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# BREACH OF LAW AS GOVERNMENT POLICY

## The use of illegal orders in Western Balkan state institutions

CIDS Report No. 2/2022

By Svein Eriksen



CENTRE FOR INTEGRITY  
IN THE DEFENCE SECTOR



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## CENTRE FOR INTEGRITY IN THE DEFENCE SECTOR

The Centre for Integrity in the Defence Sector (CIDS) promotes integrity, anti-corruption measures and good governance in the defence and related security sector. Working with Norwegian and international partners, the Centre seeks to build competence, raise awareness and provide practical means to reduce the risks of corruption by seeking to strengthen institutions through advice and training. CIDS was established in 2012 by the Norwegian Ministry of Defence and was officially appointed as s Department Head for NATO's discipline Building Integrity in 2013. The Centre is now an integral part of the Norwegian Ministry of Defence.

The views expressed in this report are those of the author and do not necessarily represent the views of, and should not be attributed to, the Norwegian MOD.

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## ABOUT THE AUTHOR

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# FOREWORD

This report is devoted to an important, but almost completely neglected topic, namely issuance, and compliance with illegal orders in state institutions. The report examines this problem in five countries in the Western Balkans: Albania, Bosnia and Herzegovina, Kosovo, Montenegro, and North Macedonia. CIDS' national representatives in each of these countries have collected data based on interviews and other information on which the present report is based. It addresses in particular the following issues:

- The adequacy of domestic legal frameworks
- The actual occurrence of illegal orders in state institutions
- Illegal orders in the context of political and socio-cultural factors
- Implications of illegal orders
- Possible measures to mitigate the situation.

Due to the gravity, scope and persistence of the problems described, the report recommends that they be addressed in international fora. Measures that are recommended include expanding the remit of the international rule of law and the preparation of more adequate international standards.

This report was written by CIDS' senior international expert Mr. Svein Eriksen. In particular CIDS' teamleaders Mr. Ahmet Alibasić (BiH) and Mr. Islam Jusufi (North Macedonia), as well as Professor Miroslav Hadžić (Belgrade) have assisted with parts of the text. I would also like to acknowledge Ms. Annette Hurum's (CIDS) contribution to the report.

CIDS would be happy to receive feedback on the report.

Oslo, 7. June 2022



**Per A. Christensen**  
Director

# EXECUTIVE SUMMARY

The purpose of the present study is to provide information about the extent to which illegalities committed by government agencies occur deliberately or at least with indifference on the part of government office holders. We examine how well legislation puts impediments in place for the use of illegal orders and what characterizes their occurrence. Without a robust rule of law, obviously including absence of illegal orders, a well-functioning democracy is inconceivable.

Overall, domestic legal frameworks show little compliance with international standards. The implied message sent to civil servants, members of the armed forces and the police, is that carrying out illegal orders is not necessarily prohibited. This undermines the fundamental principle that public employees in the performance of their duties are obliged to act in accordance with the law.

Our investigation gives reason to believe that illegal orders occur on such a large scale that they are dominant elements in the systems of public administration in the group of countries examined. The orders seem to be effective, in the sense that they are largely complied with and carried out without negative sanctions for those involved. State sponsored illegalities as described in our study, should not be seen as exceptions to an otherwise prevailing normal state, where respecting the law is typical. Nor should they be understood as expressions of systematic failure in regimes, which are on the verge of downfall. We should rather see them as expressions of normalcy, albeit a different normalcy than that which follows the norm of impartiality. They are manifestations of a logic that is summarized in the title of the present paper, "Breach of Law as Government Policy".

Generally, illegal orders seem to originate at the political level. The political initiators often hold executive office, e.g. as a minister, but in some countries political leaders without a government portfolio seem to play a particularly large role. Illegal orders occur especially in the areas of human resource management (HRM), public procurement, and the allocation of state subsidies. They are aimed at both individual decisions and decisions that set the framework for the state's activities, such as planning decisions and regulatory provisions. Illegal orders are normally issued to give special benefits to individuals or organisations with close connections to the

ruling elite, or to this elite itself. Thus, it seems reasonably clear that illegal orders are key mechanisms by means of which corruption occurs.

What enables ruling parties to govern by systematically ignoring and violating the law, is their grip over employment in state bodies. This makes it possible to have submissive officials in all key positions in the public administration and law enforcement organs.

Our study strongly suggests that public servants do not feel protected when exposed to illegal orders. They have little confidence in institutions that could have provided protection, such as prosecution services, courts, control bodies, and whistleblower mechanisms. There is a general belief that all these bodies, like the executive branch of government, are controlled by political parties.

The findings reported in this study have significant, negative consequences both nationally, in the countries themselves, and internationally when it comes to the countries' cooperation with other nations, informal transnational groups, and international organisations. The report claims that the extent of illegal orders that seems to occur, is impossible to reconcile with the ideal of true democracy. State-sponsored illegality combines with other risk factors, such as disputed statehood or deep socio-cultural rifts within populations, related to ethnic, religious, economic, or linguistic issues. In many cases, negative implications are exacerbated by the interrelations between state-sponsored illegality and these other risk factors.

Challenges discussed in the present report can probably best be addressed in collaboration with international organisations, most notably the EU. The report proposes an enlargement of the remit of the international rule of law and development of more adequate international standards regarding illegal orders. The report also proposes measures in the affected countries, while at the same time noting that the practice of illegal orders seems to be so prevalent and have been in use so long, that it seems doubtful whether domestic authorities will or are able to address the issue with the professionalism and objectivity required. The report therefore suggests that the international community should play a role.

# 1. INTRODUCTION

## 1.1. ILLEGAL ORDERS AS A PROBLEM - WHAT WE ALREADY KNOW OR CAN ASSUME

Based on what we already know about the Western Balkan countries included in the present study, there may be reason to believe that state bodies in these countries are subject to illegal orders on a large scale. It is well documented that across the Western Balkans, the authority of law is weak or very weak.<sup>1</sup> The countries are also characterized by conditions that are closely linked to this problem, such as widespread corruption and lack of effective mechanisms to hold the political leadership accountable.<sup>2</sup>

Failure of the rule of law seems to be associated with, and even directly triggered by, the behaviour of state bodies and members of the political elite. The countries in question are, in fact, characterized by a striking discrepancy: their normative basis as expressed by laws and institutions contrasts sharply with government practices.<sup>3</sup> Thus, in many areas of law that are central to securing citizens' rights, the state's actual exercise of authority may be unlawful. In a conversation with CIDS, a professor of political science at a university in the Western Balkans summed up the situation in this way, "We never had so many laws but so little justice."

Based on what the European Commission stated in 2018 – in unusually clear language – it seems that the rule of law situation may be related to illegal, even criminal behaviour by members of the governing elites. Thus, according to the Commission,

"Today, the countries show clear elements of state capture, including links with organized crime and corruption at all levels of government and

administration, as well as a strong entanglement of public and private interests".<sup>4</sup>

Similarly, in 2021 the Committee of Foreign Affairs of the European Parliament expressed great concern about "reports and accusations of connections between high-level political figures and organized crime groups" and reiterated "the need to eradicate political and administrative links to organized crime".<sup>5</sup>

Moreover, everywhere in the Balkans, there is a widespread suspicion that the law enforcement system is used for party political purposes. Thus, in Bosnia and Herzegovina "[...] judicial institutions seem to bend to the interests or pressures of the ruling political elites [...]".<sup>6</sup> In the same way, in Kosovo studies suggest that "One of the main obstacles to building an effective justice system is its vulnerability to undue political influence."<sup>7</sup> A 2021 report funded by the Dutch government, claims that in Montenegro, the executive branch has exercised undue political influence on the judiciary and the prosecution for years, i.a. by assigning apartments to judges and state prosecutors for a fraction of their estimated value.<sup>8</sup>

Such claims are not fundamentally new. They fit into a long-standing tradition across the Western Balkans where comprehensive and credible allegations of illegalities committed by government officials, are not investigated and far less sanctioned. In no ex-Yugoslav country have steps been taken to investigate and prosecute crimes committed by the communist authorities. Albania, which had a far more brutal communist regime than Yugoslavia – "with massive and systematic killings, imprisonment, torture, and internment of citizens"<sup>9</sup> - has only partially taken legal action against members of the communist leadership<sup>10</sup>,

1 For an overview of the 2009-2017 period, see i.a. the Andrea Lorenza Capuzzella, "Can the EU Assist the Development of the Western Balkans? How to Prevent the 'Stealing from the Many', *Südosteuropa Mittelungen* 01/02 (21–34), p. 27-

2 Capzzella op.cit. fn. 1, pp. 27 and 28

3 See for instance, Eric Gordy and Adnan Efendic, "Engaging Policy to Address Gaps Between Formality and Informality in the Western Balkans" in Eric Gordy and Adnan Efendic (eds.) *Meaningful Reform in the Western Balkans. Between Formal Institutions and Informal Practices* Peter Lang AG, International Publishers, Bern, 2019, (7-21), p. 10. A 2015 study prepared by the Norwegian Agency for Public Management (Difi) found that for the nine Balkan countries it covered, domestic legislation in 61 per cent of areas crucial to implementing good governance, was essentially aligned with international standards. In comparison, government practices have significantly lower compliancy rates. They were largely aligned with the standards in 24 per cent of the areas of law. See, Difi, *Defence against corruption: The risk of corruption in the defence sector in 9 countries in Southeast Europe*, Oslo, 2015.

4 The EU Commission, "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans", Strasbourg 6.2. 2018, p. 3.

5 Motion for a European Parliament Resolution 29.10.2021, available at [europar.europa.eu](https://europar.europa.eu).

6 Transparency International Bosnia and Herzegovina, *Ending impunity for Grand Corruption*, 2020, p. 2.

7 Kosovo Democratic Institute and Transparency International, *The "culture of impunity" in Kosovo*, p. 23.

8 Anaiza postupaka izbora, *napredovnja i utvrđivanja odgovornosti tužilačka u Crnoj Gori* 2020-2021.

9 Islam Jusufi et al. "An Analysis of the political Discourse on Albania's Transitional Justice System", in Innocent Chiluba (ed.), *Discourse and Conflict. Analysing Text and Talk of Conflict, Hate and Peace-building*, Palgrave Macmillan, ebook, available at <https://doi.org/10.1007/978-3-030-76485-2>, (413-438), p. 413.

10 Ilir Kalemaj, "Transitional justice and democratic consolidation in post-communist Eastern Europe: Romania and Albania", *Eastern Journal of European Studies*, 1/2021 (81-103), p. 93, Jusufi et al. fn. 11, p. 434.

who to a large extent retained, or were allowed to return to influential positions in politics and business. At the same time, so-called lustration laws and associated measures have been abused for party political purposes.<sup>11</sup>

Even after the wars in the 1990s, there has been nothing close to effective judicial sanctioning of atrocities committed under the auspices of public authorities. Senior Fellow Hikmet Karčić mentions for instance that 800 people who participated in the Srebrenica genocide, still work as active-duty police officers.<sup>12</sup> The issue of civil servants' participation in Srebrenica and elsewhere has not been examined at all. Equally troubling is the fact that Balkan war crime suspects still maintain political influence.<sup>13</sup>

All this sends a disturbing signal that state-sanctioned wrongdoing, even illegitimate violence, is protected by passivity and indeed co-operation from law enforcement branches/institutions and that moral resistance demands superhuman heroism.

