

IMPROPER SUPERIOR ORDERS

**AN ANALYSIS OF THE REGULATORY FRAMEWORKS
IN SELECTED WESTERN BALKAN COUNTRIES**



**INSTITUTE OF COMPARATIVE LAW
MONOGRAPH 188**

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LIST OF ABBREVIATIONS

BiH	Bosnia and Herzegovina
CC	Constitutional Court
CIDS	Centre for Integrity in the Defence Sector of Norway
CoE	Council of Europe
DCAF	Geneva Centre for the Democratic Control of Armed Forces
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FBiH	Federation of Bosnia and Herzegovina
ICC	International Criminal Court
ICJ	International Court of Justice
MoI	Ministry of the Interior
OSCE	Organization for Security and Cooperation in Europe
ReSPA	Regional School of Public Administration
Rome Statute	Rome Statute of the International Criminal Court
UN	United Nations

1. INTRODUCTORY REMARKS

A public sector employee quite often faces an important integrity dilemma – whether to follow a superior’s order or act in line with the law and his/her own conscience. The dilemma comes as a result of the existing contradictions between two potentially conflicting requirements. On one hand, public sector employees have to follow the orders received from their superiors and respect work discipline, since the public administration is a hierarchal organization. On the other hand, they should comply with laws, secondary legislation and rules of the Code of Conduct in their work, as it is a part of the requirement to perform their professional duties and the delegated tasks conscientiously and diligently.¹ Within this chapter, the term “improper superior order” will be used as an umbrella term referring to both “unlawful” and “unethical” superior orders.

Although the situations of receiving unlawful or unethical superior orders regularly occur in all areas of the public sphere and produce significant adverse effects on integrity, policy-makers and international institutions specialized in integrity building have paid almost no attention to them thus far. The issue of improper superior orders is particularly common in the areas most vulnerable to corruption, such as procurement and recruitment. Nevertheless, the current international legal framework governing the fight against corruption and building integrity mostly neglects the issue of improper superior orders.

On the other hand, norms of international criminal law and case law of the international criminal courts contain some relevant provisions governing one’s obligation to refuse unlawful orders. However, the application of international criminal law is mainly focused on manifestly unlawful superior orders whose execution constitutes serious crimes which take place in the course of conflict and relate directly to humanitarian crisis. The only hard law instrument explicitly dealing with the issue of unlawful superior orders is the Rome Statute of the International Criminal Court (hereinafter: Rome Statute) which constitutes the main source of international criminal law.

In addition, other respective international instruments regulating improper superior orders are soft law in nature, which renders this area under-regulated. There are relevant soft-law instruments developed under the auspices of the United Nations (hereinafter: UN) and the Organization for Security and Cooperation in Europe (hereinafter: OSCE) which were introduced during 1990s, while those of the Council of Europe (hereinafter: CoE) were adopted in the period 2000-2001. Unlike international criminal law, the said soft-law instruments are also applicable to situations of armed conflict and humanitarian situations, and are not necessarily linked to the most serious crimes of concern for the international community.

¹ Rabrenović, A., Kostić, J. & Matić Bošković M. 2018. Open Dillema: How to React to Illegal Orders from a Superior. In: Rabrenović, A. & Knežević Bojović, A. (eds.), *Integrity and Good Governance in the Western Balkans*. Danilovgrad: Regional School of Public Administration, p. 303.

Given the apparent lack of clear guidance, when outlining the relevant standards at international fora it is important to also take into account the principle of legality, the fundamental loyalty of the public sector employees to the legal order of the country, the respect for human rights and in particular, for the right to dignity. Over the past years, the Regional School of Public Administration (hereinafter: ReSPA) has showed interest in relevant aspects of handling unlawful or unethical superior orders, although limited to the general civil service regime. Under the auspices of RESPA and Centre for Integrity in the Defence Sector of Norway (hereinafter: CIDS), a publication titled “Integrity and Good Governance in the Western Balkans” was prepared in 2018. Rabrenovic led the research on legal framework in public service pertaining to the issue of handling unlawful and unethical orders.²

The issue of protecting the ability of public employees to resist in situations where they receive an improper superior order has been the object of philosophical research since the classical Greek philosophers, but current academic research on such a topic is very limited. The cornerstones of the relevant doctrine were laid by Plato, Aristotle and Latin authors such as Cicero. Further development was made along the way to the Western Middle Ages, through Albert the Great and Thomas of Aquinas. Their fundamental ideology was that natural law was prevalent over positive law or, otherwise said, that human rationality was prevalent over the whims of particular rules. Finally, Gustav Radbruch came up with the formula which in a nutshell, reads: an extremely unjust law is not law. Later, the said natural law approach influenced both international criminal law, as well as human rights instruments.³ However, neither academics nor lawmakers nowadays share the same view of the limits of the notion of “extremely unjust law” and about the characteristics of the sound institutional framework which has to be established for handling improper orders. The issue of handling improper superior orders in the military sector has, however, been the subject of wider interest in literature, as opposed to the extremely limited interest shown for the research on improper superior orders in general civil service regime and in the police.

In the course of the recent decades, the issue of the crime of obedience in military service has been long debated, but is still a critical issue in literature. Some authors adopt an expansive view of the notion of „crimes of obedience“. According to those authors, the crime of obedience in the broad sense, is defined as “an illegal or immoral act performed in response to orders or directions from authority”.⁴ Opposite to the given expansive approach, there is a narrow approach, which is prevalent in legal doctrine. Pursuant to it, the crime of obedience, in its narrow sense, includes only criminal acts performed in response to unlawful superior orders in military service.⁵

Moreover, in the area of framing obedience crimes in military service, two different approaches have been dividing legal scholars and other professionals. On one hand, there are supporters of the “one-rule-fits-all-approach” when it comes to formulating

²*Ibid.*, 303-314. Subsequently, training on addressing the dilemma of reacting to unlawful superior orders was organized under the auspices of RESPA.

³ *Ibid.*, 306.

⁴ Kelman, C. H. & Hamilton, V. L. 1989. *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility*. New Haven: Yale University Press, p. 307.

⁵ Padowitz, K. 2015. Crimes of Obedience. Available at: www.psychology-criminalbehavior-law.com/2015/02/crimes-obedience-kenneth-padowitz-attorney/ (30.10.2022).

obedience crimes in military service. According to them, the same principle should be applied even to sometimes radically different scenarios.⁶ On the other hand, legal scholars such as Bohrer argue for the modular approach, as an alternative to the “one-rule-fits-all approach”.⁷ According to Bohrer, more intensified recourse to a modular approach implies that various legal solutions should be created to accommodate for the different situations in which superior orders in military service are given, such as distinguishing the regime applicable to criminal orders given in emergency situations from the one applicable to order given in non-emergency situations.⁸ In support of his arguments, Bohrer notes that the Rome Statute clearly distinguishes between the situations where it applies the absolute liability doctrine (crimes of genocide and crimes against humanity) and the situations where it applies a conditional liability approach (war crimes).⁹ As further evidence that a modular approach is accepted in the Rome Statute may serve the fact that it only deals with the most serious crimes of concern to the international community, therefore it does not envisage the same rule for radically different situations. Apparently, that setting leaves room for national lawmakers to be flexible and creative to some extent while taking into account that the relationship between the International Criminal Court (hereinafter: ICC) and national jurisdictions is regulated by the principle of complementarity as well as the fact that the Roma Statute is not a uniform law, but entails only a minimum standard.¹⁰

⁶ See, among others, van Verseveld, A. 2016. Superior Orders, p. 1. Available at: www.oxfordbibliographies.com/view/document/obo-9780199796953/obo9780199796953-0133 (20.10.2022).

⁷ Ćorić, V. & Knežević Bojović, A. 2020. Applying a “Modular Approach” in the Field of Obedience Crimes in Military Service – the Case of Montenegro. *Science and Society*, 7(2), pp. 47-66.

⁸ Bohrer, Z. 2012. The Superior Orders Defense: A Principal Agent Analysis. *Georgia Journal of International and Comparative Law*, 41(1), p. 53.

⁹ Ćorić, V. & Knežević Bojović, A. 2020. Applying a “Modular Approach” in the Field of Obedience Crimes in Military Service – the Case of Montenegro, *Science and Society*, 7(2), p. 52.

¹⁰ The principle of complementarity provides an admissibility of a case before the ICC on the basis of a finding of unwillingness or inability of a state to prosecute an ICC statutory crime and the transfer of state jurisdiction to the court, limits the state judicial sovereignty and so portrays the configuration of the Court as a supra-national court. See Van den Herik, L. & Stahn, C. 2012. *The Diversification and Fragmentation of International Criminal Law*. Martinus Nijhoff Publishers, p. 10.

2. INTERNATIONAL STANDARDS IN THE AREA OF IMPROPER SUPERIOR ORDERS

Improper superior orders are regulated by a modest body of international hard and soft law instruments, both at universal and regional levels. In the context of the present research, the most important legal instruments are those developed by the UN, the CoE, the OSCE and the Geneva Centre for the Democratic Control of Armed Forces (hereinafter: DCAF).

2.1. INTERNATIONAL STANDARDS RELATED TO IMPROPER SUPERIOR ORDERS APPLICABLE TO ALL THE THREE SECTORS

The UN Universal Declaration of Human Rights, the Charter of the UN and other important UN instruments include the notion of human dignity. The greatest inspiration for the subsequent inclusion of human dignity in regional and international texts is derived from its presence in the Charter of the UN and in the Universal Declaration of Human Rights.¹¹ Three of the core international human rights conventions concluded during the 1960s under the auspices of the UN confirmed that dignity continues to play a prominent role in human rights texts. The International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and International Convention on the Elimination of Racial Discrimination all refer to the concept of human dignity both in their preambles and in the texts of several articles, such as those relating to the treatment of those subject to deprivation of their liberty through imprisonment or detention, and the right to education.¹² Such a pattern of making references to human dignity in the preambles to major international human rights texts has continued since then, and is reflected in numerous UN instruments, including but not limited to the Convention on the Elimination of All Forms of Discrimination against Women,¹³ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁴ the International Convention for

¹¹ McCrudden, C. 2008. Human Dignity and Judicial Interpretation of Human Rights. *The European Journal of International Law*, 19(4), p. 667.

¹² International Convention on the Elimination of All Forms of Racial Discrimination General Assembly Resolution 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc A/6014 (1966), 660 UNTS 195, Preamble; International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), UN Doc A/6316 (1966), 993 UNTS 3, Preamble; International Covenant on Civil and Political Rights, GA Resolution 2200A (XXI), 21 UN GAOR Supp (No. 16), at 52, UN Doc A/6316 (1966), 999 UNTS 171., Preamble; International Covenant on Economic, Social and Cultural Rights, Article 13.

¹³ Convention on the Elimination of All Forms of Discrimination against Women, GA Resolution 34/180, 34 UN GAOR Supp (No. 46), UN Doc A/34/46, Preamble, (1979).

¹⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Resolution 39/46, annex, 39 UN GAOR Supp (No. 51), at 197, UN Doc A/39/51 (1984), Preamble.

the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities.¹⁵ The recognition of human dignity has expanded beyond the instruments of UN to those of other international organizations, such as the Employment Policy Convention of the International Labour Organization and the Charter of Fundamental Rights of the European Union.¹⁶

The right to human dignity is considered by international law and jurisprudence as a basis of *jus cogens*, or, in other words, as a norm from which no derogation is permitted by way of particular agreements.¹⁷ The International Court of Justice (hereinafter: ICJ), as the main principal judicial organ of the UN, held in its judgment on the *Corfu Channel Case* that certain obligations do not derive from the law of war codified in Hague Convention 1907, but rather from “certain general and well-recognized principles”, namely elementary considerations of humanity. The same approach is also taken by the ICJ in several other cases, such as the Military and Paramilitary Activities in and against Nicaragua case (1986), Legality of the Threat or Use of Nuclear Weapon Case (1996) and Armed Activities on the Territory of Congo case (2002).¹⁸ Through the jurisprudence of the ICJ and other courts, the concept of human dignity became a tool through which courts give a meaning to rights, create new rights, and extend rights, which is of key importance for the recognition and protection of the right of a subordinate to refuse an improper superior order.¹⁹ Based on that understanding, the human right to dignity confers the right of a public sector employee to refuse to comply to superior orders that go against his/her conscience, moral values and ethical convictions. This understanding is nowadays a part of widely accepted Western philosophical values, while the confirmed *jus cogens* nature of the right to human dignity has strengthened the inviolability of the right of a public sector employee to refuse an improper superior order.²⁰

The International Code of Conduct for Public Officials which is annexed to General Assembly resolution 51/59 of 12 December 1996 is relevant as it contains several provisions pertaining to obligations of public officials which are potentially pertinent to the handling of unlawful and unethical orders in the public sector.²¹ The resolution is not legally binding to the UN member states. However, in its resolution, the General Assembly recommends the Code to the Member States of the UN as a tool to guide their efforts against corruption.²² The International Code of Conduct for Public Officials envisages that a public official shall perform his/her duties and functions

¹⁵ International Convention on the Rights and Dignity of Persons with Disabilities, GA Resolution A/61/611 (2006), Preamble, Articles 3, 8, 16, 24, and 25.

¹⁶ McCrudden, C. 2008. Human Dignity and Judicial Interpretation of Human Rights, *European Journal of International Law*, 19(4), p. 669.

