) and food insecurity, relocation of companies, risk of unemployment and growth of grey economy. At the same time, the fact that the armed conflicts between Armenia and Azerbaijan did not catch similar attention despite the *de facto* blockage of the supply of food to certain regions seems to suggest that the reactions and (temporary?) uptake of RBC narratives is not so much embedded in values, but more based on emotions and historical experiences.

#### IV. Prospects

At the regional level, despite a robust global trend, most CEE countries are still lagging behind this growing movement of governments and companies taking up RBC as a minimum standard.<sup>29</sup> This standard forms the proper corporate environment for businesses to make good efforts for inclusive development and ‘leave no one behind’, refocusing business processes on human rights, environmental protection and on the corporate responsibility to respect the rule of law.

The normative development in BHR in the region will continue to be shaped by different policies and normative initiatives by the European Union in the field of sustainability, environmental protection, and human rights, including mandatory HRDD standards addressing the global supply chains of the largest EU-based corporations. The impact will be most direct in those countries in CEE that are members of the EU, but will also have impact on those with candidate status, and even those who are still working towards candidate status that are part of the global supply chains of the EU-based business enterprises.

<sup>26</sup> Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, C/2023/5303, OJ L, 2023/2772, 22.12.2023.

<sup>27</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

<sup>28</sup> See, for instance, Rebecca DeWinter-Schmitt, Samuel Jones and Richard Stazinski, ‘Missing in Action? Investor Responses to the War in Ukraine’ (2022) 7:3 *Business and Human Rights Journal* 487–493.

<sup>29</sup> Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, OEIGWG Chairmanship Third Revised Draft of 17.08.2021. <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> (accessed 20 December 2023).

As this Special Issue shows, the countries in the regions have, to varying degrees, suffered from the lack of solid institutions, predictable rules, and processes. Such developments are likely to continue over the next decade. Countries with a stricter rule of law and stronger institutions will likely face fewer difficulties complying with the state's duty to protect human rights in the business context and in setting up adequate regulatory frameworks.

Challenges remain in building capacity to internalize regional BHR standards. However, some good practices can also be discerned concerning due diligence, primarily due to the impact of the EU.

Ensuring sustainability and adopting mitigating measures relating to climate change risks in the supply chains of companies doing business in the regions has been increasingly criticized, particularly with respect to extractive and construction mega projects. Environmental and human rights defenders have played an essential role in building BHR capacity in the regions. The good practice will continue as they advocate for corporate accountability for business-related human rights and propel positive changes in corporate training. Regarding substantive rights, ensuring the protection of fundamental labour rights such as the right to a minimum and living wage, freedom of association, and health and safety at work remain a concern in the region. Cybersecurity and data protection will be critical public and private issues in the coming decades.

As the aggression of the Russian Federation in Ukraine turns into year three, the risks of doing business in conflict-affected areas remains a genuine concern and challenge regarding how to translate heightened HRDD into daily practice.

## V. Structure of the Special Issue

The Special Issue is divided into two main parts: full-fledged 'Scholarly Articles' and 'Developments in the Field' (DiF) pieces. Given the importance of the state in setting up an adequate regulatory and policy framework that supports the paradigm shift regarding the role of corporations in society, the issue starts with two articles that point to the positive and negative impacts of state attitude on BHR – or the lack thereof.

Łukasz Szoszkiewicz, in his article 'Constitutional Approaches to Ensure Business Compliance with Human Rights Obligations – Building upon the Cases of Poland and Slovenia', unwraps the potential of constitutional law to strengthen the implementation of the UNGPs in CEE. The author points to at least four potential synergies: (1) the process of constitutionalizing human rights; (2) the emergence of the doctrine of horizontal effect of constitutional rights, i.e., its application between private entities; (3) the dual legitimacy (juridical and social) of state intervention in the free market economy; and (4) the mechanism of judicial review which can facilitate access to remedy and, through the removal of unconstitutional provisions from the legal framework, prevent future infringements.

This Scholarly Article has an interesting counterpart in the DiF piece by Marcin Kilanowski, who undertakes an effort to evaluate the first and second Polish NAPs and puts forward suggestions as to what lessons for the future implementation of UNGPs – not only in Poland – we can draw from it.