In a 2018 study, Aleksandra Rabrenović et al. conclude that,

[...] although it may be seen as quite peculiar, this issue (illegal orders) is encountered rather often in a public sector employee's career in the Balkans. Despite that, very little attention has been paid to it by policy-makers and international and national institutions specialised in integrity building. A public sector employee is often left completely alone with an important integrity dilemma – whether to follow his/her superior's instructions or act in accordance with the law and his/her conscience.<sup>14</sup>

The only empirical study on illegal orders known to the Centre for Integrity in the Defence Sector (CIDS), is a survey conducted by the Bosnian Ministry of Defence in 2020, covering both civilian and military personnel of the ministry. More than a third of those who participated in the survey, 35 percent, reported that they had experienced illegal orders. About half of the respondents, 49 percent, identified personnel management as an area where

unlawful orders took place. 28 per cent mentioned logistics (including public procurement) and 18,2 per cent referred to finance as particularly vulnerable areas.

The practice of illegal orders was also documented in a CIDS study on the procurement system in the Ministry of Defense of Bosnia and Herzegovina. The report describes the problem as probably wide-ranging and systematic.<sup>15</sup>

However, overall, little attention has been paid to illegal orders. Already available studies on corruption and other threats to the rule of law, often focus on people's perceptions, on social background factors and institutional risk elements. How corruption occurs, and in what ways the rule of law is set aside, are issues that have been investigated to a much lesser extent.

The purpose of the present study is to help fill this knowledge gap. It will give us insight into the extent to which illegalities committed by government agencies occur deliberately or at least with indifference on the part of government office holders. Problems that derive from human actions committed knowingly, intentionally, or recklessly by public decision-makers are qualitatively different from – and must be met with other types of reactions than those, which are due to various forms of structural and technical deficiencies.

## 1.2. THE METHOD AND ORGANISATION OF THE PRESENT STUDY

The present survey concerns 'illegal orders', as they occur in the state administration in five countries in the Western Balkans, Albania, Bosnia-Herzegovina, Kosovo, Montenegro, and North Macedonia. The study mainly concerns illegal orders within the executive branch of government, primarily in ministries. Data was collected through in-depth interviews with former and current permanent officials and politicians, as well as with other people who know the relationship between politicians and officials well. The interviews were mostly based on a pre-prepared and semi-structured interview guide. During the interviews, the term 'illegal orders' was consistently used. This phraseology does not appear to have created any lack of clarity or misunderstandings, and it did not necessitate further

11 Jusufi et al. fn. 11, p. 434.

12 Hikmet Karčić, *Obeying Unlawful Orders: Continuity of Personnel Involved in Human Rights Violations and its Impact on Reforms in Bosnia and Herzegovina*, CIDS Report No. 1 2021, Centre for Integrity in the Defence Sector, Oslo, 2021.

13 See Balkaninsight 2016, available at <https://balkaninsight.com/2016/12/07/balkan-war-crime-suspects-maintain-political-influence-12-02-2016/>

14 Aleksandra Rabrenović, Jelena Šuput, and Marina Matić Bošković, "Open dilemma: How to react to illegal orders from a superior?" in Aleksandra Rabrenović and Ana Knezević Bojović, *Integrity and good governance in the Western Balkans*, (303-314), The regional School of Public Administration, Danilovgrad, 2018, p. 314.

15 Centre for Integrity in the Defence Sector, *Functional analysis of the procurement sector in the Ministry of Defence of Bosnia and Herzegovina*, Oslo 2017, pp. 8 and 9.



clarification. The respondents seem to have quickly grasped what type of practice was at the focus of the survey.

In Chapter 4, we discuss in more detail the way in which illegal orders are expressed. It appears that such orders are rarely communicated explicitly. They can be conveyed in the form of allusions, hints, or questions. We nevertheless believe that it is justified well to use the term 'orders'. In the highly hierarchical social and cultural context of the Western Balkans, there is little doubt that both sender and recipient of these messages perceive them as being close to absolutely binding.

The interviews were conducted by CIDS' national team leaders. Based on the interview data and other material country, reports were prepared. Chapter 4 below provides a summary of the findings in the national reports. Wherever possible, we have sought to elaborate and substantiate assertions that emerge in the interviews with information and analyses in academic papers.

In addition to studying the empirical occurrence of illegal orders, we have also examined the extent to which there are adequate legal barriers to this practice. Both primary and secondary legislation have been reviewed. The Institute of Comparative Law in Belgrade has at the request of CIDS analysed the legal situation in the four ex-Yugoslav countries included in our study. The review of Albanian legislation has been carried out by an Albanian legal expert, Zhani Shapo, also on behalf of CIDS. The findings from the legal analyses are described in chapter 3 below.

We will not claim to have carried out a comprehensive survey of illegal orders in the five countries. The present study, and in particular the presentation of the empirical material (chapter 4) has an exploratory purpose. The aim is to get a preliminary idea of illegal orders as governance problems, of possible implications and remedial measures that should be considered. During the work on this study, we have also tried to get as complete an overview as possible of literature on illegal orders.

## 2. THE NORMATIVE POINT OF DEPARTURE

The question of illegal orders in this paper concerns the relationship between superiors and subordinates in the state apparatus. Government agencies are hierarchically organized. For these to be able to function and solve their tasks, subordinates are in principle obliged to carry out orders from superiors. However, the duty of obedience is not absolute. When public officials perform their functions, they act as the state. This obliges them to perform their duties – including the duties that follow from party political goals and concerns – within the normative framework provided by the constitution and the legislation. It follows logically from this obligation, that they have a right, and under certain circumstances also a duty to refuse to carry out illegal orders.

Let us already here anticipate key findings of the present study. Essentially, illegal orders have their origins in the political leadership, and their quantity seems substantial. This makes the situation particularly concerning. Put bluntly: Those who have the power to solve the problem are the ones who cause it. Moreover, Balkan public officials seem to perceive loyalty to superiors – especially to the political leadership – as a duty that takes precedence over (almost) all other considerations. The impression is created that orders given by a democratically elected or appointed leader override legal rules and restrictions. Thus, to understand the significance of – and to clarify the topic of this study, it is useful to place it within the broader context of the relationship between the two core public governance values of democracy, and the rule of law.

Although the world today is more democratic than at almost any time previously in history, it is becoming increasingly clear that democracy, understood as procedural democracy, in many places, including Western Balkan countries, has not lived up to expectations. Marred by corruption, favouritism, and abuse of power it has not been able to ensure good governance and improve the well-being of its citizens. There is now ample evidence that electoral democracy without impartial exercise of authority – including of course, absence of politically motivated illegal orders – is not enough to provide high quality government and human well-being.

The political way of life desired by the majority of European citizens, and people in many other countries (in short “the desired political way of life”)<sup>16</sup> – rests on two separate and equal pillars, “participation” and “protection”<sup>17</sup>, or in more common parlance, “democracy” and “the rule of law”. The former includes the rights of the individual to participate in political life, the latter his or her right to set in motion the legal system to protect individual rights.

“Democracy” alone does not exhaustively reflect the values that the desired political way of life should uphold. This is evidenced in expressions that have entered common usage.<sup>18</sup> Often, the term “democracy” is qualified with adjectives in expressions such as “liberal democracy”, “constitutional democracy” or “impartial democracy”. It is also common for “democracy” to be used as an adjective, for instance in the terms “democratic good governance” and “democratic rule of law”. Increasingly, double forms, such as “democracy and the rule of law” or “democracy and the constitutional state” have been established. As these examples suggest, democracy and individual rights are seen as key, but not inseparably linked to normative bases of the desired form of political life.

Democracy can promote the rule of law, but this effect is not certain.<sup>19</sup> Empirical studies find an ambiguous relationship between democracy and human rights.<sup>20</sup> Elections and peaceful transfer of power, for example, can coexist with frequent violations of individual rights.

At the same time, a strong rule of law is an essential precondition for high-quality democracy. Real democracy requires a rule of law that ensures i.a. mechanisms for accountability which affirm the equality of all citizens and constrain abuses of state power. Only with a vigorous rule of law enforced, will the various state agencies and branches of government function properly without obstruction or intimidation from powerful state actors. Only under these conditions will the responsiveness of

<sup>16</sup> Gerald Stourz, *Die moderne Isonomie. Menschenrechtsschutz und demokratische Teilhabe als Gleichberechtigungsordnung*, Böhlau Verlag, Vienna, 2015, p. 71.

<sup>17</sup> *Ibid.*

<sup>18</sup> Stourz *op.cit.* fn.17, especially pp. 63-74.

<sup>19</sup> Todd Landman, «Democracy and Human Rights: Concepts, Measures and Relationships», *Politics and Governance*, 1(6) 2018, 48-59.

<sup>20</sup> Landmann *op.cit.* fn.21, 56

governments to the interests and needs of the greatest number of citizens be achieved.<sup>21</sup>

In short, for the state to have legitimacy, it must be able to safeguard requirements of both democracy and the rule of law. Without a robust rule of law, obviously including absence of illegal orders, a well-functioning democracy is inconceivable.

Among legal scholars it is widely held that no one should be forced to comply with an illegal order and that the institutional system of the state must be protected from such practices.<sup>22</sup> The first question we will seek to answer, is to what extent and how adequately the legislation in the five countries included in the present study addresses these concerns. This is the theme of the next chapter.

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21 Guillermo O'Donnell, "Why the Rule of Law Matters", *Journal of Democracy* 15(4) (32-46), 2004.

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22 Jamina Gomes Garcia de Moraes. *To obey or not to obey: a normative account of civil servant disobedience*, LLM Thesis, Tilburg Law School, Tilburg University, August 2018, p. 35.

## 3. THE ADEQUACY OF DOMESTIC LEGAL FRAMEWORKS

### 3.1. INTERNATIONAL STANDARDS

We have analysed the domestic legal framework based on international standards. It must be said at once that illegal orders are a topic that has not been given sufficient attention and that this, unfortunately, characterise the current standards. Most existing international legal instruments were adopted in the aftermath of the Second world war and in the 1990's, and early 2000s in the wake of the wars and the associated humanitarian disasters, especially in the former Yugoslavia. In our assessment we have used sources on both international soft law and international hard law. Among the former are legal instruments adopted by the United Nations (UN), the Council of Europe (CoE) and the Organization for Security and Co-operation in Europe (OSCE). The only source of hard law that explicitly deals with illegal orders, is the Rome Statute of the International Court of Justice, which in its current form dates from 2002. While the hard law instruments focus on the extraordinary cases of illegal orders associated with serious human rights violations, the soft law frameworks deal with orders associated with what we could term everyday illegality.

Within the hard law instruments of international criminal law, there are three different approaches to the concept of liability for crimes ordered by a superior, the *respondeat superior doctrine*, the *absolute liability doctrine*, and the *conditional liability doctrine*.<sup>23</sup>

According to the *respondeat superior doctrine*, only the superior is accountable for the commission of the crime and not the subordinate who could successfully invoke a defence line of following superior orders because of a general duty to obey the orders of superiors. This approach can be found in the 1914 editions of the British Manual of Military Law and the United States Rules of Land Warfare. At Nuremberg this doctrine was rejected because it would have led to the result that the only person who could be held criminally liable for the crimes committed by the

Nazi regime, would be Adolf Hitler himself. Instead, in the statute of the Nuremberg Tribunal the *absolute liability doctrine* was adopted. The absolute liability doctrine can also be found in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Pursuant to the absolute liability doctrine, superior orders are no defence, but still they can only be considered in mitigation of punishment. The rationale behind this doctrine is that the obligation to obey superior orders is in principle limited to lawful orders only.