¹⁷ Weatherall, T. 2015. *Jus Cogens, International Law and Social Contract*. Cambridge University Press, pp. 52-54.

¹⁸ Handayani, I. 2016. Book Review: *Jus Cogens, International Law and Social Contract*. *Journal of Law*, 3(2), pp. 651-654. For more on the aforementioned caselaw and organization of the ICJ see: Ćorić, V. et al. 2008. *Međunarodni sud pravde I: organizacija, postupak, slučajeve*. Beograd: Institut za uporedno pravo.

¹⁹ Rabrenović, A., Kostić, J. & Matić Bošković M. 2018, Open Dillema: How to React to Illegal Orders from a Superior, In: Rabernović, A. & Knežević Bojović, A. (eds.), *Integrity and Good Governance in the Western Balkans*. Danilovgrad: Regional School of Public Administration, p. 306.

²⁰ *Ibid.*, 307.

²¹ International Code of Conduct for Public Officials annexed to the Resolution Adopted by the UN General Assembly on the report of the Third Committee (A/51/610) 51/59. Action against Corruption, 1997.

²² *Ibid.*, paragraph 2, p. 2.

efficiently, effectively and with integrity *in accordance with laws* or administrative policies.²³ Moreover, it foresees that public officials are bound to act in the public interest and that, consequently, their ultimate loyalty shall be to the public interests of their country, as expressed through the democratic institutions of government.²⁴ Although the International Code of Conduct for Public Officials does not deal directly with improper orders, it is important, as it contains obligations of public officials to act lawfully and in public interest, hence implicitly requiring public officials not to act in line with interests and orders of superiors when they go against the law and public interest. The scope of application of the said Code is limited to public officials. The notion of a public official is to be interpreted within the meaning of the UN Convention against Corruption, since the International Code of Conduct of Public Officials and the said Convention are interrelated: the latter includes the explicit reference to the former.²⁵ The UN Convention against Corruption provides a rather broad and flexible definition of a public official which is not limited to office holders, but extends to other persons who perform public functions or provide a public service, as defined in the domestic law.²⁶

The key legal act of the CoE regarding the issue of improper superior orders in public administration is the Model Code of Conduct for Public Officials, which is contained in the Appendix to Recommendation No. R (2000)10 of the Committee of Ministers to Member States on Codes of Conduct for Public Officials.²⁷ Although it is not legally binding, this recommendation serves as an important soft-law instrument in the field of handling improper superior orders. In it, the Committee of Ministers recommends the governments of the Member States of the CoE to promote the adoption of national codes of conduct for public officials based on the Model Code of Conduct (subject to national law and principles of public administration). In addition, the Committee of Ministers instructs the Group of States against Corruption (GRECO) to monitor the implementation of the said Recommendation.²⁸ Finally, the Model Code specifies that every public official has the duty to take all necessary actions to comply with its provisions.²⁹ The scope of application of the Model Code of Conduct for Public Officials is peculiar, as it contains a specific definition of a public official. According to its definition, it includes all the persons employed by public authorities,

²³ *Ibid.*, paragraph 2, p. 3.

²⁴ *Ibid.*, paragraph 1, p. 3.

²⁵ The UN Convention against Corruption of 2003 is the first global instrument to harmonize anti-corruption efforts worldwide. It is widely recognized as the most promising initiative to curb the scourge of corruption. This convention is unique in its worldwide coverage and the extensiveness and detail of its provisions. See more on the UN Convention against Corruption in: Ćorić Erić, V. & Makić, A. 2009. The Compatibility of the Serbian Anti-Corruption Legal Framework with the Regional and International Standards. In: Milošević, M. (ed.) *Serbian Law in Transition – Changes and Challenges*. Belgrade: Institute of Comparative Law, pp. 238-239; Vukadinović, J. & Glintić, M. 2013. Conflict of Interest. In: Rabrenović, A. (ed.) *Legal Mechanisms for Prevention of Corruption in Southeast Europe with Special Focus on the Defence Sector*. Belgrade: Institute of Comparative Law, p. 96.

²⁶ Article 2 of the UN Convention against Corruption (2003). Available at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (10.09.2022.)

²⁷ Model Code of Conduct for Public Officials, contained in the Appendix to Recommendation No. R (2000)10 of the Committee of Ministers to Member States on Codes of Conduct for Public Officials https://www.coe.int/t/dghl/monitoring/greco/documents/Rec%282000%2910_EN.pdf (10.09.2022.)

²⁸ *Ibid.*, 2.

²⁹ *Ibid.*, Article 2, paragraph 1.

and even those employed by private organizations performing public services, while it does not include publicly elected representatives, members of the government and holders of judicial office.³⁰

The Model Code of Conduct for Public Officials includes several relevant provisions governing the issues of improper superior orders. Namely, it specifies duties which should be carried out by a public official in accordance with the law, lawful instructions, and applicable ethical standards.³¹ It implies that only “lawful instructions” from a superior shall be followed, while the opposite applies to unlawful superior orders. In addition, the Model Code of Conduct introduces a relevant set of reporting activities which should be taken by a public official in the case where he/she believes that he/she is being required to act in an unlawful or unethical way. The Model Code does not advise on the competent authority to whom the report should be initially made, but leaves it for the national law to determine. However, the Model Code provides an additional avenue for a public official who reported the given matter in accordance with the law, but believes that the response received does not meet his or her concern. Under such circumstances, the Model Code entitles a public official to report that matter in writing to the relevant head of the public office.³² The Model Code further envisages that, where a matter cannot be resolved by the procedures and appeals set out in the legislation on public service on a basis acceptable to the public official concerned, the public official should carry out the lawful instructions he/she has been given.³³ That provision seems important, as it clearly states that even in the case when a matter cannot be resolved before the available national authorities, a public official should carry out only the lawful instructions, and should refrain from carrying out unlawful ones. Finally, the Model Code properly forbids retaliation against a public official who reports such a matter on reasonable grounds and in good faith. In that respect, it specifies that “public administration should ensure that no prejudice is caused to a public official who reports”.³⁴

Another important CoE’s legal act in relation to the duties of public officials is Recommendation No. R (2000) 6 of the Committee of Ministers to member states on the status of public officials in Europe.³⁵ The Recommendation is not legally binding on the CoE member states (including all Western Balkans countries) and no mechanisms have been developed to monitor its implementation. It contains duties of public officials which have to be fulfilled in order to meet the envisaged principles of good practice. Those duties include, *inter alia*, respect for the rule of law, loyalty to democratic institutions, discretion, impartiality, respect for the public and hierarchical subordination. The said Recommendation does not explicitly deal with situations where hierarchical subordination leads to the execution of improper orders.³⁶ However, the

³⁰ *Ibid.*, Article 1, paragraph 4.

³¹ *Ibid.*, Article 4, paragraph 1.

³² *Ibid.*, Article 12, paragraph 3.

³³ *Ibid.*, Article 12, paragraph 4.

³⁴ *Ibid.*, Article 12, paragraph 6.

³⁵ Recommendation No. R (2000) 6 of the Committee of Ministers to member states on the status of public officials in Europe constitutes a follow-up on the Parliamentary Assembly Recommendation 1303 (1996) which asked the Committee of Ministers to include the drawing-up of European legal instruments on the civil service and the Parliamentary Assembly Recommendation 1322 (1997) on civil service in an enlarged Europe. See Appendix to Recommendation No. R (2000) 6. Available at: <https://rm.coe.int/native/09000016804c3142> (20.10.2022).

³⁶ Appendix to Recommendation No. R (2000) 6, paragraph 13.

Recommendation is relevant, as it provides for the protection of public officials who, because of the lawful performance of their public duties, are subject to abusive claims or other unlawful acts by third parties.³⁷ That provision is potentially applicable to a subordinate who refuses to follow an allegedly improper order of a superior, although the Recommendation failed to be explicit in handling improper superior orders. For the purposes of this Recommendation, public officials are broadly determined so as to include any members of staff, whether statutory or contractual, employed by state authorities or departments, whose salary is paid out of the state budget. The only exceptions are elected representatives and certain categories of staff in case when they come under special regulations.³⁸

2.2. INTERNATIONAL STANDARDS RELATED TO IMPROPER SUPERIOR ORDERS IN THE POLICE

The European Code of Police Ethics is contained in the Appendix to Recommendation Rec (2001)10 of the Committee of Ministers of the Council of Europe to Member States. The European Code of Police Ethics sets out minimum standards, principles and values aimed at establishing a police service, which is based on the rule of law and democratic values with a view of its progressive implementation. It is applicable to traditional public police forces or police services, or to other publicly authorized and/or controlled bodies with the primary objectives of maintaining law and order in civil society, who are empowered by the state to use force and/or special powers for these purposes.³⁹

The European Code of Police Ethics contains relevant provisions governing the issue of handling improper superior orders. Firstly, it underlines the importance of legality of police operations by stating that police operations must always be conducted in accordance with the national law and international standards accepted by the country. In that regard, the European Code of Police Ethics further states that police organization shall contain efficient measures to ensure the integrity and proper performance of police staff, including the explicit reference to the fundamental rights guaranteed by the European Convention on Human Rights (hereinafter: ECHR).⁴⁰ It is noteworthy that there is a comprehensive set of caselaw of the ECtHR, which leads to improving the degree of human rights protection in the work of the police.⁴¹

³⁷ *Ibid.*, paragraph 15.

³⁸ *Ibidem.*

³⁹ European Code of Police Ethics, Recommendation no. (2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, p. 1.

⁴⁰ European Code of Police Ethics, Recommendation no. (2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, paragraph 4, point 20. To recall, the norms of the ECHR are directly applicable. See Čorić Erić, V. 2013. *Odnos Evropskog suda pravde i Evropskog suda za ljudska prava*, doctoral thesis. Belgrade: Belgrade University Law Faculty, 2013, pp. 76, 97; Grynchak, A.A. *et al*, Convention for the Protection of Human Rights and Fundamental Freedoms as a Constitutional Instrument of European Public Order, *Public Organization Review*, 2022 Jan 7:1–14. doi: 10.1007/s11115-021-00583-9. Epub ahead of print, pp.1-2.

⁴¹ There is an extensive case law of the ECtHR dealing with the independent investigation requirements applied in one specific area where it is aimed to sanction the widespread practice of police investigating police without any external civilian oversight provided. Thus far, it has been adjudicated based on the procedural limbs of the following ECHR articles: Articles 2 to 5, Article 8, and Article 10. The reasoning from the said judgments can be potentially applicable

However, the ECtHR jurisprudence focused on the issue of improper superior orders in the work of the police is not available. Secondly, the European Code of Police Ethics provides for personal responsibility and accountability of police personnel, at all levels, for orders given to subordinates.⁴² That provision is of key importance, as it clearly envisages that a superior is individually accountable for each improper order she/he issues. In addition, the European Code of Police Ethics states that a clear chain of command shall be provided within the police in order to enable determining which superior is ultimately responsible for the acts or omissions of police personnel.⁴³ Such provisions, if implemented in national legislation, would strongly discourage superiors to issue improper orders to their subordinate police personnel. Thirdly, the European Code of Police Ethics contains the prohibition for police personnel to execute a superior order that is clearly unlawful, coupled with the obligation to report such an order. Those provisions are of key importance for establishing the appropriate national regulatory framework for handling improper superior orders. Finally, the European Code of Police Ethics stipulates that police personnel should be “without fear of sanction” when reporting superior orders, which are clearly unlawful.⁴⁴ Although the European Code of Police Ethics fails to specify the meaning of “clear illegality” in the context of the superior order, the latter provision is relevant, since it implicitly encompasses the prohibition of retaliation for one who refrains from carrying out orders.

The European Court of Human Rights (hereinafter: ECtHR) quite often invokes soft-law standards in its jurisprudence, treating them as decisive. For instance, in *Korneykova and Korneykov v. Ukraine*, the ECtHR used the standards from the Committee for the Prevention of Torture, the UN and the World Health Organization to assess the conduct of the State regarding the detention condition of mother with a newborn.⁴⁵ In a similar vein, in *Bouyid v. Belgium*, the ECtHR elaborates on the provisions of the European Code of Police Ethics, although not dealing with its provisions governing improper superior orders.⁴⁶ However, the case law of the ECtHR invoking improper superior orders-related provisions of the aforementioned soft-law instruments adopted by the Committee of Ministers has not been identified.⁴⁷ The development of such case law would seem to strengthen the implementation of the

in scenarios where a police officer issues or receives improper superior orders. For additional insight into ECtHR case-law pertaining to independent investigation requirements see: Ćorić, V. & Radević, R. 2016. Independent Investigation of Violations of the European Convention on Human Rights Attributable to Police Activities. *Strani pravni život*, no. 4, pp. 155-165.

⁴² European Code of Police Ethics, Recommendation no. (2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, paragraph 4, point 16.

⁴³ *Ibid.*, paragraph 4, point 17.

⁴⁴ *Ibid.*, paragraph 5, point 39.

⁴⁵ See, for instance, the case of *Korneykova and Korneykov v. Ukraine* (Application no. 56660/12, the ECtHR’s Chamber judgment of 24 March 2016), as referred to in: Piveteau, C. 2022. Between law and values: why soft law reinforces the hybrid nature of international human rights law, *Implications philosophiques*, Dossier Droits Humains [en ligne]. (hal-03691510), p. 6.