Challenges of developing mandatory human rights due diligence in situations with little political will are also the subject of the DiF piece by Ihor Konopka, who examines from a professional and practical angle the situation in this respect in Ukraine.

The complicated task of identifying challenges to BHR implementation in illiberal regimes is reflected by Andras L. Pap, Nóra Chronowski and Zoltán Nemessányi in their article 'Corporate Human Rights Responsibility in Illiberal Regimes: The Example of the Ukrainian Refugee Crisis in Hungary'. The article provides an overview of how the lack of rule of law and illiberal regimes affect business conduct and how companies – in return for

privileged market position and subsidies – reinforce the grip on civil society and independent media. The nexus of the BHR agenda and authoritarian regimes is also examined through a professional lens by Ekaterina Deikalo, who, in her DiF piece, takes as an example the case of the political and human rights crises in Belarus since 2020. She argues that when a company operates in a situation of conflict and under a non-democratic political regime, the understanding of leverage (in the context of HRDD) should be broadened and applied not only to the direct business relationships of the company but also to its impact on the overall human rights situation in the country.

In addition, Filip Balcerzak and Stanisław Drozd, in their DiF contribution, dare to challenge the broadly accepted approach that international investment agreements (IIAs) are not conducive to respect for human rights by showing how in countries with authoritarian regimes the human rights-compatible IIAs can be used to support human rights-protecting legal architecture and company practices.

Given how much negative impact can occur if the state is left to its own devices, and how much being part of a larger community of values can help in preventing or at least slowing specific harmful processes (as seen in the case of Poland, but also Hungary), Ian Higham in his article ‘Conditionality in International Organization Accession Processes: Prospects for Business and Human Rights in Eastern Europe’ concludes that conditionality in international organizations’ (IOs) accession processes, in many cases, is a highly effective governance tool that induces governments to adopt policies that are of BHR relevance. The EU and OECD are IOs with much at stake in CEE expansion and have already imposed some BHR-related accession conditionalities. This article shows that there is significantly greater scope to include broader, more substantive BHR conditionalities that explicitly promote the UNGPs.

Jelena Aparac’s article, ‘Private Military and Security Companies as a Legacy of War: Lessons Learned From the Former Yugoslavia’, highlights the increasingly common problems posed by creating private military and security providers globally due to the current uncoordinated processes to prevent armed conflicts. She reflects on the need to avoid smart sanctions and use other foreign policy tools. The article calls for an integrated approach to security sector reform and transitional justice necessary for sustainable peace.

Two pieces in the Special Issue look more closely at corporate practice. In the article ‘Business and Human Rights in Russia: Merging or Emerging?’, which was written mainly before Russia invaded Ukraine in 2022, Michael Rogerson seeks to investigate how the most prominent Russian firms conceptualize and fulfil their human rights obligations under the UNGPs and how much the internationalization of those firms may have impacted these behaviours.

In their DiF contribution, Agata Rudnicka and Janusz Reichel provide a first take on the third-party assessment of corporate activism on LGBT+ issues in the region, by looking at the situation in Poland.

Access to remedy in the region is also under scrutiny in two pieces. Tetiana Tsvina and Nataliia Mazaraki consider how the principles of legitimacy, accessibility, predictability, rights compatibility, equitability and transparency may be reached when constructing mediation schemes for human rights-related disputes between companies and individuals or communities so the mediation would complement judicial remedies and enhance access to justice. Taking Ukraine as a case study, the article ‘Creating an Effective Mediation Scheme for Human Rights’ concludes that several tools and methods of documentation (mediation rules and guidelines, contract clauses for triggering mediation, mediators accreditation, and certification schemes) are required to enhance the use of mediation for BHR disputes.

The practitioner’s view presented in the DiF piece by Ana Dangova Hug wraps up the Special Issue on a more positive note, by proposing a way forward in overcoming barriers to access to remedy for corporate human rights violations in North Macedonia.

As mentioned at the beginning, human rights in the business context of CEE needs to be further researched and studied. We hope that by bringing together such diverse academic and practitioner perspectives, which convey the stories of business-related human rights challenges and opportunities from the region, this Special Issue will be a starting point to work towards filling this gap.

**Competing interest.** The authors declare none.

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