According to the third approach, the *conditional liability doctrine*, acting on superior orders does not relieve the subordinate of criminal responsibility unless he or she did not know and could not reasonably have been expected to know that the order was unlawful. The conditional liability doctrine is reflected in Article 33(1) of the Rome Statute of the International Criminal Court (ICC), which provides that acting on superior orders does not relieve a person from criminal responsibility unless that person was under a legal obligation to obey, he or she did not know the order to be unlawful (this is interpreted as a subjective criterion), and the order was not manifestly unlawful (this is interpreted by most professionals as an objective criterion). On the other hand, paragraph 2 of Article 33 excludes, however, the possibility of invoking the defence of superior orders when the acts ordered constitute genocide or crimes against humanity. In the given case, a rule of absolute liability applies.<sup>24</sup>

What has not gained much attention, however, are illegal orders with less immediate consequences – which we have labelled “everyday illegality” – and the connection between this everyday illegality and the most serious cases such as human rights violations. The issue of everyday illegality thus far, has been addressed only by international soft law instruments, and unfortunately not in a systematic and detailed manner. Arguably, the lack of hard law instruments

<sup>23</sup> Annemieke van Verseveld, *Superior Orders*, 2016, available at <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0133.xml>;

<sup>24</sup> Annemieke van Verseveld, *Superior Orders*, 2016, available at <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0133.xml>; Eric A. Posner & Alan O. Sykes, An Economic Analysis of State and Individual Responsibility Under International Law, 9 AM. L. & ECON. REV. 72, 129 (2007), p. 20.

governing everyday illegalities may have negatively impacted the quality of national legal frameworks.

Contrary to the Rome Statute (as an international hard law instrument), CoE and OSCE soft law instruments do not follow the conditional liability doctrine. Instead, they enshrine the principle that an official is responsible for each and every illegal order he or she carries out.<sup>25</sup>

Based on the international standards, we have identified seven benchmarks against which we assess the domestic legal frameworks:

1. It is ensured that civil servants are made aware that following an improper order of a superior is prohibited.
2. A statute sets out clearly the mandatory steps to be taken by civil servants when they believe that they have received an order from a superior that is illegal or unethical.
3. A statute establishes and details a safe and confidential mechanism that will guide subordinates on how to behave when they believe that they have received an order from a direct superior that they believe is illegal or unethical.
4. A statute establishes and details an effective complaint mechanism for civil servants whose rights are threatened or denied because of refusal to comply with an illegal or unethical superior order.
5. Disciplinary arrangements adequately support and strengthen the protection of civil servants regarding illegal and unethical superior orders.
6. It is ensured that an order issued during a state of war, state of emergency or armed conflict should never be executed if it constitutes breach of international humanitarian law and international criminal law.
7. The criminal legal framework stipulates that for military persons, it is a crime to refuse to execute superior orders that are in line with requirements based on international human rights, international criminal law, and humanitarian law.

Each of the benchmarks is further divided into more detailed indicators.

### 3.2. THE EXTENT TO WHICH DOMESTIC FRAMEWORKS ARE ALIGNED WITH INTERNATIONAL STANDARDS

Overall, domestic legal frameworks show little compliance with the international standards as expressed in the seven benchmarks above. The police laws of two countries contain an explicit prohibition for police officers to follow unlawful orders. Apart from this, there is in our sample of countries no comprehensive legal prohibition against carrying out illegal orders, be it in the civil service, in the military or in the police. Moreover, regulations within each of these sectors are internally inconsistent, which creates confusion and legal uncertainty and makes it difficult for public officials to know how to deal with illegal orders. The message sent to civil servants, members of the armed forces and the police, is that carrying out illegal orders is not necessarily prohibited. This undermines the fundamental principle that public employees in the performance of their duties, are obliged to act in accordance with the law.

When we assess the domestic legislation, based on each of the benchmarks mentioned above, we find i.a. that:

- none of the countries included in the study have provisions for safe and confidential mechanisms to guide public officials regarding illegal orders (benchmark 3)
- complaints arrangements for civil servants receiving illegal orders to complain for civil servants receiving illegal orders do not exist in any of the countries. Equally non-existent are provisions that prohibit retaliation against public officials who refuse to carry out illegal orders (benchmark 4).
- in none of the countries (apart from the general civil service legislation in one of them) do the disciplinary regulations contain provisions that persons who knowingly and intentionally issue illegal orders should be sanctioned (benchmark 5). On the other hand, several countries have provisions that failure to comply with orders - without making any distinction between legal and illegal ones - entails disciplinary sanctions (benchmark 1, indicator 4).

<sup>25</sup> The only exception is the European Code of Police Ethics which contains the prohibition for police personnel to execute a superior order which is limited in scope as such a prohibition is only applicable to superior orders which are **clearly** illegal.

- most of the countries meet the criterion that an order issued during a state of war, state of emergency or armed conflict should never be executed if it constitutes a breach of international humanitarian law and international criminal law. However, there are countries in our study where this requirement has not been clearly stipulated (benchmark 6)
- the criminal law frameworks of most countries have provisions on criminal liability for military personnel who fail to comply with orders from superiors. The provisions are not aligned with international standards because they fail to distinguish between orders that are in line with, and orders that violate international human rights, international criminal law, and humanitarian law. The latter group of orders shall not be executed under any circumstances (benchmark 7).

In the development of their legislation, the countries have picked and chosen which international standards they may want to follow and which ones they do not. The end result is, as already mentioned, a system with low formal barriers to issuing and executing illegal orders. The question arises whether this result has been achieved intentionally or by chance. Although it is difficult to answer definitively, the question becomes even more urgent when, in addition to the formal regulations, we also analyse actual practices of state institutions.

## 4. ACTUAL PRACTICES OF STATE INSTITUTIONS

### 4.1. HOW OFTEN, AT WHOSE INITIATIVE, AND IN WHICH AREAS DO ILLEGAL ORDERS OCCUR?

Our investigation gives reason to believe that illegal orders occur on such a large scale that they are dominant elements in the systems of public administration in our group of countries. The authors of the individual country studies describe the scope in the following ways:

“The practice of implementing illegal orders is internalised across the public administration. It has become almost a norm” [...] “Illegal orders are ubiquitous” ... Issuance of illegal orders is common or even very common” [...] “It is a cancerous tumour on our society” [...] “The majority of civil servants are willing to participate in unlawful dealings”.

Generally, illegal orders seem to originate at the political level. The political initiators often hold executive office, e.g. as a minister, but in some countries political leaders without a government portfolio seem to play a particularly large role.

Subordinate personnel, including political appointees, may on their own initiative, issue illegal orders, but if they do this to achieve personal financial gain and without the understanding of senior political leaders, they seem to run a distinct risk. The political parties’ desire to acquire public resources is said to be so dominant that they do not tolerate subordinate staff acting on their own. Should such wayward behaviour nevertheless occur, political leaders will often ensure that those who have taken liberties are prosecuted and sanctioned. In this way, the outside world is given the impression that there is a will to fight even high-level corruption.

Although the extent of politically initiated illegality appears extensive, not all politicians are equally involved. In some countries the extent of the use of illegal orders has declined after changes of government. A reason may be that the incoming leadership has moral concerns about such a practice. Respondents also point out that the new governments may have a weak parliamentary base, that the new political personnel are inexperienced, often insecure about themselves, and may fear the consequences of illegality. If their government falls, they may fear being held accountable and perhaps being subject to reprisals.

While some respondents say that they were under strong pressure to commit illegal acts, that they and their family were exposed to threats, this does not seem to be the main pattern. In most cases, it appears that superiors do not explicitly order a subordinate to commit clearly illegal acts. Illegal orders are almost always conveyed orally, often just as hints. However, the fact that a message is given as a hint by a superior to a subordinate, seems to make it particularly forceful. Asking to receive the order in writing rarely occurs. Such a request can be seen as an act of opposition and therefore create trouble for the person asking for it.

It is not always a minister or another political leader who gives the order directly. The task can be left to junior political staff in, for example, the minister’s cabinet (see the textbox below).

**Textbox 1 The way illegal orders can be conveyed - statement by an interviewee**

Illegal orders are rarely issued in the form of strict orders, and they may not come directly from the head of the institution. Instead, the head uses the circle of people that he/she appoints to be advisors and/or technical staff linked to the position of the head. These people then make sure that head's instructions, which go against the regulations, are transmitted to those whose 'engagement' is needed. The reason for this approach is the need to keep the 'main boss' safe from any suspicions or investigations. In other words, being a member of the minister's cabinet implies the need to shield the boss at any time and at any cost. However, members of the cabinet are not naïve either. It is an unwritten rule that such instructions are given only orally (i.e. without leaving any paper trail) and the manner in which it is done is very subtle. The conversation is extremely friendly and often begins with a saying that is common with us: "The Minister sends his regards and says that your good work is being noticed". As a result, a targeted civil servant is not only tempted to act in line with the request due to his/her future prospects in the institution (most of us have desires and objectives that a minister can help achieve) but also due to the fact that after such 'polite request' and 'kind words' of the minister, the act of refusing 'to cooperate' would be seen by the minister and his/her cohorts as an act of arrogance and ingratitude.

Although illegal orders may not be explicitly stated, there is little doubt that both those who convey such messages (be it in the form of allusions or questions) and those who receive them perceive them as binding. Such an understanding follows from the limited role of civil servants, which is explained in more detail in section 4.2 below and which must be seen in the context of the wider societal culture of the Western Balkans (see chapter 5 below). Other factors also work in the same direction. Not all officials

seem to be equally at risk of being asked to carry out illegal acts. People who are perceived as vulnerable, e.g. because they lack political connections or have a strained economy seem to be especially exposed. A senior police official in Albania says that ruling parties have preferred to appoint a person who is perceived as submissive to the interior minister as police director and thus, may be expected to obey inappropriate, even illegal instructions. Other respondents express similar views. The pressure on subordinates to carry out illegal orders can be intensified by claims that compliance is a patriotic duty demanded by overriding national interests.

Illegal orders occur especially in the areas of human resources management (HRM), public procurement, and the allocation of state subsidies.

In all countries in our sample, it is widely held that party political relations are crucial for most employment decisions - not only in the public sector, but also in the large part of the business community that has close contacts with members of the political elite. It is especially decisions on employment, promotions, and payment of bonuses and other extraordinary benefits that are the subject of illegal intervention.

In Albania, the government's own figures from the Commissioner for civil service oversight indicate that from 14 to 30 percent of the total number of civil servants are illegally employed.<sup>26</sup> The survey only seems to cover those cases where the head of a state institution appointed people directly without carrying out legally prescribed procedures. However, the fact that all steps in the employment process are technically implemented does not prevent illegalities (see textbox 2 below). In ex-Yugoslav countries, it is estimated that when such conditions are considered, the proportion of illegal employment of junior civil servants may amount to as much as fifty percent of the total number of employments.