⁴⁶ See, the case of *Bouyid v. Belgium* (Application no. 23380/09, Grand Chamber judgment of 28 September 2015), pp. 13-14.

⁴⁷ In interpreting the ECHR, the ECtHR applies the evolutive approach i.e. resorts to the principle of the ECHR as a living instrument. See: Ćorić, V. & Knežević Bojović, A. 2018. Indirect Approach to Accountability of Corporate Entities through the Lens of the Case-Law of the European Court of Human Rights. *Strani pravni život*, no. 4, p. 30, doi: 10.5937/spz0-20339.

aforementioned soft-law instruments pertaining to improper superior orders issued in three distinct areas of employment: the general civil service regime; the police and the defence sector.

2.3 INTERNATIONAL STANDARDS RELATED TO IMPROPER SUPERIOR ORDERS IN THE DEFENCE

The OSCE Code of Conduct on Politico-Military Aspects of Security is a politically binding instrument which was adopted at the 91st Plenary Meeting of the Special Committee of the CSCE Forum for Security Co-operation in Budapest on 3 December 1994, while it came into effect on 1 January 1995.⁴⁸ As a politically binding instrument, this Code is not eligible for registration under Article 102 of the Charter of the UN.⁴⁹ However, each Participating State is responsible for the implementation of this Code and will provide, upon request, appropriate clarification regarding its implementation of the Code. Moreover, the participating States will seek to ensure that their relevant internal documents and procedures or, where appropriate, legal instruments, reflect the commitments made in this Code.⁵⁰ Its implementation will be assessed, reviewed and improved, by the appropriate OSCE bodies, mechanisms and procedures.⁵¹

The OSCE Code of Conduct on Politico-Military Aspects of Security contains provisions governing improper superior orders which are relevant for both superiors and subordinates. When it comes to duties and liabilities of superiors, it envisages that armed forces personnel vested with command authority should be made aware that orders contrary to national and international law are prohibited. It further stipulates that they will be held individually accountable under those laws for the unlawful exercise of command authority. When it comes to subordinates, the OSCE Code specifies that the responsibility of superiors does not exempt subordinates from any of their individual responsibilities in the case when they execute an order which is contrary to national and international law. However, the OSCE Code did not further elaborate on that issue. Consequently, no provisions are in place which would clarify the reporting mechanisms available to a subordinate who does not execute improper superior orders. There is only one general provision providing for appropriate legal and administrative procedures to protect the rights of all its forces personnel. Finally, the OSCE Code envisages a commitment for participating States to instruct their armed forces personnel in international humanitarian law, rules, conventions and commitments governing armed conflict as well as to make them aware of their

⁴⁸ OSCE Code of Conduct on Politico-Military Aspects of Security, 3 December 1994, Programme for Immediate Action Series, No. 7FSC/Journal No. 94.

⁴⁹ For more on the OSCE Code of Conduct on Politico-Military Aspects of Security see: Ćorić, V. & Zirojević M. 2015. Jačanje korporativne bezbednosti kroz unapređenje saradnje između OEBS-a i drugih međunarodnih organizacija, U: Zirojević, M. & Ćorić, V. (eds.), *Četrdeset godina od potpisivanja Helsinškog završnog akta*, p. 374; Ćeranić, J. 2013. Parliamentary oversight of the defence sector. In: Rabrenovic, A (ed.), *Legal mechanisms for prevention of corruption in Southeast Europe with special focus on the defence sector*. Belgrade: Institute of Comparative Law, pp. 37–67.

⁵⁰ OSCE Code of Conduct on Politico-Military Aspects of Security, paragraph 10, point 41.

⁵¹ *Ibid.*, paragraph 9, point 38.

individual accountability for their actions under national and international law.⁵² This provision is pertinent, as it distinguishes the regime applicable in armed conflict from the regular one.

The DCAF, as an international foundation with the mission to assist the international community in pursuing good governance and reform of the security sector, develops resources for security governance, which are relevant for handling improper superior orders. One of those resources is the DCAF's publication of 2015 entitled "The Armed Forces". It acknowledges two aspects relevant to the regime, which should govern unlawful superior orders. One aspect relates to the duties and responsibilities of subordinates, and the other to those of superiors. It is noteworthy that the DCAF, in both cases, envisages an important role to be played by internal control mechanisms. When it comes to duties and responsibilities of subordinates, the DCAF underlines that a system of internal oversight and complaint in the armed forces should recognize the right to refuse superior illegal orders, entitling thus persons serving in the Armed Forces not to execute orders they consider illegal. At the same time, it provides for the individual responsibility of a subordinate who executes such an order.⁵³ On the other hand, in the same document, the DCAF foresees that a superior order should conform to national and international law, and consequently it provides for command responsibility of the superior, if such compliance is not achieved. In that context, the DCAF specifies that both individual and command responsibility should be ensured through internal control mechanisms for cases when orders do not conform to national and international law.⁵⁴ In addition, in its publication the DCAF stipulates that command and individual responsibility should be both covered by an effective chain of command, as well as that one of the main characteristics for distinguishing military from civilian organizations are the centralized structure and hierarchical chain of command of military organizations.⁵⁵ Similarly, in one of its other backgrounds the DCAF determines an effective chain of command within the military as one of its elements of an effective system of democratic control, aimed at, *inter alia*, ensuring accountability to society and its oversight institutions and ensuring professionalism in the military.⁵⁶

2.4. RELEVANT TREATIES AND JURISPRUDENCE IN THE AREA OF INTERNATIONAL CRIMINAL LAW

There are three different "evolution" approaches to the concept of liability for crimes ordered by a superior, which have been developed through the legal history within international criminal law. These are: the *respondeat superior* doctrine, the absolute liability doctrine, and the conditional liability doctrine.⁵⁷ According to the *respondeat superior* doctrine, only the superior is accountable for the commission of the crime

⁵² *Ibid.*, paragraph 7, point 30.

⁵³ Geneva Centre for the Democratic Control of Armed Forces. The Armed Forces. SSR Backgrounder Series (Geneva: DCAF, 2015), p. 13.

⁵⁴ *Ibid.*, 8.

⁵⁵ *Ibid.*, 9.

⁵⁶ Democratic Control of Armed Forces, DCAF Backgrounder, 2008, pp. 2-3.

⁵⁷ Van Verseveld, A. 2016. Superior Orders. Available at: <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0133.xml>.

and not the subordinate, who could successfully invoke a defence of 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 lead to the result that the only person who could be held criminally liable for the crimes committed by the Nazi regime would be 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 and the International Criminal Tribunal for Rwanda. Pursuant to the absolute liability doctrine, superior orders are no defence, and they can only be considered in the 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/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, which stipulates that acting on superior orders does not relieve a person from criminal responsibility, unless that person was under a legal obligation to obey, he/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.⁵⁸ In the given case a rule of absolute liability applies.⁵⁹

The Rome Statute is further relevant as it contains provisions governing the criminal responsibility of superiors for crimes committed by subordinates under their effective authority and control. In that regard, Article 28, paragraph 2 of the Rome Statute is relevant, reading:

“With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”⁶⁰

⁵⁸ See more on the *respondeat superior* doctrine, the absolute liability doctrine, and the conditional liability doctrine in: Ćorić, V. & Knežević Bojović, A. 2020. Applying a “Modular Approach” in the Field of Obedience Crimes in Military Service – the Case of Montenegro, *Science and Society*, 7(2), pp. 47-66.

⁵⁹ Van Verseveld A. *Superior Orders*, 2016, available at <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0133.xml>; Posner, E.A. & Sykes, A.O. 2007. An Economic Analysis of State and Individual Responsibility Under International Law. *American Law & Economics Review*, 72(9), p. 129.

⁶⁰ Rome Statute, Article 28, paragraph 2. Available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

The Rome Statute refers only to the most serious crimes of concern to the international community as a whole, given that only those crimes fall within the jurisdiction of the ICC.⁶¹ The ICC is considered a court of last resort with a complementary role to national judicial systems. The ICC was established by the Rome Statute and entered into force on 1 July 2002. Currently, more than 100 countries have signed and ratified the Rome Statute. Although the ICC is not an organ of the UN, it maintains a cooperative relationship with it. The limitations of ICC's jurisdictions are twofold. Firstly, the ICC is the last resort for bringing justice to victims of genocide, crimes against humanity and war crimes, meaning it adjudicates only the most serious crimes of concern of the international community as a whole. On that road, it exercises jurisdiction over individuals accused of being directly responsible for or assisting those responsible for such crimes, including military commanders and other superiors.⁶² Moreover, due to its complementary role to national judicial systems, the Rome Statute deems a case inadmissible, where it is already being investigated or prosecuted by a national government.⁶³ It is important to mention that the ECtHR also has relevant jurisprudence pertaining to improper superior orders, or more specifically, to command responsibility, where the ECtHR took into account the relevant provision of the Rome Statute, the Statute of the International Criminal Tribunal for Rwanda, as well as the Statute of the International Criminal Tribunal for the Former Yugoslavia.⁶⁴

To put in a nutshell, the issue of obedience to unlawful military orders has long been a core issue in international criminal law. It is important to be fully acquainted and in line with the relevant norms and case law of international criminal law, but it is even more important to observe and take into account other aforementioned integrity instruments, which regulate the issue of improper superior orders in general civil service, police and defence sectors, extending beyond the situations of armed conflict and humanitarian situations, and not necessarily linked to the most serious crimes of concern of the international community.

⁶¹ These are as follows: genocide, crimes against humanity, war crimes, and crimes of aggression.

⁶² Rome Statute, Article 7. Available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

⁶³ DCAF, UNDP, Public Oversight Over the Security Sector, A Handbook for Civil Society Organizations, 2008, p. 295; This principle provides an admissibility of a case before the ICC on the basis of a finding of unwillingness or inability of a state to prosecute an ICC statutory crime and the transfer of state jurisdiction to the court, limits the state judicial sovereignty and so portrays the configuration of the Court as a supra-national court. See Van den Herik, L. & Stahn, C. 2012. *The Diversification and Fragmentation of International Criminal Law*. Martinus Nijhoff Publishers, p. 10.

⁶⁴ See the case of *Jelić v. Croatia* (Application no. 57856/11, ECtHR judgment of 12 June 2014) as referred to in Barberić, L., Čolak, D., & Dolmagić, J. 2015. Prosecuting War Crimes and Meeting Obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms at the Same Time – the Case of Croatia, *Croatian International Relations Review*, 21(74), pp. 55-56.

3. METHODOLOGICAL APPROACH TO STANDARDS AND INDICATORS

The approach taken in the study is to analyse the applicable regulatory frameworks of the four countries in selected aspects related to improper superior orders based on tailor-made standards. A conscious choice was made to focus on issues that regulate the prohibition to follow improper superior orders, the regime of corresponding disciplinary, misdemeanour and criminal responsibility, set of obligations imposed on a public servant once he/she believes that received order is improper, and the mechanisms available to public servant both to advise and decide upon received complaints, which are linked to handling improper superior orders. As this study analyses the regulatory framework governing improper superior orders, the methodology that we are going to use in this study shall be based on assessment of the level of alignment of the regulatory framework of each country with the international standards. Therefore, the standards are developed to capture the normative, legal aspect of handling improper superior orders in the public sector, without going into the actual practices, which do not depend solely on the quality of the regulatory frameworks, but perhaps even more so on the social and political context of each country.

In order to provide a benchmark for the assessment, the study identifies key international standards and indicators in the given area. Indicators were developed for each standard in order to facilitate and guide the assessment.⁶⁵ The outlined standards and indicators drew considerable inspiration from the international soft-law instruments that describe the relevant standards, but were also informed by the best practices of national legislations, international jurisprudence and international hard law instruments.

The standards examined in the study are the following:

1. It is ensured that civil servants are made aware that following an improper order of a superior is prohibited.
2. The set of obligations to be taken by a civil servant, when he/she believes that an order received from a superior is unlawful or unethical, is clearly set out in the statute.
3. The safe and confidential mechanism is determined by a statute in order to advise and guide a subordinate how to react in case when he/she believes that an order received from a direct superior is unlawful or unethical.
4. Effective complaint mechanisms are determined by a statute for civil servants whose rights are threatened or denied as a result of refusal to comply with an unlawful or unethical superior order.

⁶⁵ Knežević Bojović, A. & Reljanović, M. 2022. *Free Access to Information*. Belgrade: Institute of Comparative Law, p. 24.

5. Disciplinary offences and procedures adequately support and strengthen protection with regard to unlawful 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 sets out a crime of refusal to execute superior orders for military persons in line with requirements stemming from international human rights, international criminal law and humanitarian law.

The level of alignment of the selected legal frameworks with the outlined standards and indicators was assessed within three distinct areas of employment: general civil service regime; the police and the defence sector with two notable exceptions. Firstly, assessment of the general civil service regime in the analysed countries will be provided, which will be followed by the analysis in the security sectors: the police and the defence sectors. When it comes to the first exception, one specific standard is introduced only for the military sector, focusing on the assessment of compliance of criminal framework in the part regulating the crime of refusal to execute superior orders whose potential perpetrators are military persons, where such framework exists, with the requirements stemming from international human rights, international criminal law and humanitarian law (Standard 7). This standard is developed in order to assess whether guarantees are in place in analysed criminal legislations aimed at preventing, in the military sector, the potentially adverse effects of the existence of a rather problematic criminal offence of refusal to execute superior orders. In addition, the alignment with Standard 4 was not examined separately for all three distinct areas of service, since the same legal acts are applicable to the general civil service regime, police and defence sector. Consequently, the same legal acts were subject to assessment against the said standard for all the aforementioned three areas of service.

The core of the study consists of a detailed qualitative assessment of the level of alignment of the national regulatory frameworks of the four countries with the relevant international standards, based on the defined indicators. The assessment takes into account the provisions of national constitutions, and primary and secondary legislation. The study goes one step further, as the qualitative assessment is also quantified for each indicator and standard.⁶⁶

The quantification of the assessment is based on the approach used by SIGMA. Consequently, the methodology consists of two layers of quantified assessment.

The first layer includes assessment per indicator within each standard. Each standard includes one or more indicators. Within this assessment, points are awarded to each indicator on a 0-3 scale, as per the Table 1. The 0-3 scale was chosen given that the indicators are, for the most part, defined in rather straightforward terms, often not allowing for a nuanced approach to the assessment of compliance with the relevant standard. A four-point scale was, therefore, deemed optimal.⁶⁷

⁶⁶ *Ibid*, p. 25.

⁶⁷ *Ibidem*.

TABLE 1: POINTS AWARDED PER INDICATOR

Point	Point description
0	Not in line with standards
1	Mostly not in line with standards
2	Mostly in line with standards
3	Fully in line with standards

The second layer of assessment is done, once all the indicators within one standard are awarded their respective points. Then, the average point is calculated per standard. The average point per standard is calculated by dividing the sum of all points awarded with the number of indicators for the given standard. The average point for the standard is then translated to a quantified standard value on a 0-5 scale, as per Table 2. Since standards, as a rule, comprise two or more indicators (with some exceptions), and were purposefully defined to be more complex, the selected six-tier scale allows for nuances to be assessed and identified when it comes to compliance with or departures from the standard.⁶⁸

TABLE 2: STANDARD VALUES

Average point	Standard value	Description of standard value
0 – 0.50	0	Not in line with standard
0.51 – 1.00	1	Mostly not in line with standard
1.01 – 1.50	2	Significant departures from standard
1.51 – 2.00	3	Some departures from standard
2.01 – 2.50	4	Mostly in line with standard
2.51 – 3	5	In line with standard

The quantification is presented in tables at the level of each standard. The intention of the quantification is not to “name and shame”, but rather to provide a simplified, yet informative outlook on the state of play regarding each of the relevant regulatory frameworks, and to pinpoint the respective strengths and weaknesses. The study does not offer a definitive quantitative assessment, but rather offers a qualitative interpretation of the data collected in the conclusion.⁶⁹

⁶⁸ *Ibid.*, 24.

⁶⁹ *Ibid.*, 26.

4. COMPLIANCE OF LEGISLATION OF THE ANALYSED COUNTRIES WITH KEY INTERNATIONAL STANDARDS

4.1. GENERAL CIVIL SERVICE REGIME

Standard 1. It is ensured that civil servants are made aware that following an improper order of a superior is prohibited

Indicator 1

Clear prohibition for a civil servant not to follow an improper order is provided for in the statute.

None of the analysed countries provides for a clear prohibition not to execute unlawful and unethical superiors' orders. However, several of them contain a prohibition not to follow orders whose execution constitutes a criminal offence, while one of them includes a more encompassing prohibition which is applicable both to the execution of a criminal offence and of a misdemeanour. The legal frameworks of North Macedonia and Montenegro do not include any prohibition that would be relevant in this respect.⁷⁰ On the other hand, the law of the Bosnia and Herzegovina (hereinafter: BiH), entity laws of the Republic of Srpska and the Federation of BiH (hereinafter: FBiH), only stipulate that an order whose execution would constitute a criminal offence shall be refused by a civil servant, while the corresponding prohibition is not envisaged for other forms of unlawfulness, nor for unethical orders.⁷¹ The statute of the Republic of Serbia goes one step further, requiring that both orders whose execution constitutes either a

⁷⁰ Law on Public Sector Employees (Закон за вработените во јавниот сектор), "Official Gazette of the Republic of Macedonia", Nos. 27/14, 199/14, 27/16, 35/18, and 198/18, and "Official Gazette of the Republic of North Macedonia", Nos. 143/19, 14/20 and 302/20, Article 35; Law on Suppression of Corruption and Conflict of Interest, (Закон за спречување на корупцијата и судирот на интереси), "Official Gazette of the Republic of Macedonia", No. 12/2019, Article 60; Law on Civil Servants and State Employees (Закон о државним службеницима и намјештеницима), "Official Gazette of Montenegro", Nos. 2/2018, 34/2019, 8/2021, and 37/2022- CC decision, Article 70.

⁷¹ Law on State Service in the Institutions for Bosnia and Herzegovina (Закон о државној служби у институцијата Босне и Херцеговине), "Official Gazette of the BiH", Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 14, paragraph 2; Law on State Service in the Federation of the Bosnia and Herzegovina (Закон о државној служби у Федерацији Босне и Херцеговине), "Official Gazette of the FBiH", Nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77/2006 – decision CC, 34/2010 – decision CC, 45/2010 – other law, 4/2012, 99/2015 and 9/2017 – decision of the CC), Article 17, paragraph 2; Law on Civil Servants (Закон о државним службеницима), "Official Gazette of the Republic of Srpska", Nos. 118/2008, 117/2011, 37/2012, and 57/2016, Article 21.

criminal offence or a misdemeanour shall be refused by a civil servant.⁷² It should be noted that both the aforementioned countries which do not include a prohibition not to follow an order whose execution would constitute a criminal offence, still do contain similar provisions regulating cases when a civil servant receives a superior order whose execution would amount to a criminal offence. However, those provisions are less stringent, as, instead of including prohibition, they only foresee that a civil servant in question is not obliged to execute an unlawful order whose execution would constitute a criminal offence.⁷³ The law of Montenegro makes one step further from the legal framework of North Macedonia by envisaging that a civil servant is not obliged to execute superior orders whose execution would constitute either a criminal offence or a misdemeanour.

The example of North Macedonia is peculiar, because there are inconsistencies between different pieces of legislation governing how civil servants should react to superior improper orders. That exerts an adverse effect on legal security of the general civil service regime in the Republic of North Macedonia. The statutes of North Macedonia regulating the given issue do not contain a clear prohibition for a civil servant not to execute improper orders of superiors. Instead, the Law on Suppression of Corruption of the Republic of North Macedonia is more advanced than the Law on Public Sector Employees of the Republic of North Macedonia in that respect. It releases a civil servant from the obligation to execute an unlawful order, provided that he/she informed in writing the designated persons about receiving superior unlawful order, meaning that it covers unethical, but lawful orders.⁷⁴ On the other hand, the Law on Public Sector Employees of the Republic of North Macedonia states that a civil servant in question is not obliged to execute a superior order, if its execution constitutes a criminal offence.⁷⁵ Finally, the Law on Administrative Servants does not contain any such prohibitions.⁷⁶ Instead, its provisions governing disciplinary offences confirm that no prohibition in that respect is even implicitly envisaged. The identified inconsistencies between those three pieces of legislation of the Republic of North Macedonia have to be removed to eliminate confusion, since all those laws are applicable to civil servants, as well as to some other overlapping categories of public sector employees. The anticipated amendments should be directed both towards achieving mutual coherence and fulfilling the said indicator.

⁷² Law on Civil Servants (Zakon o državnim službenicima), “Official Gazette of the Republic of Serbia”, Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020, Article 18, paragraph 3.

⁷³ Law on Public Sector Employees (Закон за вработените во јавниот сектор), “Official Gazette of the Republic of Macedonia”, Nos. 27/14, 199/14, 27/16, 35/18, and 198/18, and “Official Gazette of the Republic of North Macedonia”, Nos. 143/19, 14/20 and 302/20, Article 35; Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), “Official Gazette of Montenegro”, Nos. 2/2018, 34/2019, 8/2021, and 37/2022- CC decision, Article 70, paragraph 4.

⁷⁴ Law on Suppression of Corruption and Conflict of Interest (Закон за спречување на корупцијата и судирот на интереси), “Official Gazette of the Republic of Macedonia”, No. 12/2019, Article 60.

⁷⁵ Law on Public Sector Employees (Закон за вработените во јавниот сектор), “Official Gazette of the Republic of Macedonia”, Nos. 27/14, 199/14, 27/16, 35/18, and 198/18, and Official Gazette of the Republic of North Macedonia, Nos. 143/19, 14/20 and 302/20, Article 35.

⁷⁶ Law on Administrative Servants (Закон за административни службеници), “Official Gazette of the Republic of Macedonia”, Nos. 27/14, 199/14, 48/15, 154/15, 5/16, 142/16, and 11/18 and “Official Gazette of the Republic of North Macedonia”, Nos. 275/2019 and 14/20.

Indicator 2

Clear prohibition for a civil servant not to follow an order whose execution would constitute a breach of international criminal law.

None of the analysed countries provides for an explicit prohibition for a civil servant not to follow an order whose execution would constitute a breach of international criminal law. The lack of such a prohibition is particularly apparent in North Macedonia and Montenegro, given that laws of both countries do not even include a clear prohibition not to obey any kind of improper superior order.⁷⁷ The legal framework of the Republic of North Macedonia contains more advanced normative solution than the legal framework of Montenegro, as it foresees that a public servant has to comply with the international treaties ratified in line with the Constitution when performing all work assignments.⁷⁸ Those provisions of the statutes of North Macedonia governing the performance of general work assignments are particularly relevant, because the ratified international treaties constitute one of the main sources of international criminal law. However, it would be more adequate if the analysed laws explicitly provided for a more specific prohibition not to obey any superior order whose execution would constitute a breach of international criminal law. On the other hand, the BiH law, entity laws of the Republic of Srpska and the FBiH, as well as the Serbian law, do not address any aspect of the prohibition not to follow an order whose execution would constitute a breach of international criminal law. More specifically, although the normative solutions of the above-mentioned legal frameworks contain a prohibition to execute an order whose execution would constitute a criminal offence, none of those legal frameworks refers to the obligation of a civil servant to act in line with any of the sources of international criminal law.⁷⁹

⁷⁷ Law on Public Sector Employees (Закон за вработените во јавниот сектор), “Official Gazette (North Macedonia)”, Nos. 27/14, 199/14, 27/16, 35/18, and 198/18, Article 35; Law on Suppression of Corruption and Conflict of Interest (Закон за спречување на корупцијата и судирот на интереси), “Official Gazette of the Republic of Macedonia”, No. 12/2019, Article 60; Law on Civil Servants and State Employees (Закон о државним службеницима и намјештеницима), “Official Gazette of Montenegro”, Nos. 2/2018, 34/2019, 8/2021, and 37/2022- CC decision, Article 70. See more on this: Indicator 1.

⁷⁸ Law on Public Sector Employees (Закон за вработените во јавниот сектор), “Official Gazette of the Republic of Macedonia”, Nos. 27/14, 199/14, 27/16, 35/18, and 198/18, and “Official Gazette of the Republic of North Macedonia”, Nos. 143/19, 14/20 and 302/20, Article 4; See also, Law on Suppression of Corruption and Conflict of Interest (Закон за спречување на корупцијата и судирот на интереси), “Official Gazette of the Republic of Macedonia”, No. 12/2019, Article 8, paragraph 8.

⁷⁹ Law on State Service in the Institutions for Bosnia and Herzegovina (Закон о државној служби у институцијата Босне и Херцеговине), Official Gazette of the BiH, Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 14; Law on State Service in the Federation of the Bosnia and Herzegovina (Закон о државној служби у Федерацији Босне и Херцеговине), “Official Gazette of FBiH”, Nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77/2006 – decision CC, 34/2010 – decision CC, 45/2010 – other law, 4/2012, 99/2015 and 9/2017 – decision of the CC, Article 17; Law on Civil Servants (Закон о државним службеницима), “Official Gazette of the Republic of Srpska”, Nos. 118/2008, 117/2011, 37/2012, and 57/2016, Article 21; Law on Civil Servants, “Official Gazette of the Republic of Serbia”, No. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020), Article 18, paragraph 3.

Indicator 3

There is an unambiguous statutory rule stipulating that a civil servant following an unlawful or unethical order from a superior will be held individually accountable.