<sup>26</sup> Data retrieved from the annual reports of the Commissioner for Civil Service Oversight for the years 2017 to 2020 (<http://www.kmshc.al/raportimi-vjetor-per-kuvendin/>). Accessed June 2021. The figures vary considerably probably because the number of positions included in the civil service has changed noticeably from year to year



## Textbox 2 Manipulation of the recruitment process

There are several ways used to ensure that for example a minister's 'preferred candidate' is employed:

- The text of the vacancy announcement may be tailored for the 'preferred candidate'. When the minister's time in the ministry is coming to an end, it is often political employees in his or her cabinet who are favoured in this way.
- Applicants for civil service vacancies are evaluated and ranked by a committee that may consist of five members, two from the recruiting institution announcing the vacancy and three independent experts. The two members from the recruiting institution are appointed by the minister may often be given to understand that one of the applicants is the Minister's preferred candidate.
- To gain a majority in the committee, the institution's representatives must be supported by at least one of the three independent experts. Usually, this is not difficult to achieve. The position as a committee member is paid, and most members want to keep their contracts. Going against the wishes of a powerful minister and being seen as a troublemaker will not strengthen the possibilities for later appointments.
- It is suspected that the institution's representatives may be leaking the questions - possibly also the answers - that are included in the written and oral tests of the preferred candidate.
- The score given to applicants by the recruitment commission - or the majority of commission - may not be consistent with their actual performance. The lack of such consistency usually goes in favour of the preferred candidate.

Regarding procurement, a 2021 government report found that 70 per cent of Albanian public procurements were not in conformity with procurement legislation, and that the accumulated value of all types of improper financial transactions conducted by public authorities in 2020 increased by 34 percent, compared to the previous year.<sup>27</sup> Similar conditions are reported from other countries in the present survey. Major consequences of illegal, procurement-related orders, are severely overpriced contracts, unnecessary purchases, and unfair discrimination of suppliers.

Illegal orders are aimed at both individual decisions and decisions that set the framework for the state's activities, such as planning decisions and regulatory provisions. Interviewees mention that long-term plans for investments, public procurement and government budgets are particularly vulnerable. Regarding public regulations, it is especially pieces of secondary legislation - which can be decisive for how primary legislation is implemented - that are exposed to illegal intervention. Respondents point out that when legislation is inadequate, it is because it is intended to be inadequate.

The fact that some areas of the state are particularly vulnerable to illegal orders, does not mean that other parts are protected from them. Illegal orders can occur anywhere, depending on characteristics of the individual case, especially who it concerns and whose interests are affected. This makes case processing in the public administration and other state authorities unpredictable. To deal with the uncertainty, the judicial system and the decision-making system in government bodies are heavily influenced by excessive formalism. This approach may protect individual officials but is not conducive to improving the rule of law (see more about this in section 4.5 below).

When illegal orders are given, it is almost always to give special benefits to individuals, possibly organisations that have a particularly close connection to the political leadership or other key decision-makers. Those who facilitate illicit transactions by issuing or executing required instructions within the government hierarchy will also

<sup>27</sup> Ministry of Finance and Economy. Report on the Functioning of the Public Internal Financial Control System in the General Government Units for 2020. May 2021. <https://www.financa.gov.al/wp-content/uploads/2021/07/Raporti-Vjetor-i-KBFP-2020.pdf>. Accessed May 2021. According to the report, 45 per cent of the legal violations were in the areas of procurements of goods and services and investments, followed by the tax and customs, concessions and auctions, privatizations, administration of public property, and salaries and allowances.

obtain benefits, or 'kickbacks' i.e. money, or access to positions. Thus, it seems reasonably clear that the illegal orders are key mechanisms by means of which corruption occurs.

The presentation above, shows that illegal orders are conveyed and executed in subtle ways that can be difficult to detect. Often it does not present major problems to give dubious decisions a semblance of legality. Indeed, there is a great risk that the pursuit of apparent legal compliance, and not substantive justice, will become, and in all probability already is, a prevailing practice given the excessively formalistic legal culture across the Western Balkans (more about this in section 4.5). In some areas of law and in some countries, regulations are now planned or being introduced that will reduce the scope for party-politically motivated manipulation. However, it remains to be seen what effect these changes will have in countries where little respect for formal legislation is a key feature of political culture (more on this in chapter 5).

#### **4.2. THE RELATIONSHIP BETWEEN SUPERIORS AND SUBORDINATES AND ITS IMPLICATIONS FOR ILLEGAL ORDERS**

What enables ruling parties to govern by systematically ignoring and violating the law, is their grip over employment in state bodies. This makes it possible for the government leadership to have submissive officials in all key positions in the public administration and law enforcement authorities. Regarding for instance abuse of the procurement system in ministries, the following positions (just to name those which are within the executive branch of government) are particularly important: the Minister, the Secretary General, the Head of the Law Unit and Head of the Procurement Section. As one respondent points out, these officials are expected to be attentive to corrupt intentions of the party leadership and exert pressure on subordinates to rig tender processes in their favour.

The recruitment, dismissal, career progression, salaries, and bonuses of key officials are directly dependent on the will of party leaders, or the relevant ministers. In this way they are almost completely dependent on top leaders, and in the words of an interviewee, "it is easy to talk them into blind loyalty". In countries, such as the ones included in our study where unemployment rates are exceptionally high,

considerations of integrity and professionalism will easily be subordinated to the desire to get a position at all.

People generally feel they owe political parties and individuals who have provided them with employment a debt of gratitude. However, the fact that loyalty is the key recruitment criterion means that perceived disloyalty easily leads to negative consequences. Thus, civil servants' sense of gratitude is regularly mixed with feelings of insecurity and fear.

Fear normally strikes when a change of government is imminent. In countries where it is widely held that 60-70 percent of civil servants employed based on their perceived loyalty, civil servants employed by the previous government are in a weak bargaining position and some of them must go to great lengths to keep their positions under new political constellation. At least in one of the countries, changes of government are reported to trigger competition among officials to be as loyal as possible to incoming political leaders.

The national reports point out that not only material concerns, but also informal cultural features and social customs, including perceptions of the proper role and functions of civil servants, promote both the issuance and compliance with illegal orders (we return to this topic in the next chapter). What is expected of a public official, is passive obedience, not professional independence, and especially not critical questions about the appropriateness of instructions or suggestions from political leaders. Prevailing cultural norms promotes an awareness of the duty to obey - not the law, but your superiors.

#### **4.3. THE PERCEIVED ROLE OF LAW ENFORCEMENT AND OVERSIGHT BODIES**

Our study strongly suggests that public servants do not feel protected when exposed to illegal orders. They have little confidence in institutions that could have provided protection, such as prosecution services, courts, control bodies (e.g. ombudsman arrangements, and anti-corruption agencies), and whistleblower arrangements. There is a general belief that all these bodies, like the executive branch of government, are controlled by political parties, and that they do not want to or are not strong enough to deal impartially with allegations of illegal orders. Officials

are aware of several cases where it is widely believed that the courts have protected the giver, but not the recipient of an illegal order. They also know that even if they were to prevail in court, it is by no means certain that the administrative body in question would uphold and implement the court's decision.

In cases where civil servants themselves are victims of an alleged illegal, mostly HRM-related decision, it seems that in some countries at least there is a greater tendency than otherwise to challenge controversial decisions. In Kosovo, the Independent Oversight Board for the Civil Service (IOBCS) processed 2894 complaints in the 2015-2020 period. Of these, approximately 22 percent were settled in favour of the complainant. It is worrying, however, that a significant proportion (upwards of 15 per cent) of these decisions were not respected or implemented by the institutions to which the complaints were addressed.

Data from Albania suggests that civil servants do not have confidence in the possibility of being upheld by the appeals body, the Commissioner for Civil Service Oversight (CCSO). The number of complaints that this body receives from civil servants is only a fraction – some 12 percent - of the total number of illegal personnel decisions.<sup>28</sup>

#### 4.4. EXCEPTIONS THAT CONFIRM THE MAIN RULE

In the interview material, there are scattered examples of people who refuse to bow to illegal orders as well as of institutions where the scope of such practice is smaller than in other government agencies. These people and institutions often seem to have one important thing in common, they benefit from visible and clear support from influential foreign partners, i.a. the EU, NATO, USA, UK, and Germany. This seems to have been the situation in Montenegro in the autumn of 2021, when both the country's director of police and minister of interior repeatedly refused to obey what they perceived as illegal orders from the prime minister, see textbox 3 below. The interview material also indicates that civil servants' inclinations to protest illegal orders may increase when the political leadership is perceived as inexperienced, weak, or uncoordinated.

#### Textbox 3 Allegations that the Montenegrin Prime Minister issues illegal orders

Violence erupted in the Montenegrin town of Cetinje on 4 and 5 September 2021 when representatives of opposition parties (DPS, SDP, SD) and other groups got into a brawl with the police during the enthronement of the new head of the Serbian Orthodox Church in Montenegro.

Shortly after these events, the Montenegrin Parliamentary Committee for Security and Defence held a hearing on the unrest in Cetinje and on the conduct of the police in this regard. During this hearing the argument was heard that the Prime Minister had attempted to directly intervene in the police operations in Cetinje and by this course of action issued illegal orders to the director of police and Minister of Interior.

In his statement to the parliamentary committee, the Minister of the Interior claimed that he found the Prime Minister's instructions illegal for several reasons. In particular, he emphasized that the police's operational freedom was clearly enshrined in the Internal Affairs Act, which makes it illegal for the government and ministers individually, including the Prime Minister and the Minister of Interior to instruct the police in operational matters. Moreover, according to the Minister, the Prime Minister had substantiated his instruction with reference to a piece of secondary regulations, which could not be given priority over a statutory provision. He therefore had no choice but to disregard the Prime Minister's instructions.

The Prime Minister, for his part, reacted strongly to the Interior Minister's and the director of police's rejection of his instructions. According to Montenegrin media, he accused them of conspiring against him and planning a coup d'état. It is widely believed that the fact that the Prime Minister did not immediately remove both the Director of Police and the Minister of the Interior is related to the clearly expressed support these two received from the EU, as well as US, British and German authorities. The Director of Police and the Minister of the Interior were also supported by the parliamentary opposition.

<sup>28</sup> In 2017 the CCSO identified a total of 839 illegal decisions and received 101 complaints, the year after the numbers were 105 and 829. The data is collected from the source mentioned in fn. 28.

Other examples of opposition to illegal orders do not reach newspaper headlines or in other ways attract public attention as the case mentioned above. We had in-depth interviews with officials who opposed illegal orders, who report that they felt intensely alone, without support or anybody to turn to, and that they suffered negative and personally very burdensome consequences. In text box two below, we have summarized one of the interviews with an official who refused to obey

#### **Textbox 4 Civil servant refuses to obey the minister's instruction**

The official opposed repeated requests from the Minister to commit what she perceived to be an illegal act. She contacted the Anti-Corruption Agency, which confirmed her view of the legality of the disputed request. When the official upheld her refusal, the Minister initiated a disciplinary injunction against her. She then told the Minister that she would appeal a disciplinary order to the administrative court. The Minister then said she was happy to do so, but he also added that she was probably aware that regardless of the court's conclusion, the Minister would be able to destroy her. The official found the situation so stressful that she was reported sick for a long period. What became the official's rescue was that the minister was replaced after the parliamentary elections that took place a few months after the disciplinary case. The new minister, who belonged to another political party, ensured that she was reinstated in her old position.