None of the analysed countries has an unambiguous statutory rule stipulating that a civil servant following an unlawful or unethical order from a superior will be held individually accountable. The normative solutions pertaining to the individual accountability of a civil servant who obeys an improper order from a superior vary from country to country. Moreover, the legal solutions of some of the analysed countries are not internally consistent. When it comes to the normative framework of the Republic of Srpska, its Constitution contains a solution that should be considered exemplary, since it provides for no exception from its constitutional rule on individual accountability of civil servants who breached constitutionally guaranteed human rights and freedoms by obeying unlawful superior orders.⁸⁰ However, the statutory provisions governing the general service regime in the Republic of Srpska are not consistent with this constitutional solution: they provide for an exemption from liability of a civil servant for the damage caused by the execution of the superior order in cases when the civil servant informed the superior that the execution of the order may cause damage.⁸¹ In a similar vein, the Montenegrin statutory framework pertaining to civil servants is not internally consistent, as it initially foresees that a civil servant is individually accountable for the legality, competence and efficiency of his/her performance,⁸² while subsequently, within the same piece of national legislation, it states that a civil servant will not be liable for damage caused by execution of unlawful or unethical order, as long as the civil servant warned the superior accordingly.⁸³

Most of the analysed legal frameworks contain a statutory rule stipulating that a civil servant will be held individually accountable, either if he/she executes an unlawful superior order without giving *a priori* notice to the superior that a received order is unlawful, or its execution may give rise to damage, or alternatively, if he/she executes the superior order whose execution constitutes a criminal offence. Otherwise, if the superior was properly warned, the execution of an improper order would not give rise to a liability of a civil servant for damages, pursuant to the national statutes of the Republic of

⁸⁰ Constitution of the Republic of Srpska (Ustav Republike Srpske), “Official Gazette of the Republic of Srpska”, Nos. 21/92 –consolidated text, 28/94 –Amendments XXVI-XVIII, 8/96 –Amendments XLIV-LI, 13/96-Amendments LII-XCII, 15/96-corr., 16/96- Amendment LIII, 21/96-Amendments LIV-LXV, 21/02-Amendments LXVI-XCII, 26/02-corr., 30/02-corr., 31/02-Amendments XCIII-XCVIII, 69/02-Amendments XCIX-CIII, 31/03-Amendments CIV and CV, 98/03-Amendments CVI-CXII, 115/05- Amendment CXIV, and 117/05-Amendments CXV-CXXI and 48/2011 – Amendment CXXII and “Official Gazette of the BiH” No. 73/2019- CC decision, Article 48.

⁸¹ Law on Civil Servants (Zakon o državnim službenicima), “Official Gazette of the Republic of Srpska”, Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 82, paragraph 1.

⁸² Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), “Official Gazette of Montenegro”, Nos. 2/2018, 34/2019, 8/2021, and 37/2022- CC decision, Article 5, paragraph 2.

⁸³ Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), “Official Gazette of Montenegro”, Nos. 2/2018, 34/2019, 8/2021, and 37/2022- CC decision, Article 70, paragraph 5.

Srpska.⁸⁴ In a similar vein, the civil servant under the Montenegrin law will also not be individually liable, if he/she warned the superior that his order is unlawful or may cause damage, as long as the execution of such an order does not constitute a criminal offence or a misdemeanour.⁸⁵ The North Macedonian Law on Public Sector Employees contains the most comprehensive normative solution, as it expressly states that in the absence of such a prior notice of a public sector employee, both the public sector employee and his/her immediate superior will be held individually accountable for its unlawfulness.⁸⁶

On the other hand, the statutes BiH and FBiH contain less explicit normative solutions. While those three legal frameworks clearly stipulate that a civil servant will be held individually accountable only if he/she executes a superior order whose execution constitutes a crime, the individual accountability of a civil servant who failed to give the aforementioned prior notice to the superior is only implicit, or more precisely, it can be assumed although it is not explicit.⁸⁷ Finally, the Serbian law provides for an exemption from the liability of a civil servant for the damage caused by the execution of the superior order in cases when the civil servant informed the superior that the execution of the order may cause damage.⁸⁸ However, the Serbian law failed to provide explicitly and clearly that a civil servant will be held individually accountable if he/she executes a superior order whose execution constitutes a criminal offence or a misdemeanour.⁸⁹ More specifically, the Serbian law stipulates that the civil servant shall refuse such an order, even when it is repeated by the superior, while not explicitly specifying the potential consequences of the breach of that provision.⁹⁰

⁸⁴ Law on Civil Servants (Zakon o državnim službenicima), “Official Gazette of the Republic of Srpska”, Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 82, paragraph 1.

⁸⁵ Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), “Official Gazette of Montenegro”, Nos. 2/2018, 34/2019, 8/2021, and 37/2022- CC decision, Article 70, paragraph 5.

⁸⁶ Please note that the term “public sector employee” as referred to in the Law on Public Sector Employees includes, but is not limited to the category of “civil servants”. See Law on Public Sector Employees (Закон за вработените во јавниот сектор), “Official Gazette of the Republic of Macedonia”, Nos. 27/14, 199/14, 27/16, 35/18, and 198/18, and “Official Gazette of the Republic of North Macedonia”, Nos. 143/19, 14/20, and 302/20, Article 2 and Article 35, paragraphs 4 and 5.

⁸⁷ Law on State Service in the Federation of the Bosnia and Herzegovina (Zakon o državnoj službi u Federaciji Bosne i Hercegovine), “Official Gazette of the FBiH”, Nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77/2006 – decision CC, 34/2010 – decision CC, 45/2010 – other law, 4/2012, 99/2015 and 9/2017 – decision of the CC, Article 17, paragraph 2; Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 14.

⁸⁸ Article 121 read in conjunction with Article 123 of the Law on Civil Servants (Zakon o državnim službenicima), “Official Gazette of the Republic of Serbia” Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020.

⁸⁹ The Serbian Labour Law also contains some relevant provisions in that respect. The Serbian Labour Law *inter alia* prescribes suspension for those defendants who are prosecuted for the crimes committed at work or work-related crimes until the case is processed. See more: Rajić, J. 2015. Commencement of Criminal Procedure and Its Influence on Employment Contract. *Strani pravni život*, no. 4, p. 249; Kovačević, Lj. 2017. Termination of Employment Due to Employee Conduct. *Revue de droit compare to travail et de la securite sociale*. 4, pp. 280-283.

⁹⁰ Article 18 of the Law on Civil Servants (Zakon o državnim službenicima), Official Gazette of the Republic of Serbia” Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020.

Indicator 4

The applicable disciplinary and misdemeanour framework does not create any confusion with regard to prohibition to follow an unlawful or unethical order from a superior.

Among the analysed countries, there is no applicable disciplinary and misdemeanour framework that would clearly address the prohibition to obey both an unlawful and unethical order from a superior. The inadequate offence frameworks are a mere consequence of the fact that none of those laws contains a clear and all-encompassing prohibition to follow an unlawful or unethical order from a superior, as was specified earlier in the text.

The legal frameworks of North Macedonia and Montenegro, which do not contain statutory prohibition to follow any kind of improper orders, also do not envisage an appropriate disciplinary and misdemeanour framework in that regard, thus contributing to the existing confusion with regard to the exact scope of that prohibition. While two out of three relevant statutes of North Macedonia do not include any relevant provisions governing disciplinary and misdemeanour offences applicable to execution of unlawful or unethical superior orders, the third piece of North Macedonian national legislation (Law on Administrative Servants) does envisage a disciplinary offence amounting to a refusal to execute a superior written order in case of urgent need. The North Macedonian Law on Administrative Servants fails to specify that only refusal of execution of legal or ethical orders may constitute a disciplinary offence. Instead, the law wrongly stipulates existence of urgent need and written form of superior order as requirements sufficient for one conduct to amount to disciplinary offence.⁹¹ Similarly, the Montenegrin Law on Civil Servants and State Employees contains a disciplinary offence amounting to the refusal of a civil servant to execute any order, thus failing to distinguish between illegal and legal orders.⁹²

On the other hand, laws of Serbia, of the BiH as well as entity laws of the Republic of Srpska and the FBiH also do not contain sufficiently appropriate disciplinary or misdemeanour frameworks which would eliminate any confusion with regard to the scope of the prohibition to follow improper superior orders. To recall, laws of the BiH, as well as entity laws of the Republic of Srpska and the FBiH, explicitly provide for the prohibition to execute an order whose execution constitutes a criminal offence, while the prohibition from the Serbian law is applicable both to the execution of a criminal offence and to the execution of a misdemeanour. Among those four legal frameworks, the normative solutions of the BiH are most advanced and may be considered exemplary, since they contain both misdemeanour and disciplinary offences adequately addressing issues related to unlawful orders, thus avoiding any confusion about the scope of the given prohibition. While the misdemeanour offence in BiH law is specifically tailored for a superior who repeats the manifestly unlawful order despite previously having been

⁹¹ Law on Administrative Servants (Закон за административни службеници), "Official Gazette of the Republic of Macedonia", Nos. 27/14, 199/14, 48/15, 154/15, 5/16, 142/16, and 11/18 and "Official Gazette of the Republic of North Macedonia", Nos. 275/2019 and 14/20, Article 73, paragraph 7.

⁹² Law on Civil Servants and State Employees (Закон о државним службеницима и намјештеницима), "Official Gazette of Montenegro", Nos. 2/2018, 34/2019, 8/2021, and 37/2022- CC decision, Article 95, paragraph 2.

warned by a civil servant about its unlawfulness,⁹³ the disciplinary offence is applicable to a civil servant when he/she refuses to execute lawful superior orders, hence rightly not covering the case when one refuses to execute an unlawful order.⁹⁴

Conversely, the statutory disciplinary frameworks of the Republic of Srpska and of the Republic of Serbia create confusion by failing to distinguish between unlawful and lawful orders, since they stipulate that each refusal to commit superior orders amounts to disciplinary offence.⁹⁵ More precisely, the laws of the Republic of Srpska and the Republic of Serbia envisage two separate types of disciplinary offences: a disciplinary offence amounting to non-execution of a superior order, or alternatively, its reckless, negligent or untimely execution, but both their types treat unlawful and lawful orders equally, which creates the said confusion.⁹⁶ It is noteworthy that the legal frameworks of the Republic of Srpska and the Republic of Serbia do not contain any rules governing misdemeanour offences applicable to matters relating to non-execution of superior orders. Finally, the disciplinary and misdemeanour frameworks of the law of the FBiH are also inadequate in that regard, as the said law fails to specifically address the prohibition to obey improper superior orders.

Indicator 5

The constitutional legal framework clearly provides for direct applicability of ratified international treaties, international customary law and peremptory norms of international law.

The constitutional provisions of only two analysed countries explicitly provide for the direct applicability of ratified international treaties. These are the Constitution of Montenegro⁹⁷ and the Constitution of the Republic of Serbia.⁹⁸ The Constitution of the BiH also uses a term of “direct applicability”, but only in the context of the ECHR.⁹⁹ In contrast, the constitutions of other analysed countries, with a notable exception of

⁹³ Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 63a, paragraph 10.

⁹⁴ Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 54, paragraph 2, point e).

⁹⁵ Law on Civil Servants (Zakon o državnim službenicima), “Official Gazette of the Republic of Srpska”, Nos. 118/2008, 117/2011, 37/2012, and 57/2016, Article 68, paragraph 2, point ž); Law on Civil Servants (Zakon o državnim službenicima), “Official Gazette of the Republic of Serbia” Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020, Article 109, paragraph 1, point 1.

⁹⁶ Article 109, paragraph, 1 point 1 of the Law on Civil Servants (Zakon o državnim službenicima), “Official Gazette of the Republic of Serbia” Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020.

⁹⁷ Constitution of Montenegro (Ustav Crne Gore), “Official Gazette of Montenegro”, Nos. 1/2007 and 38/2013 – Amendments I-XVI, Article 9.

⁹⁸ Constitution of the Republic of Serbia (Ustav Republike Srbije), “Official Gazette of the Republic of Serbia”, Nos. 98/2006 and 115/2021, Article 16, paragraph 2.

⁹⁹ Constitution of the Bosnia and Herzegovina (Ustav Bosne i Hercegovine), Annex IV General Framework Agreement for Peace in Bosnia and Herzegovina and “Official Gazette of the BiH”, No. 25/2009, Amendment I, Article 3; For more on direct applicability see Čorić Erić, V. 2013. *Odnos Evropskog suda pravde i Evropskog suda za ljudska prava*, doctoral thesis. Belgrade: Belgrade University Law Faculty, pp. 76, 97.

the Republic of Srpska, do provide for the direct applicability of ratified international treaties in national law, although they do so in a rather implicit manner. Namely, the Constitution of North Macedonia and the Constitution of the FBiH merely state that international treaties ratified in accordance with the respective constitution are part of the internal legal order.¹⁰⁰ The Constitution of the FBiH is more specific and clear in that regard, as it establishes that, where there is a conflict between provisions of national legislation and of the international treaty, the international treaty will prevail.¹⁰¹ Through that provision, the Constitution of the FBiH clearly recognizes the principle of direct applicability of the international treaties in national law. Namely, it recognizes the primacy of the ratified international treaty, even when its provisions are not adopted in a national legislative act. On the other hand, the Constitution of the Republic of North Macedonia is less specific in that regard. It specifies that the ratified international treaties cannot be changed by law.¹⁰²

This provision of the Constitution of the Republic of North Macedonia stipulating that the ratified international treaties shall not be subject to statutory changes cannot be considered sufficient for the recognition of the concept of direct applicability of international treaties. It is insufficient as it does not address the situations where a provision of the given international treaty is neither changed by the national law, nor it is even in conflict with the existing national legislation, but nevertheless cannot be invoked before national judicial organs as long as it is not incorporated in a national legislative act. The wording of other provisions of the Constitution of the Republic of North Macedonia supports the given interpretation. For instance, one of the provisions stipulates that national courts adjudicate on the basis of the Constitution, laws and international agreements ratified in accordance with the Constitution.¹⁰³ That provision again is not sufficiently clear, as it does not clarify whether legislation implementing a treaty locally is required for the ratified international treaty to become domestically binding. For those reasons, the Constitution of the Republic of North Macedonia fails to specify whether the ratified international treaty is directly applicable to national legislation.