The two cases outlined above have features in common that also appear elsewhere in the interview material. It is almost impossible to have a dispassionate and professional discussion of the legality and appropriateness of a given instruction or line of action. Just about any reasonable doubt and criticism may encounter a distinct “black-and-white thinking”, in which people are perceived either as loyal or disloyal, friendly or hostile, patriotic or unpatriotic. As we noted above, unpleasant consequences may await people who are seen to be at the wrong extremes of these dichotomous scales.

## **4.5. CONTINUITY AMID DISCONTINUITY: THE LEGACY OF AUTHORITARIANISM AND ENDURING CRIME-POLITICS CONNECTIONS**

Several respondents point out that the current scope of illegal orders cannot be understood without considering the countries' history. This argument follows two tracks.

Firstly, it is pointed out that the current states in the Balkans, until recently either were, or were part of, authoritarian states, with a person-oriented, arbitrary system of government, which bred a political culture with a lack of respect for the state's own formal rules.<sup>29</sup> The legal order of the Second Yugoslavia was declaratively based on the rule of law and *Rechtsstaat* principles. However, at the same time the judicial system ensured that the ruling elite was exempt from any form of effective responsibility and accountability.

Because of the communist system's inefficiency and unpredictability, compensatory mechanisms contradicting its formal logic were widespread and penetrated deep into state institutions and political bodies. Even the greatest idealist realized that acting outside the legal boundaries, was appropriate and necessary, and that adherence to state regulations led nowhere.<sup>30</sup> According to Professor Miroslav Hadžić, illegal orders, which were almost exclusively issued by higher and top-level officials, caused many and long-lasting detrimental effects on the Yugoslav state and society and on Yugoslav citizens individually.<sup>31</sup> In theory, party members and officials could oppose such orders, but in that case, they would have to bear the social and political consequences of their actions. Hadžić claims that the regime secured obedience and loyalty from both civil servants and ordinary citizens by using ideological indoctrination, social corruption, and an omnipresent system of repression. The public administration was under supervision of a network of party cells and units of the state security services. As a result, opposition to illegal orders diminished steadily. These practices reflect an understanding of the state, of its role and functions, which did not disappear with communism. Many of today's political leaders were directly or indirectly socialized into the communist political culture, and therefore had, and

<sup>29</sup> For a more general elaboration of this topic, see e.g. Denisa Kostovicova and Vesna Bojzic-Dzelovic, "Introduction. State Weakening and Globalization", in Denisa Kostovicova and Vesna Bojzic-Dzelovic (eds.), *Persistent State Weakness in the Global Age*, Routledge, London 2009.

<sup>30</sup> Dušan Reljić, „Institutionen in postkommunistischen Gesellschaften. Der Fall Jugoslawien“, in Johannes Chr. Papalekas op.cit. footnote 16, (197-200), at 195 and 196.

<sup>31</sup> Written contribution to CIDS, 2022

obviously still have few objections to the idea that the state and its leaders (as representatives of the ruling class) are above the law.

Secondly, there is a long tradition in the Balkans of cooperation between political authorities, state security agencies, and organized crime. During the Tito era, an alliance was forged between Yugoslavia's intelligence agencies and its criminal underworld. The latter served as the authorities' instrument for keeping opposition elements under control, including the liquidation of dissidents abroad who were considered a serious threat to the regime. More than 100 Yugoslavs were murdered abroad between 1965 and 1990 without a single successful investigation taking place.<sup>32</sup>

The states that emerged in the wake of the collapse of Yugoslavia and the wars of the 1990s were deeply marked by the interplay between politics, state authorities, and criminal circles. During the wars, military success was hinged on success in the "murky underworld" of smugglers, arms traffickers, and quasi-private criminal combatants.<sup>33</sup> However, emphasizing the importance of criminal actors does not mean excluding politics. Many of the criminalized sides of warfare took place at the initiative and with the support of political authorities. They served various political purposes, including taking care of tasks that political leaders could not or would not carry out themselves, e.g. smuggling. For politicians, the cooperation with criminal actors also proved highly lucrative.<sup>34</sup>

The legacy of criminalized warfare left deep scars in the ex-Yugoslav states. According to Peter Andreas, "the smuggling networks that proved so essential to the Bosnia war effort, have at the same time contributed to the criminalization of the state and the economy in the postwar period [...] Key players in the covert acquisition and distribution of supplies during wartime have emerged as a nouveau riche "criminal elite" with close ties to the government and nationalist political parties".<sup>35</sup>

Peter Andreas wrote this contribution in 2002 and his focus was mostly Bosnia. He claims that similar considerations also apply to i.a., (North) Macedonia and Serbia. 15 years later, in 2017, the Global Initiative against Transnational Organized Crime describes the same type of connection between politics and wartime crime in several Western Balkans countries: "After the war, many of those who were involved in illicit activity moved up into business and politics. In the process they did not shake off their criminal past. Instead, they simply rebranded themselves, bought sharp suits and took over the trappings of office".<sup>36</sup>

Albania was not directly involved in the hostilities, but the country was centrally located on the smuggling route for, among other things, fuel. An interviewee says that Albania "fuelled the war in Bosnia" and that this helped to "perpetuate the criminalization of Albanian politics".

#### 4.6. ILLEGALITY WITHOUT INSTRUCTION

To what extent can illegalities be committed or given legal protection without there being any prior instruction from a superior official? In the Balkans (as in other Eastern European countries), a legal culture, and thus a decision-making culture, has developed, which views the judicial process as an instrument not primarily to promote the rule of law, but to protect the interests of the political elite.<sup>37</sup> A core element of this culture is excessive legal formalism, where a case is treated based on a purely linguistic analysis of the legal text and not a discussion of the merits of the case or abstract legal principles.

Legal practitioners in ex-Yugoslav countries are described as "skilful technicians" who are expected to find an adequate legal form and justification for almost any desired outcome.<sup>38</sup> At the same time, the fear of political retribution instils in public officials a reluctance to make any decisions at all on their own initiative.<sup>39</sup> For judges, the use of excessive formalism is a suitable strategy for evading responsibility for decisions based on an assessment of the actual content of cases. According to Alan Uzelac "various formal objections and trivial procedural issues [are] always

32 Michael Dziedzic, Laura Rosen and Phil Williams, "Lawless Rule versus the Rule of Law in the Balkans", US Institute of Peace, 2002, p. 3, available at [https://www.jstor.org/stable/pdf/resrep12330.pdf?refreqid=excelsior%3Aeb5c1ca808501745a2ea8b44267e5b53&ab\\_segments=&origin=](https://www.jstor.org/stable/pdf/resrep12330.pdf?refreqid=excelsior%3Aeb5c1ca808501745a2ea8b44267e5b53&ab_segments=&origin=).

33 Peter A. Andreas, "The clandestine political economy of War and Peace in Bosnia", *International Studies Quarterly*, 1(48) 2004, (29-51), 30,31.

34 Andreas op.cit. fn. 36, p. 32.

35 Andreas op.cit. fn.36, p. 44.

36 "Crooked Kaleidoscope. Organized Crime in the Balkans. Geneva 2017, p. 16.

37 Alan Uzelac, "Survival of the Third Legal Tradition", *Supreme Court Law Review*, 49 S.L.C.R. (2d), 377-396, 394. For ex-Yugoslav countries, see also, Fikret Karčić, "A Study on Legal Formalism in the Former Yugoslavia and its Successor States", CIDS Report No. 1 2019, Centre for Integrity in the Defence Sector, Oslo, 2021. For Central Eastern Europe, see Zdeněk Kühn, *The Judiciary in Central and Eastern Europe. Mechanical Jurisprudence in Transformation*

38 Uzelac op.cit. fn. 29, p. 382

39 Uzelac op.cit. fn. 29, p. 383

welcome as a means to dismiss a case on formal grounds or as a trigger to transfer the case to some other authority, or to a less fortunate colleague.<sup>40</sup>

An important consequence of this formally justified passivity is low, or very low efficiency in the law enforcement system.<sup>41</sup> This also applies to the investigation and sanctioning of high-level corruption that may involve members of the political leadership.<sup>42</sup> If we follow the reasoning of legal experts, including legal experts from countries included in this study, nobody needs to instruct law enforcement officers to adopt a passive attitude; it largely follows from the education system's and judicial system's reproduction of formalism and subservience to political authorities.<sup>43</sup> A politician interviewed in connection with the present study says, "Formalistic passivity in the law enforcement bodies is a huge problem", and he adds that recently "COVID-19 has aggravated the situation."

Admittedly, legal formalism may prevent discretionary and possibly arbitrary decisions by legal practitioners and, further, counteract rule by unelected judges. At the same time, legal scholars argue that in today's highly complex societies formalism, not to mention excessive formalism, is not desirable. In several areas of law, it is impossible to use terms that are so precise that they cover all conceivable situations and legal problems. This is one of the reasons why administrative law contains so many vague, or 'blank' concepts, such as 'the merit principle', 'the principle of legality' or 'the public interest'. These, and other equally indefinite concepts can hardly be defined precisely in a legal text, and they can – depending on how they are defined – be more or less compatible.

The content of blank concepts and the balance between them can only be determined on a case-by-case basis by courts and other public authorities applying legislation. Weighing up these issues and making reasonable trade-offs between them are important for the rule of law to be fully realized in highly complex, modern societies. At the same time, this task is intellectually challenging. It must be carried out by public officials who have the necessary qualifications and the necessary professional autonomy

and integrity. Obviously, these requirements are difficult to meet in countries where the administration of justice is characterized by excessive formalism imbued with subservience to political leaders. This is another reason why this approach to legal interpretation and judicial adjudication is deemed to be detrimental to justice and to the rule of law.<sup>44</sup>

One of the key administrative law concepts, "public interest" was by no means absent from socialist legal theory. However, the practical content of the concept was exclusively determined at the top of the political system in a non-democratic process, implemented in a strongly hierarchical manner by executive authorities, and enforced in the courts by the all-powerful procuracy. The legacy of this approach continues to be evident in the language usage in formerly socialist countries – especially the fact that there is no distinction between the state and the public. In other words, according to current parlance, state interest equals public interest.<sup>45</sup>

Under communism, it was difficult, if not impossible, to distinguish between the interests of the state and the interest of the political leadership. It seems reasonable to assume that there is a legal continuity also on this point, where even today the interest of the political leadership is conflated with the interest of the state, which in turn is equal to the public interest.

Overall, in states characterized by excessive legal formalism, it is difficult to imagine effective legal barriers and remedies against illegal orders issued by the political leadership, orders which are often justified with state interests.

The discussion in this section indicates that legal culture and decision-making culture in public bodies are of great importance to understand the prevalence and tolerance of illegal orders. The next chapter will take a closer look at the significance of informal political norms, and socio-cultural norms.

40 Ibid.

41 Karčić op.cit. fn. 29, p. 16.

42 See for instance, the European Commission, "2021 Communication on the EU Enlargement Policy", Strasbourg, 19.10. 2021, p. 9.