The Constitution of the Republic of Serbia is peculiar when it comes to its provisions governing the position of ratified international treaties in the Serbian legal system. As it was mentioned earlier, the Serbian Constitution is advanced in terms of stipulating that ratified international treaties are directly applicable and that they constitute an in-

¹⁰⁰ Constitution of the Republic of Macedonia (Устав на Република Северна Македонија), “Official Gazette of the RM”, Nos. 52/91, 1/92, 31/98, 91/01, 84/03, 107/05, 3/09, 49/11, 6/19 and 36/19, Article 118; Constitution of the Bosnia and Herzegovina, (Annex IV General Framework Agreement for Peace in Bosnia and Herzegovina and “Official Gazette of the BiH”, No. 25/2009, Amendment I, Article 3; Constitution of Montenegro (Ustav Crne Gore), “Official Gazette of Montenegro”, Nos. 1/2007 and 38/2013 – Amendments I-XVI, Article 9.

¹⁰¹ Constitution of the Federation of Bosnia and Herzegovina, (Ustav Federacije Bosne i Hercegovine), “Official Gazette of the Federation of Bosnia and Herzegovina” Nos. 1/94,1/94, Amendment I, 13/97, Amendments II-XXIV, 13/97-Amendments XXV-XXVI, 16/02 – Amendments XXVII-LIV, 22/02 – Amendments LVI-LXIII, 52/2002-Amendments LXIV-LXXXVII, 60/02- corr. of Amendment LXXXI, 18/03-Amendment LXXXVIII, 63/03-Amendments LXXXIX-XCIV, 9/2004-Amendments XCV-CII, 32/2007-corr., 20/2004-Amendments CIII and CIV, 33/2004- Amendment CV, 71/2005- Amendments CVI-CVIII, 72/2005- Amendment CVI, 88/2008- Amendment CIX and 79/2022- Amendments CX-CXXX, Article 3, Chapter 7 (International Relations).

¹⁰² Constitution of the Republic of Macedonia (Устав на Република Северна Македонија), “Official Gazette of the RM”, Nos. 52/91, 1/92, 31/98, 91/01, 84/03, 107/05, 3/09, 49/11, 6/19 and 36/19, Article 118.

¹⁰³ Constitution of the Republic of Macedonia (Устав на Република Северна Македонија), “Official Gazette of the RM”, Nos. 52/91, 1/92, 31/98, 91/01, 84/03, 107/05, 3/09, 49/11, 6/19 and 36/19, Article 98.

tegral part of the legal system in the Republic of Serbia. Đurić rightly observes that the wording of the Serbian Constitution does not provide a clear answer to the question of whether ratification of an international treaty by the National Parliament is necessary or whether other envisaged methods of ratification are also sufficient for an international treaty to become an integral part of the legal system in the Republic of Serbia and as such is directly applicable.¹⁰⁴

Moreover, at the same time, the Constitution of the Republic of Serbia envisages that ratified international treaties shall be in line with the Constitution. Such a provision brings additional confusion to the effect of the constitutionally guaranteed direct applicability of international treaties in Serbian legal order. Ever since the adoption of the Serbian Constitution, much ink has been spilled over the adequacy of the said provisions governing a hierarchy of sources of law in the Serbian legal order.¹⁰⁵ Namely, both Article 16, paragraph 2 and Article 194, paragraph 4 of the Constitution of the Republic of Serbia place ratified international treaties below the Constitution and above domestic laws and by-laws. Further to that, Article 16, paragraph 2 and Article 167, paragraph 1 of the Constitution of the Republic of Serbia strengthen that provision by enabling the Constitutional Court (hereinafter: CC) to deprive ratified international treaty of its internal legal force when it does not comply with the Constitution.¹⁰⁶

Therefore, in comparison to the Constitution of Montenegro, the Serbian Constitution accepts an overly restrictive understanding of the concept of the ratified international treaties that are directly applicable. However, such a constitutionally established hierarchy of norms does not constitute an isolated case in comparative constitutional law. In principle, the majority of European states do not recognize absolute primacy of international law. However, it appears that other countries which do not accept the primacy of ratified international treaties, verify their compliance with the respective national constitution as a prior rule, meaning before their ratification. In that light, Pejić came up with a comparative law argument, claiming that most of European constitutions established control over the constitutionality of international treaties as a prior rule.¹⁰⁷ Krstić added that it would be desirable that international treaties are verified as compliant with the Constitution prior to their ratification in one of the following ways: through their assessment by the relevant parliamentary body, relevant ministry, an expert opinion, or opinion of independent bodies dealing with specific matter (e.g. the Commissioner for the Protection of Equality in the area of human rights and anti-discrimination).¹⁰⁸ On the other hand, Nenadić argues

¹⁰⁴ Đurić, V. 2007. *Ustav i međunarodni ugovori*. Beograd: Institut za uporedno pravo, pp. 376-377.

¹⁰⁵ Zdravković, A. 2019. Međunarodno pravo u važećem Ustavu i amandmanima na Ustav Republike Srbije iz 2018. godine – izvitopereni monizam? *Evropsko zakonodavstvo*, no. 69, p. 38; Krstić, I. 2012. Human Rights Protection in Serbia from a Constitutional Standpoint". In: *Tackling Constitutional Challenges on the Road to the European Union: Perspectives from South-East European Accession Countries*, Skopje: Konrad Adenauer Stiftung, pp. 112-114; Polovchenko, K.A. 2019. Sources of International Law in the Legal System of a Modern State. *Opción*, 35(22), pp. 1507-1522; Đurić, V. 2007. *Ustav i međunarodni ugovori*. Beograd: Institut za uporedno pravo, pp. 374-388.

¹⁰⁶ Krstić, I. 2012. Human Rights Protection in Serbia from a Constitutional Standpoint, In: *Tackling Constitutional Challenges on the Road to the European Union: Perspectives from South-East European Accession Countries*. Skopje: Konrad Adenauer Stiftung, p. 113.

¹⁰⁷ Pejić, J. 2008. Ustavni sud i kontrola ustavnosti međunarodnih ugovora [Constitutional Court and control of constitutionality in international treaties]. *Legal Life*, 14 (6), pp. 741-756.

¹⁰⁸ Krstić, I. 2012. Human Rights Protection in Serbia from a Constitutional Standpoint. In: *Tackling Constitutional Challenges on the Road to the European Union: Perspectives from South-East European Accession Countries*. Skopje: Konrad Adenauer Stiftung, p. 113.

that applicable Article 169 of the Serbian Constitution shall be interpreted as providing ground for the control of the constitutionality of ratified international treaties.¹⁰⁹ According to her, there is no law in the Serbian legal system that is exempt from such control, since *a priori* compliance assessment of the constitutionality of laws was established by the Constitution of the Republic of Serbia as universal control for all laws, including the law on ratification of an international treaty.¹¹⁰ Following her arguments, some academicians who were in favour of prior control of the constitutionality of ratified international treaties admitted that although the Serbian Constitution does not directly provide for this type of control of international treaties, its Article 169 makes this type of control legally permissible.¹¹¹ However, it seems that legal certainty would be increased, only if the said desirable control over the constitutionality of international treaties which would be performed before their ratification is explicitly stipulated by the constitution.

The aforementioned authority of the Serbian CC to deprive a ratified international treaty of its internal legal force if it does not comply with the Constitution should be examined in view of the international law principle *pacta sunt servanda*. The Venice Commission gives meaningful guidance in that respect. It notices that if the ratified international treaty becomes deprived of its internal legal force by the CC, it would be necessary either to amend the respective national constitution, which is subject to complex procedure, or to denounce the respective treaty, or withdraw from it.¹¹² By doing so, the violation of international obligations deriving from the treaties ratified by the respective State Party will be avoided. The Venice Commission further warns that denunciation of or withdrawal from a treaty can be done only if this possibility exists under the concrete treaty, or in line with Article 56 of the Vienna Convention on the Law of Treaties. The said article of the Vienna Convention on the Law of Treaties by no means allows denunciation of or withdrawal from a treaty in each case. Instead, it states that they are allowed, only if such a treaty establishes that the parties intended to admit the possibility of denunciation or withdrawal, or if a right of denunciation or withdrawal may be implied by the nature of the treaty. In addition, it is determined that a party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty once it fulfils the aforementioned conditions.¹¹³ All those requirements should be carefully considered and met once the Serbian CC decides to denounce or withdraw from a certain ratified treaty in order to respect the principle *pacta sunt servanda*.

When it comes to recognition of the direct applicability of international treaties in domestic law, the Constitution of the Republic of Srpska lags behind the rest of the analysed countries, as it contains the most ambiguous provision. According to the

¹⁰⁹ Nenadić, B. 2009. Ustavni sud Republike Srbije u svetlu Ustava iz 2006 [Constitutional Court of the Republic of Serbia in the Light of 2006 Constitution]. *Revus*, vol. 11, p.135.

¹¹⁰ Nenadić, B. 2008. Prethodna kontrola ustavnosti zakona – u svetlu Ustava Republike Srbije od 2006 [Preceding control of constitutionality of laws in the light of the Serbian 2006 Constitution]. *Pravna riječ*, no. 14, pp. 72-81.

¹¹¹ Pejić, J. 2008. Ustavni sud i kontrola ustavnosti međunarodnih ugovora [Constitutional Court and control of constitutionality in international treaties]. *Legal Life*, 14(6), pp. 741-756; Polovchenko, K.A. 2019. Sources of International Law in the Legal System of a Modern State. *Opción*, 35(22), pp. 1517-1518.

¹¹² Krstić, I. 2012. Human Rights Protection in Serbia from a Constitutional Standpoint. In: *Tackling Constitutional Challenges on the Road to the European Union: Perspectives from South-East European Accession Countries*. Skopje: Konrad Adenauer Stiftung, p. 113.

¹¹³ Article 56, paragraph 2 of the Vienna Convention on the Law of Treaties, 1969, available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, 30.11.2022.

Constitution of the Republic of Srpska, the constitutional order is based *inter alia* on guarantees and protection of human rights in line with international standards.¹¹⁴ The given general statement in the Constitution on “the protection of human rights in line with international standards” is not sufficient for the recognition of the direct applicability of the provisions of ratified international treaties in the national law of the Republic of Srpska. The identified shortcoming of the Constitution of the Republic of Srpska cannot be overcome by the fact that the Constitution of the BiH is also applicable to the Republic of Srpska, given that the Constitution of the BIH also does not provide for adequate recognition of the direct applicability of ratified international treaties.¹¹⁵

The direct applicability of both international customary law and peremptory norms of international law is not explicitly recognized in the constitutions of all the analysed countries. Namely, the given constitutions do not explicitly refer to the notions of international customary law and peremptory norms of international law. Constitutional provisions of the BiH and of its entities are broadly and vaguely formulated and as such, they do not refer to direct applicability of any sources of international law, except ratified international treaties. Those constitutional provisions recourse to rather ambiguous terms, such as ensuring the “highest level of internationally recognized human rights and basic freedoms”,¹¹⁶ “guaranteeing and protecting of human rights and freedoms in line with international standards,¹¹⁷ and on “general rules of international law” as part of the legal order of the FBiH.¹¹⁸

The notion of “generally accepted norms of international law”, which is included in the constitutions of the Republic of Serbia, Montenegro and the Republic of North Macedonia, looks like, *prima facie*, a separate category of sources of international law, different from the international customary rules and peremptory norms of international law in terms of the internationally accepted classification of sources of international

¹¹⁴ Constitution of the Republic of Srpska (Ustav Republike Srpske), “Official Gazette of the Republic of Srpska”, Nos. 21/92 – consolidated text, 28/94 – Amendments XXVI–XVIII, 8/96 – Amendments XLIV–LI, 13/96 – Amendments LII–XCII, 15/96–corr., 16/96 – Amendment LIII, 21/96–Amendments LIV–LXV, 21/02–Amendments LXVI–XCII, 26/02–corr., 30/02–corr., 31/02–Amendments XCIII–XCVIII, 69/02–Amendments XCIX–CIII, 31/03–Amendments CIV and CV, 98/03–Amendments CVI–CXII, 115/05 – Amendment CXIV, and 117/05–Amendments CXV–CXXI and 48/2011 – Amendment CXXII and “Official Gazette of the BiH” No. 73/2019– CC decision, Article 5.

¹¹⁵ Let us recall that the Constitution of the BiH does not go further than saying that BiH and both entities will ensure the highest level of internationally recognized human rights and basic freedoms. See Constitution of the Bosnia and Herzegovina (Ustav Bosne i Hercegovine), Annex IV General Framework Agreement for Peace in Bosnia and Herzegovina and “Official Gazette of the BiH”, No. 25/2009, Amendment I), Article 1.

¹¹⁶ Constitution of the Bosnia and Herzegovina (Ustav Bosne i Hercegovine), Annex IV General Framework Agreement for Peace in Bosnia and Herzegovina and “Official Gazette of the BiH”, No. 25/2009, Amendment I, Article 2.

¹¹⁷ Constitution of the Republic of Srpska (Ustav Republike Srpske), “Official Gazette of the Republic of Srpska”, Nos. 21/92 – consolidated text, 28/94 – Amendments XXVI–XVIII, 8/96 – Amendments XLIV–LI, 13/96 – Amendments LII–XCII, 15/96–corr., 16/96 – Amendment LIII, 21/96–Amendments LIV–LXV, 21/02–Amendments LXVI–XCII, 26/02–corr., 30/02–corr., 31/02–Amendments XCIII–XCVIII, 69/02–Amendments XCIX–CIII, 31/03–Amendments CIV and CV, 98/03–Amendments CVI–CXII, 115/05 – Amendment CXIV, and 117/05–Amendments CXV–CXXI and 48/2011 – Amendment CXXII and “Official Gazette of the BiH” No. 73/2019– CC decision, Article 5.

¹¹⁸ Constitution of the Federation of Bosnia and Herzegovina (Ustav Federacije Bosne i Hercegovine), “Official Gazette of the Federation of Bosnia and Herzegovina” No. 1/94, 1/94, Amendment I, 13/97, Amendments II–XXIV, 13/97–Amendments XXV–XXVI, 16/02 – Amendments XXVII–LIV, 22/02 – Amendments LVI–LXIII, 52/2002–Amendments LXIV–LXXXVII, 60/02 – corr. of Amendment LXXXI, 18/03–Amendment LXXXVIII, 63/03–Amendments LXXXIX–XCIV, 9/2004–Amendments XCV–CII, 32/2007–corr., 20/2004–Amendments CIII and CIV, 33/2004– Amendment CV, 71/2005– Amendments CVI–CVIII, 72/2005– Amendment CVI, 88/2008– Amendment CIX and 79/2022– Amendments CX–CXXX, Article 3, Chapter 7 (International Relations).

law, as formulated in Article 38 of the Statute of the ICJ. However, in that regard, it is noteworthy that there are different and convincing voices in the legal doctrine.

Namely, it was argued that the use of the term of “generally accepted norms of international law” seems to be quite successful, because it allowed the Serbian doctrine and judicial practice to encompass by the said term the following categories: norms of customary international law, general principles of international law, as well as other sources stipulated by Part 1 of Article 38 of the Statute of the ICJ. Dimitrijević claims that a broad understanding of the term of “generally accepted norms of international law” can be explained by the fact that all these sources are “generally accepted”.¹¹⁹ On the other hand, Zdravković rightly argues against this overly broad interpretation of the notion of “generally accepted norms of international law”. According to her, the notion of “generally accepted norms of international law” in the sense of the Serbian Constitution should be interpreted to amount only to the category of norms of customary international law, while not including other sources of international law stipulated by Part 1 of Article 38 of the Statute of the ICJ, such as judicial decisions, teachings of the most highly qualified publicists and the general principles of law recognized by civilized nations. Zdravković explains that the aforementioned judicial decisions and the teachings of the most highly qualified publicists are subsidiary sources of international law, which do not constitute the formal sources of international law. Therefore, there is no reason to consider them as a formal source of national law, nor to provide them with direct applicability in the legal system of the Republic of Serbia. In addition, she claims that the general principles of law recognized by civilized nations should also not be covered by the notion of “generally accepted norms of international law” in the sense of the Serbian Constitution, since the said general principles, strictly speaking, become rules of international law only if and when they are applied by the ICJ. Those general principles are accepted by the “civilized nations” *in foro domestico*, or more specifically, they are originally national rules which cannot be regarded as rules of international law, as long as they are not applied by the ICJ as an international court.¹²⁰ For those reasons, the recourse to the narrow understanding of the notion of “generally accepted norms of international law” restricted to the norms of international customary law seems more than convincing and therefore such an interpretation became dominant among scholars.¹²¹

For those reasons, the recourse to the term “generally accepted norms of international law” by the constitutions of the Republic of Serbia, Montenegro and of the Republic of North Macedonia can be regarded as a mostly positive example when measured against the said indicator. While the dominant approach in the legal doctrine goes in favour of including the category of international customary law within the notion of “general accepted norms of international law” it is silent on the question whether “generally accept-

¹¹⁹ See Dimitrijević, V. *et al.* 2006. *Osnovi međunarodnog javnog prava* [Fundamentals of Public International Law]. Belgrade: Belgrade Centre for Human Rights. p. 26.

¹²⁰ Zdravković, A. 2019. *Međunarodno pravo u važećem Ustavu i amandmanima na Ustav Republike Srbije iz 2018. godine – izvitopereni monizam?* *Evropsko zakonodavstvo*, no. 69, p. 36.

¹²¹ Krstić, I. 2015. *Status međunarodnog prava u pravnom poretku Republike Srbije i njegova primena u praksi*. *Pravni život*, 64 (12), p. 25; Đajić, S. 2013. *Primena međunarodnog prava u pravnom poretku Republike Srbije: načela i praksa*. In: Novaković, M. (ed.), *Basic Concepts of Public International Law – Monism and Dualism*. Belgrade: Law Faculty, Institute of Comparative Law, Institute of International Politics and Economics, p. 498; Nastić, M. 2012. *Ustavopravni osnov primene Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda u postupku pred nacionalnim ustavnim sudovima*. Doctoral thesis. Niš: Niš University Law Faculty, p. 209,

ed norms of international law” should encompass the peremptory norms of international law. However, such an inclusion would make perfect sense due to the importance of the peremptory norms of international law, and their link with the rules of international customary law is undisputable.¹²² While the Constitution of Montenegro and the Constitution of the Republic of Serbia explicitly provide for the direct applicability of the said “generally accepted norms of international law”,¹²³ the Constitution of the Republic of North Macedonia determines them as some of fundamental values of the constitutional order of the Republic of North Macedonia.¹²⁴

In a nutshell, the constitutional frameworks of all analysed countries are only partially in line with the relevant indicator. The Constitution of Montenegro and the Constitution of the Republic of Serbia contain almost identical provisions governing the direct applicability of international treaties, while direct applicability of international customary law and peremptory norms of international law failed to be explicitly addressed. The constitutions of the Republic of North Macedonia, the BiH, the FBiH and the Republic of Srpska are not convergent with relevant standards on recognition of direct applicability of the three aforementioned categories of sources of international law, even though the Constitution of the FBiH offers slightly improved solutions governing the direct applicability of international treaties than it is the case with the Republic of North Macedonia and two entities of the BiH.

Summary Assessment for the Standard

None of the analysed countries provides for a clear prohibition to execute improper superiors’ orders, nor to follow an order whose execution would constitute a breach of international criminal law. The legal frameworks of the BiH and its entities contain a prohibition to follow orders whose execution constitutes a criminal offence. The law of the Republic of Serbia goes one step further, requiring that both orders whose execution constitutes either a criminal offence or a misdemeanour shall be refused by a civil servant. The case of North Macedonia is specific, because there are inconsistencies between different pieces of legislation governing how civil servants shall react to superior improper orders, which may create confusion and adversely affect the legal security of the general civil service regime in the Republic of North Macedonia.

Moreover, none of the analysed legal frameworks contains unambiguous rules stipulating that a civil servant following an improper superior order will be held individually accountable; the normative solutions vary across countries, some of them not even being internally consistent.

There is no applicable disciplinary and misdemeanour framework, which clearly addresses the prohibition to obey both an unlawful and unethical order from a superior.

¹²² For additional insight into those issues see: Zdravković, A. 2020. Finding the Core of International Law – *Jus Cogens* in the Work of International Law Commission. *SEE EU Cluster of Excellence in European and International Law, Series of Papers*, Vol. 5, Europa Institut, University of Saarbrücken, pp. 141-158.

¹²³ Constitution of Montenegro (Ustav Crne Gore), “Official Gazette of Montenegro”, Nos. 1/2007 and 38/2013 – Amendments I-XVI, Article 9; Constitution of the Republic of Serbia (Ustav Republike Srbije), “Official Gazette of the Republic of Serbia”, Nos. 98/2006 and 115/2021, Article 16, paragraph 2.

¹²⁴ Constitution of the Republic of Macedonia (Устав на Република Северна Македонија), “Official Gazette of the RM”, Nos. 52/91, 1/92, 31/98, 91/01, 84/03, 107/05, 3/09, 49/11, 6/19 and 36/19, Article 8.

However, it should be noted that the normative solutions of the BiH may be considered exemplary, as they contain both misdemeanour and disciplinary offences adequately addressing issues related to unlawful orders, thus avoiding any confusion about the scope of the given prohibition.

The constitutional provisions of Montenegro, as well as of the Republic of Serbia, explicitly provide for the direct applicability of ratified international treaties, while the constitutions of other analysed countries, with a notable exception of the Republic of Srpska, provide for the direct applicability of ratified international treaties in national law, although they do so in a rather implicit manner. In a similar vein with other European countries, the direct applicability of both international customary law and peremptory norms of international law is not explicitly recognized in the constitutions of any of the analysed countries. However, the Constitution of Montenegro and the Constitution of the Republic of Serbia explicitly provide for the direct applicability of the said “generally accepted norms of international law”, whose meaning is differently understood by legal scholars, but indisputably includes the category of international customary law.

Overall, the regulatory frameworks of the BiH, the Republic of Serbia, the Republic of Srpska, and Montenegro are mostly not in line with the standard, while the legislations of the FBiH and North Macedonia are not in line with the standard.

IT IS ENSURED THAT CIVIL SERVANTS ARE MADE AWARE THAT FOLLOWING AN IMPROPER ORDER OF A SUPERIOR IS PROHIBITED

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. Clear prohibition for a civil servant not to follow an improper order is provided for in the statute.	0-3	1	1	1	2	0	1
2. Clear prohibition for a civil servant not to follow an order whose execution would constitute a breach of international criminal law.	0-3	0	0	0	0	1	0
3. There is an unambiguous statutory rule stipulating that a civil servant following an unlawful or unethical order from a superior will be held individually accountable.	0-3	0	0	1	0	1	1
4. The applicable disciplinary and misdemeanour framework does not create any confusion with regard to prohibition to follow an unlawful or unethical order from a superior.	0-3	2	0	1	1	0	1
5. The constitutional legal framework clearly provides for the direct applicability of ratified international treaties, international customary law and peremptory norms of international law	0-3	0	1	0	1	0	1
Total points		3	2	3	4	2	4
Average points		0.6	0.4	0.6	0.8	0.4	0.8
Standard	0-5	1	0	1	1	0	1

Standard 2. The set of obligations to be taken by a civil servant when he/she believes that an order received from a superior is unlawful or unethical is clearly set out in the statute.

Indicator 1

A civil servant who believes that an order received from a direct superior is unlawful or unethical is obliged by a statute to warn a direct superior.

The legal frameworks of the analysed countries are not uniform when it comes to the statutory obligation of a civil servant to warn the direct superior if he/she believes that an order received from a direct superior is unlawful or unethical. The normative framework of Montenegro includes such an obligation.¹²⁵ In some instances, such as the case of the BiH, North Macedonia and FBiH, a similar statutory obligation of a civil servant is in place, although limited to scenarios where a civil servant believes that a received order is unlawful, but not unethical.¹²⁶ The normative framework of the Republic of Serbia also limits the statutory obligation to cases where a civil servant believes that a received order is unlawful (but not unethical) and to cases where its execution may cause damage. Also, the given obligation under the Serbian law is formulated in a slightly different manner than the set indicator, since a civil servant is not required to warn the superior, but to inform her/him.¹²⁷ In the Republic of Srpska, the normative solution is more adequate, although again formulated in a slightly different manner, where a civil servant is not required to warn the superior, but to inform her/him about the reasons for not executing the oral order which seems unethical or unlawful.¹²⁸

Indicator 2

A civil servant who believes that an order received from a direct superior is unlawful or unethical is bound by a statute to require a direct superior to repeat it in written form.

The statutory obligation of a civil servant to require a direct superior to repeat a received order in written form if he/she believes that it is unlawful or unethical is not

¹²⁵ Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), "Official Gazette of Montenegro", Nos. 2/2018, 34/2019, 8/2021, and 37/2022- CC decision, Article 70, paragraph 2.

¹²⁶ Law on Public Sector Employees (Закон за вработените во јавниот сектор), "Official Gazette of the Republic of Macedonia", Nos. 27/14, 199/14, 27/16, 35/18, and 198/18, and "Official Gazette of the Republic of North Macedonia", Nos. 143/19, 14/20, and 302/20, Article 35; Law on Suppression of Corruption and Conflict of Interest (Закон за спречување на корупцијата и судирот на интереси), "Official Gazette of the Republic of Macedonia", No. 12/2019, Article 60; Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 14; Law on State Service in the Federation of the Bosnia and Herzegovina (Zakon o državnoj službi u Federaciji Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77/2006 – decision CC, 34/2010 – decision CC, 45/2010 – other law, 4/2012, 99/2015 and 9/2017 – decision of the CC, Article 17.

¹²⁷ Article 18, paragraph 1 of the Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Serbia", Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020).

¹²⁸ Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Srpska", Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 21.

fully in place in analysed countries. The statutes of the BiH and the FBiH include the said statutory obligation, limiting it to situations where the received superior order is allegedly unlawful to the civil servant in question.¹²⁹ The Montenegrin normative solution is more flexible, as a civil servant is not obliged, but only entitled to require a repeated order in written form, regardless of the fact whether the superior order is unlawful or unethical.¹³⁰ The legal frameworks of the Republic of North Macedonia, the Republic of Serbia and the Republic of Srpska failed to include any aspect of such a statutory obligation.¹³¹ The Law on Civil Servants of the Republic of Serbia may serve as an illustrative example of such a gap. Subject Law stipulates that a civil servant is obliged to execute a received superior order which is repeated in written form, as long as its execution does not constitute a criminal offence or misdemeanour. However, the said Serbian law failed to envisage an obligation of a civil servant to require a direct superior to repeat a received order in written form, if he/she believes that it is unlawful or unethical.¹³²

Indicator 3

A civil servant who believes that an order received from a direct superior is unlawful or unethical is required by a statute to directly report all details of the case to designated persons within the institution in writing, regardless of whether the respective unlawful or unethical order was received in written form or not. The notion of “designated person within the institution” refers to respective head or an immediate superior of the person who issued the order, as well as to another designated person responsible for the legality and integrity of the institution’s operation.