43 Uzelac op.cit. fn. 29 and Karčić op.cit. fn. 29, pp. 8-10.

44 Martin Matczak (2016): *Why Judicial Formalism is Incompatible with the Rule of Law?* At [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2831477](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2831477)

45 Edwin Rekosh (2005): *Who Defines the Public Interest?* in SUR: International Journal of Human Rights, 2005 Year 2, Number 2, pages 166-179. At <https://sur.conectas.org/wp-content/uploads/2017/11/sur2-eng-rekosh.pdf>

# 5. ILLEGAL ORDERS: THE IMPORTANCE OF POLITICAL AND SOCIO-CULTURAL FACTORS

## 5.1. INFORMAL VS. FORMAL NORMS

The discussion above strongly suggests that the weak rule of law in the countries included in the present study, to no small extent is due to human agency. Public decision-makers knowingly and deliberately break laws, or alternatively, they are not sufficiently aware, or do not mind whether their actions may subvert justice and the rule of law. Our findings strongly suggest that the rule of law does not only depend on the existence of the right type of formal norms as expressed in laws and institutions. To be effective, the formal norms must be congruent with and supported by the informal norms of decision-makers and citizens.

Thus, in a paper prepared for Sigma<sup>46</sup>, Kalypso Nicolaidis and Rachel Kleinfeld, argue that an assessment of the state of the rule of law in a country, must ultimately will be informed by an investigation of informal political and socio-cultural norms.<sup>47</sup> Similarly, the authors of the national studies on which the present report is based, point out that the occurrence of illegal orders can only be understood and explained by considering cultural factors. In the rest of this chapter, we will try to explain the prevalence of illegal orders by looking at the two types of factors that Nicolaides and Kleinfeld see as important determinants of the rule of law, informal political and socio-cultural norms.

In short, we argue that

- in post-communist European states, including Western Balkan countries, we find a societal culture of informality: a deeply rooted and extensive set of informal norms;<sup>48</sup>
- while the core of the rule of law is the impartial exercise of public authority, partisan use of public authority is the essence of informal political and socio-cultural norms across the Western Balkans;
- a significant part of the legislation in countries in the

Western Balkans is in accordance with international standards on impartiality. Thus, the countries' formal norm system is in clear contradiction to prevailing informal norm sets;

- according to renowned scholars, informal laws may be more influential than formal state laws when it comes to shaping actual behaviour within social institutions;
- the weaker a country's formal institutions are, the greater the scope for society's informal norm system;
- faced with two competing sets of norms – one formal and the other informal – Balkan political leaders can decide to what extent and in what way formal and informal norms should be used, often according to the formula “for my friends anything, for my enemies the law”;
- due to the above, there are low normative barriers to the use of illegal orders to achieve goals that cannot be attained by formally permitted instruments.

Below we will describe in greater detail - based on available literature – the ‘mental climate’ that makes it not only possible, but even probable that state institutions are used - not to protect, but to undermine the rule of law.

## 5.2. INFORMAL POLITICAL NORMS

As we have seen, the purpose of illegal orders seems to be to give politicians or political parties unfair access to public resources. This is consistent with a major strand of literature, which focuses on politicians' self-interest. Across the Balkans, political parties are considered the most corrupt social institution.<sup>49</sup> Studies suggest their resources are primarily accrued through profit-seeking in state bodies.<sup>50</sup> Once in office, party leaders and ministers are not primarily interested in conventional policymaking, but in seizing state resources for their own enrichment,

<sup>46</sup> Sigma

<sup>47</sup> Kalypso Nicolaidis and Rachel Kleinfeld, „Rethinking Europe's “Rule of law” and enlargement agenda: the fundamental dilemma”. Sigma paper no. 49, pp. 23 and 24.

<sup>48</sup> Nicolas Hayoz, “Das Syndrom der Machtkultur in Osteuropa”, in Nicole Gallina and Katerina Gehl (eds.) Kultur der politischen Eliten in Osteuropa. Neue Zugänge zum Forschungsfeld, LIT Verlag GmbH & Co. Vienna, 2016, p. 62.

<sup>49</sup> According to the 2019 *Balkan Barometer Public Opinion Analytical Report*, political parties and health providers are considered to be most corrupt. In either case 77 percent of the respondents say that the institution is affected by corruption.

<sup>50</sup> Petr Kopetcký, „Political Parties and the State in Post-Communist Europe: The Nature of Symbiosis”, in Petr Kopetcký, *Political Parties and the State in Post-Communist Europe*, (1-23) Routledge, Oxon, 2008, 18.

or for the enrichment of people close to them.<sup>51</sup> Having a share in political power is synonymous with wealth.<sup>52</sup> Those who have the greatest share, are usually those who possess the greatest wealth - and vice versa.<sup>53</sup> There are numerous stories of fabulous fortunes of named politicians, allegations that they run their countries almost like their private corporations, and widespread perceptions that they are involved in extortion and money laundering schemes to finance their own wealth and political campaigns.<sup>54</sup>

However, mere appropriation is not sufficient. Political leaders also want to neutralize threats to - and secure future opportunities for extractive schemes. This means that they try, among other things:

- To weaken and only hesitantly implement legislation and control and monitoring schemes that may complicate or expose their rent seeking behaviour.<sup>55</sup>
- To place party loyalists in key positions in the state apparatus.<sup>56</sup>
- To use their access to state resources to ensure re-election.<sup>57</sup>

- To ensure control over the police, judiciary, and intelligence services.<sup>58</sup>

Thus, the profit-seeking purpose of political leaders does not only lead to isolated acts of abuse of state powers such as transferring public money into private pockets; it also guides decisions influencing the overall design and functioning of the state apparatus. As Alina Mungiu-Pippidi observes, it “[...] often manifests itself not just by the use of a public position for personal gain but, more broadly, as the widespread infringement of the norms of impersonality and fairness that should characterize modern public service.”<sup>59</sup> A weakening of the state in the ways outlined above, so that it systematically serves the interests of the ruling elite – cannot happen without using illegal or unconstitutional means or violating international norms that the countries have committed themselves to follow.

What is also striking is that in the event of a change of government, the new political leadership rarely or never takes steps to have possible illegal acts committed by its predecessors, investigated and prosecuted. This is all the more remarkable since newly elected leaders usually use the preceding election campaign to demonize its political opponents, and to accuse them of being involved in improper, even criminal schemes. Professor Miroslav Hadžić describes this as a distinct form of Western Balkan “retainer clientelism”, in which political leaders protect each other from being held effectively accountable for possible wrongdoings.<sup>60</sup>

To what extent do we find motives and attitudes that do not fit into the picture outlined above? Writing in 2006, on the nexus between politics and crime in Balkan states, Norbert Mappes-Niediek, mentions a few such cases.<sup>61</sup> He observes that in for example Kosovo, no credible allegations of corruption have been made against political leaders such as Ibrahim Rugova, Fehmi Agani or Hydajet Hyseni.<sup>62</sup> More recently, prime minister of Kosovo, Albin Kurti, is not perceived to have any corruption scandals

51 Walter Kemp, *Crooked Kaleidoscope. Organized Crime in the Balkans*, The Global Initiative against Transnational Organized Crime, Geneva, 2017.

52 Thomas Brey, „Parteien in Ex-Jugoslawien als Reform- und Modernisierungshindernisse“, *Südosteuropa Mitteilungen*, 05/2015, 16-27, p. 25.

53 Norbert Mappes-Niediek, *Balkan Mafia. Staaten in der Hand des Verbrechens - Eine Gefahr für Europa*, Chr. Links Verlag, Berlin 2003, 65..

54 See for instance Brey, op.cit. fn. 42, p. 25, and Venelin Ganev, *Preying on the State. The Transformation of Bulgaria after 1989*, Cornell University Press, London 2007, locs. 3882, 3883.

Miranda Patručić, “The Organized Crime and Corruption Reporting Project in the Western Balkans”, *Südosteuropäische Mitteilungen*, 05/2018 (18-25), p.22.

Maja Jovanovska, *Macedonian Prosecutor Implicates Former Political Leaders in Money Laundering, Extortion, Illicit Land Deals*, Organized Crime and Corruption Reporting Project, 28 January 2019, available at <https://www.occrp.org/en/investigations/macedonian-prosecutor-implicates-former-political-leaders-in-money-laundering-extortion-illicit-land-deals>.

55 Instead of trying to repair broken institutions and to close legal loopholes, state leaders may try to circumvent and if necessary, intentionally create malfunctions in formal arrangements in order to assert and protect personal interests. To achieve visa liberalisation, Balkan countries have had to commit to establishing anti-corruption bodies. These types of organs have been established, however in some cases they are almost completely toothless. It is difficult to believe that the intention has been for them to function effectively. Regarding Serbia, see Ana Knežević-Bojović, *Continuity and discontinuity in Serbian legislation and practice - selected aspects*, Institute of Comparative Law, Belgrade 2018, pp. 28 and 29, Bulgaria, Johanne Lie Tærum, *EU Conditionality and Anti-Corruption*, master thesis in political science, University of Oslo 2014, p. 83, and North Macedonia, Transparency International – North Macedonia, “Grand Corruption and Tailor-made Laws in the Republic of North Macedonia”, Skopje, 2021. For more general observations regarding Bulgaria, see Ganev op.cit. fn. 63.

56 See for instance, *Analysis of the Professionalisation of the Senior Civil Service and the Way Forward for the Western Balkans*, Sigma Paper 55, 2018

57 Brey op.cit. fn. 42, p. 22. During the campaign for the 2018 Bosnian general elections, the then *Republika Srpska* president, Milorad Dodik, openly threatened to dismiss anyone who would vote for his competitors. Audiotape recordings from meetings of the ruling DPS party of Montenegro, reveal discussions about how many additional votes the party can expect to get for each new person it gives employment in the public sector (Mans. Policy Brief, 29 November 2013). The party is also reported to offer cash benefits in return for votes. In Montenegro there are also media reports that the police director has instructed the police on how to act in order to ensure the ruling DPS victory in elections. Regarding party political abuse of election commissions, see Jovana Marovic et al, *Strengthening the Rule of Law in the western Balkans: Call for Revolution against Particularism*, The Balkans in Europe Policy Advisory Group (BiEPAG), 2019, and Adela Halo and Megi Llubani, *National Integrity System Assessment Albania 2016*, Transparency International, 2016, p. 12. According to leaked tapes, the government of North Macedonia brought people without citizenship in Macedonia to the ballot box and created hundreds of thousands of fake IDs to manipulate elections (Mathias Bak, *Western Balkans and Turkey: Overview of corruption and anti-corruption*, U4 Helpdesk Answer 2019:17, p. 14.

58 Brey op.cit. fn.84, p. 22 and Miroslav Hadžić, *Raspono bavještajnog na Zapadnom Balkano*, as quoted in Milan Milošević, “Control and oversight of intelligence and security services”, in Rabrenović et al.

59 Alina Mungiu-Pippidi, “Reconstructing Balkan particularism. The ambiguous social capital of southeastern Europe”, paper presented at the Uppsala ECPR workshop, April 2004.

60 Written contribution to CIDS, 2022.

61 Mappes-Niediek op.cit. fn. 47.

62 Mappes-Niediek fn. 47, p. 86.



associated with his name;<sup>63</sup> nor is Zdravo Krivokapić, who was elected prime minister in Montenegro in late 2020 <sup>64</sup>.

Although the written sources only mention scattered examples of politicians who are not seen as corrupt or otherwise involved in illegal or unethical activities, the self-interest of individuals alone cannot adequately explain the extent of illegal orders and the systemic nature of this practice. The way in which politicians pursue their own ends and interests, must be understood in the light of the prevailing political culture in the Balkans. As we shall see, cultural norms make vigorous assertion of self-interest - if necessary, by illegal orders – a part and parcel of politicians' informal job descriptions.

Wolfgang Höpken mentions several closely related aspects of what he labels 'the Balkan political culture' that seem particularly relevant to understand the scope and nature of illegal orders:<sup>65</sup>

- refusal or inability to recognize the distinction between the state's formal system and the personal and political interests of the incumbent leadership,
- distrust of formal state institutions,
- preference for personalized, non-institutionalized forms of social action, and
- little respect for formal rules.

According to Höpken, these cultural elements lead to the state being seen as a resource for free personal use by the political elite. At the same time, recruitment to various social elite groups takes place via personal networks that sometimes are involved in large-scale corruption and even organized crime.<sup>66</sup>

Similarly, Nicholas Hayoz describes a "culture of power" as typical of ex-communist countries in Eastern Europe, including the Balkans. It has, i.a., the following elements:<sup>67</sup>

- a culture of the strong Leader and of loyal following and subservience, i.e., the duty of followers to obey their Leaders,
- a culture of informality, which Leaders use to consolidate

63 New Eastern Europe, 15 April 2020, <https://neweasterneurope.eu/2020/04/15/richard-grenell-dictating-the-pulse-of-the-kosovo-serbia-dialogue/>.

64 DW, <https://www.dw.com/en/opinion-montenegros-new-government-faces-uphill-battle/a-55819335>.

65 Wolfgang Höpken, «Gibt es eine balkanische politische Kultur?», *Südosteuropa Mitteilungen*, 06/2009 (30-47).

66 Ibid.

67 Hayoz, op.cit. fn. 42, pp. 56 and 57.

their power networks,

- a culture of corruption, including various forms of clientelism, patronage, and corruptive networks, and
- a culture of manipulation, which means that, i.a., the media and public opinion are influenced and used to secure the regime's preservation of power.

The prevailing "culture of power" does not mean that the Leaders use their power to strengthen the institutions of the state, but rather to weaken them to consolidate their own political and economic position.<sup>68</sup>

### 5.3. SOCIO-CULTURAL NORMS

Also, more general cultural features can help us to understand the occurrence of illegal orders within state institutions. Although institutional culture and national culture are not identical concepts, a prominent line of reasoning holds that the behaviour and management of institutions are set within and influenced by the broader culture of a country.<sup>69</sup> Thus, unless a society's state institutions are congruent with its underlying culture, they will not be sustainable.<sup>70</sup>

Several theories have been advanced to identify cultural dimensions that may impact management practices and organisational behaviour.<sup>71</sup> We shall briefly present two dimensions of societal culture, power distance/egalitarianism and individualism/collectivism that are associated with levels of corruption, and hence with violation of the core principle of the rule of law and impartial exercise of public authority. Social psychologists see these two dimensions as the two most important factors for differentiating nations and cultures.<sup>72</sup>

Power distance is a country's cultural tendency toward hierarchy. People in societies with high power distance (high PD), accept a hierarchical societal order in which everybody has a designated place, which needs no further explanation. The individualism/collectivism dimension refers to the

68 Hayoz, op.cit. fn. 52, p. 58.

69 Andrea Lenschow, Duncan Liefferink and Sietske Veenman, "When the Birds Sing. A Framework for Analysing Domestic Factors behind Policy Convergence", 12(5) *Journal of European Public Policy* (2005), 797-816, 801, Soma Pillay and Nirmala Dorasamy, "Linking cultural dimensions: An institutional theory perspective", *International Journal of Cross-Cultural Management*, 10(3) 363-378, 2010, and Kuno Schedler and Isabella Proeller, "Public management as a cultural phenomenon. Revitalizing societal culture in international public management research", in Kuno Schedler and Isabella Proeller (eds.), *Cultural aspects of public management reform*, Elsevier JAI, Amsterdam 2007, p. 10.

70 Schedler and Proeller op.cit. fn. 54, 9.

71 Pillay and Dorasamy op.cit. fn. 54, 369.

72 Nekane Basabe and Maria Ros, "Cultural dimensions and social behaviour correlates: Individualism - Collectivism and Power Distance", *Revue Internationale de Psychologie Sociale*, (1) 2005 189-225, p. 190.

degree to which people live as individuals or are tightly integrated into groups such as families. Whereas Balkan countries score high on power distance and collectivism, the Nordic countries show the opposite pattern, with great emphasis on egalitarianism and individualism.<sup>73</sup>

High PD scores correlate negatively with, and low PD positively with exemption from corruption.<sup>74</sup> Thus, hierarchical social values challenge the principle of equality before the law while egalitarian values support it. We can assume that in distinctly hierarchical societies such as the Balkans, it will be difficult for public officials to assert any degree of professional independence vis-à-vis the political leadership.

Given the extensive interweaving of politics and crime that we have described above, it is not unreasonable to imagine that the political elite uses its access to the state's institutions for illegal purposes, and that cultural features make them meet little resistance in these efforts. The culturally conditioned response of a civil servant, would rather consist of demonstrating loyalty and subservience to leading politicians, even when they issue illegal orders. Such reasoning naturally follows from Soma Pillay's and Nirmala Dorasamy's observation that High PD scores,

“[...] discourage subordinates from questioning authority [...] and mean that decisions are not made on the basis of merit [...]. It is apparent that such a paternalistic system encourages favouritism and nepotism. [...] In such societies, scandals involving people in authority are more likely to be covered up by loyal subordinates who are under pressure to comply with a superior's wishes in the face of intimidation and/or ethical dilemma [...] ‘whistle-blowing’ is seen as being disloyal or a challenge to authority.”<sup>75</sup>

In discussing illegal orders, it is worth noting that according to Michael A. Daniels and Gary J. Greguras, cultures that are high on PD are especially associated with abusive treatment of subordinate employees,

“[...] abusive treatment occurs more frequently [...], perhaps to reinforce power differentials [...] and therefore such treatment may be viewed as more common and more expected in high power relationships [...]. In addition, in high power distance relationships, employees are dependent on their leaders for resources and guidance [...]. As such, when the leader is abusive towards employees, not only may this be expected, employees are less likely to retaliate or react negatively for fear of retaliation by those more powerful [...].”<sup>76</sup>

Collectivism seems to weaken impartiality in much the same ways as high power distance.<sup>77</sup>

“Collectivist societies are characterized by the interests of the group prevailing over the interests of the individual. This is manifested in the predominance of such traits as obedience, loyalty and conformity to the norms and duties of the group. [...] obedience, conformity, acquiescence and loyalty are prominent features in a collectivist culture. This inhibits ‘whistleblowing’ and enhances the pervasiveness of corruption. [...] In a collectivist culture, loyalty to ‘in-groups’ can become a more important ethical standard than social justice.”<sup>78</sup>

Here we have given general descriptions of the connection between cultural traits and behaviour of public officials. However, there is little doubt that they are suitable for more specifically explaining the discrepancy between formal law and actual governance practices in countries in the Western Balkans.<sup>79</sup>

At the same time as the societal culture influences the behaviour of state bodies, this behaviour, including illegal activities such as corruption, may in turn reinforce widespread beliefs, habits, and social practices. People's own personal experience that state institutions do not comply with the law, will reduce their own respect for formal rules, and lead them to resort to informal, often illegal forms of problem solving such as bribery, legal shortcuts, and other forms of corruption.

73 When it comes to PD the scores for the Western Balkan countries, for which data is available, are Albania 90 (which means high PD), Bosnia 90, Montenegro 88, and Serbia 86. The scores for the Nordic countries are, Denmark 18 (which means great emphasis on egalitarianism), Finland 33, Iceland 30, Norway 31, and Sweden 31. Regarding individualism/collectivism the scores for the Western Balkan countries are Albania 20 (which means a high level of collectivistic orientation), Bosnia 22, Montenegro 24, and Serbia 25. The corresponding scores for the Nordic countries are, Denmark 74 (which means a great emphasis on individualism), Finland 63, Iceland 60, Norway 69, and Sweden 71. Source, hofstede-insights.com.

74 Robert Klitgaard, *On culture and corruption*, Blavatnik School of Government Working Paper Series 2017/020, 2017, p. 11

75 Pillay and Dorasamy op.cit. fn. 54, p. 371.

76 Michael A. Daniels and Gary J. Greguras, “Exploring the Nature of Power Distance: Implications for Micro- and Macro-Level Theories, Processes, and Outcomes”, *Journal of management* 5(40), 2014, 1209-1229, p. 1215.

77 Klitgaard op.cit. fn. 59, p. 10.

78 Pillay and Dorasamy op.cit. fn. 54, p. 372. See also Andreas P. Kyriacou, “Individualism-Collectivism, Governance and Economic Development”, *European Journal of Political Economy*, 1(42) 2016, 91-104, especially p. 100.

79 See for instance, Dušan Mojić, Jelena Jovančević, and Saša, Jovančević, “Culture and public administration reforms in postsocialist transformation: the case of Serbia”, *Sociologija* 3(60), 2018, (653-669), p. 665.

# 6. IMPLICATIONS OF ILLEGAL ORDERS

## 6.1. BREACH OF LAW AS AN GOVERNMENT POLICY

Our study indicates that illegal orders under the auspices of the political leadership, may have a large scope and a systemic character. The orders seem to be effective, in the sense that they are largely complied with and carried out without negative sanctions for those involved. State sponsored illegalities as described in our study, should not be seen as exceptions to an otherwise prevailing normal state, where respecting the law is typical. Nor should they be understood as expressions of system failure in regimes, which are on the verge of downfall.

We should rather see them as expressions of normalcy, albeit a different normalcy than that which follows the norm of impartiality. They are manifestations of a logic that governs the functioning of Western Balkan states, a logic which is summarized the title of the present paper, "breach of law as a government policy". This reasoning is consistent with analyses of prominent scholars, f.ex. the Princeton professor Jan-Werner Müller who argues that the undermining of political rights and independent institutions are not technical glitches, but a conscious project under the auspicious of authoritarian leaders.

The findings reported in this study have significant negative consequences both nationally, in the countries themselves, and internationally when it comes to the countries' cooperation with other nations, informal transnational groups, and international organisations. State-sponsored illegality cannot be solely blamed for the consequences we will outline below. It combines with other risk factors, such as disputed statehood or deep socio-cultural rifts within populations, related to ethnic, religious, economic, or linguistic issues. In many cases negative implications are exacerbated by the interrelations between state-sponsored illegality and these other risk factors. In societies such as the Balkans, where political and social trust is low, loyalty and obedience can appear as overriding values, as absolute duties. They must be adhered to regardless of legal or other consequences of doing so, to protect the nation, the

state, the ethnic group, the political party, or the political leadership against real or imagined mortal enemies.<sup>80</sup>

## 6.2. NATIONAL IMPLICATIONS

The situation described,

- has a strong and obvious negative effect on *the rule of law*. Justice is selectively administered, with impunity for offenses committed by the political leadership and persons closely connected with it. Moreover, the extent of illegalities committed by the political leadership creates fertile ground for more general lawlessness and crime and consequently rising citizen insecurity.
- has a strong negative impact on the *quality of democracy*. The countries' political leadership largely escape effective judicial accountability. Moreover, the allocation of goods and burdens by government agencies, is systematically unfair. While people belonging to, or having close ties to the political leadership enjoy advantages, people without such contacts suffer drawbacks. The fact that the countries, despite these weaknesses, are electoral democracies, may contribute to weakening the reputation of democracy and citizens' confidence in democracy as a form of government.
- gives reason to fear that *the risk of state-sanctioned violence* to an extent comparable to what happened during the wars in the 1990s, has not disappeared. Illegality under the auspices of government, which in normal times is expressed in corruption, can in extraordinary times escalate to something far worse. Arguably, the compulsion to issue and obey illegal orders, is particularly strong in a context where all considerations of individual responsibility is drowned by a massive public propaganda apparatus hammering home political messages, that what is mortally threatened and must be protected at all costs, is the survival of the (imagined) ethnic group.
- may foster *domestic instability*. Corrupt ruling elites, who to a large extent base their political influence on applying state authorities for illegal purposes, may

<sup>80</sup> See for instance, Gazela Pudar et al., "Political Culture in Southeast Europe. Navigating between Democratic and Authoritarian Beliefs and Practices", Friedrich Ebert Stiftung, Sarajevo, 2019, p. 4.

deliberately cultivate conflict because of opportunities for profiteering and as an attempt to maintain or to win increased political support. Systematic state-sponsored illegality can trigger outrage among its victims, increasing the likelihood that some of them will express their anger in violent actions. Security threats that develop more slowly, are related to financial instability and economic distortions that arise, for example, as results of political leaders attempts to enrich themselves through opaque agreements with domestic and foreign investors.

- significantly impairs the governments' ability to *improve the welfare of their citizens*. Studies show that the ability of democracies to perform, to develop high-quality policies depends on impartiality in the civil service, on 'free and fair' recruitment and promotion.<sup>81</sup> However, in countries where the civil service is strongly politicized, evidence and knowledge production will be manipulated to serve the interests of the political leadership.<sup>82</sup>
- casts doubt on the extent to which state bodies are *reformable* at all. How can one reasonably expect that politicians who may have based their careers on illegalities, will effectively and credibly contribute to creating states based on democracy and the rule of law? Further, state authorities seem largely unconcerned about the extensive emigration of well-educated, young people, people who see no future for themselves in the Balkans, i.a. because of phenomena described in this paper. These are people who could have made important contributions to developing their home countries. There is an obvious risk that this will not happen, that state institutions will remain staffed by people who are indoctrinated in, and who have adapted to, the prevailing system and the prevailing ways of doing things.

### 6.3. INTERNATIONAL IMPACT

The situation described

- raises doubts about *the political leadership's willingness to effectively comply with international obligations and recommendations*, especially those that may threaten their ability to continue with illegal enrichment. When government functions and policies are up for sale to the highest bidders, not only violations of domestic, but also international law may become the norm.

International rules may be given strong verbal support, while at the same time no effective steps are taken to change problematic practices of domestic state bodies. The impression arises that the political leadership deliberately practice doublespeak; messages given in international settings may be noticeably different from those delivered to national audiences. As one of our respondents commented, "Façade matters a lot in the Balkans. A public official is one person when he talks to compatriots, quite another when he is in the company of foreigners." There is every reason to assume that politicians from the Balkans who participate in international work to combat crime, may be deeply involved in the very issues they are expected to fight.<sup>83</sup>

- weakens confidence in countries' *willingness and ability to effectively combat transnational crime*. It is widely held that trafficking of drugs on the scale that is going on in the Western Balkans, is only possible with collusion from state actors, such as law enforcement authorities. Politicians may protect key criminal actors and thus profit from the status quo.<sup>84</sup>
- increases the countries' *vulnerability to external security threats*. Widespread state-sponsored illegality increases the risk of state leaders and government officials to enter into deeply destabilizing alliances with what has been termed transnational criminal superpowers, which can trigger violent counter-reactions from competing networks. Criminal superpowers are constantly on the hunt for state leaders who can be co-opted.
- weakens confidence in the countries' *willingness and ability to effectively act in accordance with core values of EU and NATO*. This includes the capacity to act predictably and instil trust and the ability to manage the complex challenges both international organisations are facing.

The militaries in countries where state-sponsored illegality is pervasive, make unreliable allies. As defence spending or income from asset disposals are illegally siphoned off to the purses of political elites, armies remain poorly trained and equipped. Military and police professionalism and capabilities may be inadequate to protect borders, leaving such countries vulnerable to attack and to cross-border crime. These effects will be exacerbated by the fact that

81 Bo Rothstein, "Epistemic democracy and the quality of government", *European Politics and Society*, 1 (20) 2019. (16-31)

82 Ibid.

83 A case in point is the Albanian politician Saimir Tahiri, who in 2019 was sentenced to 3 years and 4 months in prison. He was accused of being involved in organized crime and international drug smuggling while serving as Minister of Interior (2013-2017) and consequently responsible for the Albanian police.

84 Walter Kemp et al., *Spot prices. Analyzing flows of people, drugs and money in the Western Balkans*, Global Initiative Against Transnational Organized Crime 2021, p. 43.

members of the state security bodies are recruited in ways where consideration of group affiliation and loyalty may trump professional qualifications.

Moreover, unaccountable Balkan elites and representatives of clearly authoritarian regimes, such as Russia, China, and the Gulf states may have few difficulties in finding a *modus vivendi*. What these actors share is “a personalized power

blurring between the public and the private, in which state resources are viewed as personal property of the ruler and his associates.”<sup>85</sup> Across the Western Balkan region, the way governments do business with China is seen to erode already weak institutions, encourage corruption, and slowing down progress towards EU integration.<sup>86</sup>

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85 Kurt Bassuener, “Primed Receptors: Synergies between Western Balkan Political Elites and Chinese Actors and State Media”, *Südosteuropa Mitteilungen*, 3/2020, 35-50, p. 37.

86 “China in the Balkans: Controversy and Cost”, *Balkan Insight*, 15 December 2021, available at <https://balkaninsight.com/2021/12/15/china-in-the-balkans-controversy-and-cost/>.

# 7. RECOMMENDATIONS

## 7.1. AN EXTENSION OF THE INTERNATIONAL RULE OF LAW AGENDA

Challenges discussed in the present study can probably best be addressed in collaboration with international organisations, most notably the EU, which are deeply committed to strengthening the rule of law and democracy across the Balkans. All countries in our study apply for EU membership. Below, we present three topics that could be considered incorporated into the EU rule of law agenda.

Although the present study is of an exploratory nature, we have made it probable that illegal orders have a large scope with significant negative consequences. Given that our study seems to be one of very few that exists on this topic, there is a need to obtain more precise information based on a more comprehensive empirical material than was collected in this study.

*We recommend that the question of illegal orders be made a topic during the EU accession process, e.g., by conducting in-depth, national studies on this issue. Such studies should be implemented on the initiative and with the guidance of the EU, but in close cooperation with each applicant country.*

The present survey concerns the executive branch of government. However, often this part of the state is not at the center of attention in the international rule of law agenda, which tend to concentrate on the independence of the judiciary. In our view, the executive should be given greater attention, also when it comes to the rule of law.

- After all, most people's experience with the "rule of law" is not in the courts, but through bodies of the executive branch, ministries, and agencies, entrusted with the authority of the state.<sup>87</sup>
- In all countries covered by the present study, the executive, or perhaps more precisely, political parties via the executive, dominate over all other branches of government, including the judiciary. Our study gives reason to believe that law enforcement agencies show great passivity in the face of allegations of illegality committed by the executive branch of government.

- It is the responsibility of the executive – the government and the responsible ministries – to monitor and assess the rule of law situation and whenever necessary prepare and propose reforms.

*We recommend that in the case of the Western Balkans, the executive branch of government be included in all major studies of the rule of law, and in policies and measures to improve it.*

As we have also seen, the occurrence, compliance with, and lack of judicial sanctioning of illegal orders and associated offenses, are related to the predominant, excessively formalistic legal culture in Western-Balkan countries. This makes it probable that a change in legal rules and formal structures will not affect the practice among law enforcement bodies if the legal culture remains the same. Thus, legal and institutional arrangements imported from Western countries may have completely different consequences than intended if the legal culture is not changed at the same time. For example, measures to give state bodies greater independence, may have the opposite effect and make it difficult to subject these bodies to effective accountability and control mechanisms. The excessively formalistic legal culture in the Balkans, and the effects of this culture i.a. on the rule of law, is a topic that so far has not been subjected to any in-depth analysis.

*We recommend that such an analysis, or possibly analyzes of the legal culture in each individual country be initiated.*

## 7.2. DEVELOPMENT OF INTERNATIONAL STANDARDS

As we noted above, illegal orders have been given scarce attention in the design of international standards. The lack of attention may be due to a perception that illegal orders are extraordinary phenomena, which assume special importance in war and other exceptional situations. By focusing on the extraordinary, one may have lost sight of, and not seen it relevant to examine the extent and nature of illegal orders in more everyday situations. The present study suggests that this type of state-sponsored illegalities may have a large and systemic scope and entail significant negative consequences for the international community.

<sup>87</sup> Nicolaidis and Kleinfeld op.cit. fn. 39, p.23.

*We therefore recommend that initiatives be taken*

- *to develop better international standards when it comes to tackling illegal and inappropriate orders. The standards must be suitable to counteract illegalities committed in the civil service.*
- *to develop international standards on whistle blowing in the military and other security forces;*
- *to develop international standards in balancing secrecy and the right to know in defence and security.*

### **7.3. POSSIBLE MEASURES AT THE NATIONAL LEVEL**

Questions about the effectiveness of the rule of law and about what measures are needed to mitigate weaknesses discussed in this report, concern fundamental societal and hence, political values. Ideally, the issues in question should be discussed and resolved through democratic processes. However, the problems outlined have such an extent and depth and have obviously been going on for so long, that it seems doubtful whether domestic authorities will or are able to initiate such a process with the professionalism and objectivity required.

However, as we have already indicated, the international community should play a role here. All countries covered by the present study aspire to EU membership. Three of

them are already NATO members, and two want NATO membership. Both organisations, and especially the EU, see themselves as guardians of the rule of law. As mentioned above, a first step could be that the EU - through the ongoing enlargement process - initiate a closer analysis of the problems identified in the present report. CIDS, for its part, will address issues in this report in bilateral meetings with the countries' authorities.

However, in all the countries, hardly any of the ministries concerned have the necessary administrative capacity to monitor, assess and propose measures to improve the rule of law situation. There is therefore great doubt as to whether the countries will be able to follow up and implement measures that should prove necessary after a thorough analysis as proposed above.

*We recommend that steps be taken to significantly strengthen the capacity of the ministries concerned, and in particular the Ministries of Justice, to pursue policy developments concerning the countries' rule of law situation.*

We have accounted for significant weaknesses in the countries' laws that affect illegal orders.

*We therefore recommend that the legislation be reviewed with a view to correcting these weaknesses.*

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