None of the analysed legal frameworks fully introduced the statutory obligation of a civil servant to directly report in writing to a designated person all the details of the case pertaining to an allegedly unlawful or unethical superior order, regardless of the

¹²⁹ Law on State Service in the Federation of the Bosnia and Herzegovina (Zakon o državnoj službi u Federaciji Bosne i Hercegovine), “Official Gazette of the FBiH”, Nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77/2006 – decision CC, 34/2010 – decision CC, 45/2010 – other law, 4/2012, 99/2015 and 9/2017 – decision of the CC, Article 17; Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 14, paragraph 2.

¹³⁰ Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), “Official Gazette of Montenegro”, Nos. 2/2018, 34/2019, 8/2021, and 37/2022-CC decision, Article 70, paragraph 3.

¹³¹ Law on Suppression of Corruption and Conflict of Interest (Закон за спречување на корупцијата и судирот на интереси), “Official Gazette of the Republic of Macedonia”, No. 12/2019, Article 60; Law on Public Sector Employees (Закон за вработените во јавниот сектор), “Official Gazette of the Republic of Macedonia”, Nos. 27/14, 199/14, 27/16, 35/18, and 198/18, and Official Gazette of the Republic of North Macedonia, Nos. 143/19, 14/20, and 302/20, Article 35; Law on Civil Servants (Zakon o državnim službenicima), “Official Gazette of the Republic of Srpska”, Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 21; Article 18, paragraph 2 of the Law on Civil Servants (Zakon o državnim službenicima), “Official Gazette of the Republic of Serbia”, Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020.

¹³² Article 18, paragraph 2 of the Law on Civil Servants (Zakon o državnim službenicima), “Official Gazette of the Republic of Serbia”, Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020.

fact whether the respective unlawful or unethical order was received in written or unwritten form. What is common for all these frameworks, is that the said statutory obligation is not introduced with regard to unethical superior orders which are not considered unlawful. The only exception is the normative framework of Montenegro, where the said obligation of a civil servant remains fully unimplemented.¹³³ As for the scope of the corresponding statutory obligation in the case of the BiH and the FBiH, the said statutory obligation to report in writing is limited to situations where the allegedly unlawful superior order has been repeated.¹³⁴ In the Republic of Srpska, the statutory obligation to directly report in writing is applicable only to cases where the execution of an unlawful order would constitute a criminal offence, while in the Republic of Serbia it is applicable to cases where such an execution would constitute a criminal offence or a misdemeanour.¹³⁵ The normative framework of North Macedonia seems internally inconsistent, as one national statute sets out the given obligation of a civil servant for all the allegedly unlawful orders received from a superior,¹³⁶ while other pieces of national legislation limit the scope of the introduced obligation only to situations where the execution of the received order would constitute a criminal offence.¹³⁷

Most of the analysed normative frameworks dealing with reporting of allegedly unlawful orders stipulate that it shall be done to an immediate superior of the person who issued the order, with the exception of North Macedonia, the Republic of Serbia and the Republic of Srpska. More specifically, the legal frameworks of the BiH and the FBiH stipulate that all details of such an order shall be reported to the supervisor of the person issuing that order. On the other hand, the normative framework of the Republic of Macedonia is an exception, since it foresees that such an order shall be reported to both the immediate superior of the person who issued the order and to another designated institution, which is not directly linked to the superior (State Anti-Corruption Agency). The above stated solution could serve as an example to other systems in the region, as it ensures much needed impartiality. The cases of the Republic of Serbia and the Republic of Srpska are peculiar, because their statutes contain a rule that a civil servant shall promptly inform the head of the respective institution about receiving an allegedly unlawful order, meaning that the civil servant does not necessarily report to the immediate superior of the person who issued

¹³³ Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), "Official Gazette of Montenegro", Nos. 2/2018, 34/2019, 8/2021, and 37/2022- decision CC, Article 70, paragraph 4.

¹³⁴ Law on State Service in the Federation of the Bosnia and Herzegovina (Zakon o državnoj službi u Federaciji Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77/2006 – decision CC, 34/2010 – decision CC, 45/2010 – other law, 4/2012, 99/2015 and 9/2017 – decision of the CC), Article 17, paragraph 2; Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 14, paragraph 2.

¹³⁵ Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Srpska", Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 21; Article 18 paragraph 3 of the Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Serbia", Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020.

¹³⁶ Law on Suppression of Corruption and Conflict of Interest (Zakon za sprečavanje na korupcijata i sudирот на интереси), "Official Gazette of the Republic of Macedonia", No. 12/2019, Article 60, paragraph 2.

¹³⁷ Law on Public Sector Employees (Zakon za вработените во јавниот сектор), "Official Gazette of the Republic of Macedonia", Nos. 27/14, 199/14, 27/16, 35/18, and 198/18, and "Official Gazette of the Republic of North Macedonia", Nos. 143/19, 14/20, and 302/20, Article 35, paragraph 3.

the order. Exceptionally, under specific circumstances, where an allegedly improper order is issued by the very head of the institution, the statutes of the Republic of Serbia and of the Republic of Srpska prescribe that a civil servant shall report to a body overseeing the work of the institution where the superior is employed.¹³⁸ This normative solution also seems well-tailored, as it explicitly regulates the situation where an allegedly improper order has been issued by the head of the respective institution.

Summary Assessment for the Standard

The legal frameworks of the analysed countries are not uniform when it comes to the statutory obligation of a civil servant to warn a direct superior, if he/she believes that an order received from a direct superior is unlawful or unethical. While the normative framework of Montenegro includes such an obligation, in the majority of analysed countries, such as the BiH, the FBiH, the Republic of Serbia and North Macedonia a similar statutory obligation of a civil servant is in place, although limited to scenarios where the civil servant believes that a received order is unlawful but not unethical. The Republic of Srpska stipulates an obligation similar to the said Montenegrin obligation, since it is applicable to both unlawful and unethical orders, but is slightly differently formulated, because a civil servant is not required to warn the superior, but to inform him/her.

The statutory obligation of a civil servant to require that the direct superior repeat the order in written form, if he/she believes that it is unlawful or unethical, is not fully in place in analysed countries. While the statutes of the BiH and the FBiH include the said statutory obligation, limiting it to situations where the received superior order is allegedly unlawful, Montenegrin law contains more flexible rules, since the civil servant is not obliged but only entitled to require the order to be repeated in written form. Conversely, the legal frameworks of the Republic of North Macedonia, the Republic of Serbia and the Republic of Srpska failed to include any aspect of such a statutory obligation.

None of the analysed legal frameworks fully introduced the statutory obligation of a civil servant to directly report in writing to a designated person all the details of the case pertaining to an allegedly unlawful or unethical superior order, regardless of whether the respective unlawful or unethical order was received in written or unwritten form. The only exception is the normative framework of Montenegro, where the said obligation of a civil servant remains fully unimplemented. In addition, the normative solution of the Republic of North Macedonia could serve as an example for other systems in the region, as it ensures needed impartiality by stipulating that a civil servant shall promptly inform both the immediate superior of the person who issued the order and another designated institution, which is not directly linked to the superior.

Overall, the regulatory frameworks of the BiH and the FBiH show some departures from the standard, while the legislations of the Republic of Serbia and North Macedonia demonstrate significant departures from the standard. Finally, the normative solutions of the Republic of Srpska are mostly not in line with the standard.

¹³⁸ Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Srpska", Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 21; Article 18, paragraph 3 of the Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Serbia", Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020, Article 18, paragraph 3.

THE SET OF OBLIGATIONS TO BE TAKEN BY A CIVIL SERVANT, WHEN HE/SHE BELIEVES THAT AN ORDER RECEIVED FROM A SUPERIOR IS UNLAWFUL OR UNETHICAL, IS CLEARLY SET OUT IN THE STATUTE

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. A civil servant who believes that an order received from a direct superior is unlawful or unethical is obliged by a statute to warn a direct superior.	0-3	2	2	2	2	3	
2. A civil servant who believes that an order received from a direct superior is unlawful or unethical is bound by a statute to require a direct superior to repeat it in a written form.	0-3	2	2	0	1	1	
3. A civil servant who believes that an order received from a direct superior is unlawful or unethical is required by a statute to directly report all details of the case to designated persons in writing within the institution regardless of the fact whether the respective unlawful or unethical order was received in written or unwritten form.	0-3	2	2	1	1	0	
Total points		6	6	3	4	4	
Average points		2	2	1	1.33	1.33	
Standard	0-5	3	3	1	2	2	

Standard 3. The safe and confidential mechanism is determined by a statute in order to advise and guide a subordinate on how to react in the case when he/she believes that an order received from a direct superior is unlawful or unethical.

Indicator 1

Availability of respective hotline channels or other trustful mechanisms to a civil servant who believes that an order received from a direct superior is unlawful or unethical is determined by a statute. The civil servant should be advised through a given mechanism whether the given conduct would constitute a criminal offence, misdemeanour or any other offence, as well as whether the case could be reported to a competent public prosecution office or police. In that context, the civil servant has a statutory right to ask anonymously for advice.

None of the analysed countries adequately provides, on the statutory level, for the availability of trustful mechanisms to advise and guide a civil servant who believes that an order received from a direct superior is unlawful or unethical. The same applies to the inclusion of the right to ask anonymously for advice in that regard.

Indicator 2

Qualifications of the staff of the respective hotline channels or other trustful mechanisms are specified by secondary legislation. Their staff is qualified to advise, *inter alia*, whether a certain superior order is unlawful or unethical. The staff is also qualified to advise whether the certain order complies with international human rights, international criminal law and humanitarian law.

The bylaws establishing the appropriate mechanisms followed by required qualifications of their staff have not been identified in any of the analysed countries.

Summary Assessment for the Standard

None of the analysed countries adequately provides, on the statutory level, the availability of trustful mechanisms to advise and guide a civil servant who believes that an order received from a direct superior is unlawful or unethical. Also, there are no bylaws in force which establish the appropriate mechanisms followed by the required qualifications of their staff in all the analysed countries. Consequently, none of the analysed legislative frameworks are in line with the given standard.

THE SAFE AND CONFIDENTIAL MECHANISM IS DETERMINED BY A STATUTE IN ORDER TO ADVISE AND GUIDE A SUBORDINATE ON HOW TO REACT IN CASE WHEN HE BELIEVES THAT AN ORDER RECEIVED FROM A DIRECT SUPERIOR IS UNLAWFUL OR UNETHICAL

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. Availability of respective hotline channels or other trustful mechanisms to a civil servant who believes that an order received from a direct superior is unlawful or unethical is determined by a statute. The civil servant should be advised through a given mechanism whether the given conduct would constitute a criminal offence, misdemeanour or any other offence, as well as whether the case could be reported to a competent public prosecution office or police. In that context, the civil servant has a statutory right to ask anonymously for advice.	0-3	0	0	0	0	0	
2. Qualifications of the staff of the respective hotline channels or other trustful mechanisms are specified by secondary legislation. Their staff is qualified to advise, <i>inter alia</i> , whether certain superior order is unlawful or unethical. The staff is also qualified to advise whether a certain order complies with international human rights, international criminal law and humanitarian law.	0	0	0	0	0	0	
Total points	0	0	0	0	0	0	
Average points	0	0	0	0	0	0	
Standard	0-5	0	0	0	0	0	

Standard 4. Effective complaint mechanisms are determined by a statute for civil servants whose rights are threatened or denied as a result of refusal to comply with an unlawful or unethical superior order.

Indicator 1

Internal mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. inspectorates, ethical committees).

None of the analysed countries provides effective internal complaint mechanisms for civil servants whose rights are threatened or denied as a result of refusal to comply with unlawful or unethical superior orders on the statutory level. The anti-corruption law of North Macedonia is distinctive, as it stipulates that no one can be held liable nor suffer any consequences as a result of his/her refusal to obey an unlawful order, as long as he/she has reported its alleged unlawfulness to competent authorities. Moreover, the said law determines that a civil servant who reports an allegedly unlawful order and refuses to execute such an order is protected as a whistle-blower.¹³⁹ However, the said law failed to specify the applicable internal complaint mechanisms in that regard, and its provisions show that a civil servant is to be protected only through external mechanisms.

Indicator 2

External mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. an administrative instance and the court).

None of the analysed legal frameworks establishes external complaint mechanisms to provide effective protection for civil servants whose rights are threatened or denied as a result of refusal to comply with any kind of improper order, with the exception of the anti-corruption law of North Macedonia, which designates the State Anti-Corruption Commission as the competent body acting in line with the Law on Protection of Whistle-Blowers in that regard.¹⁴⁰ The apparent lack of established mechanisms, both external and internal, results from the fact that most of the analysed countries oblige civil servants to execute improper repeated orders of a superior, unless their observance constitutes a criminal offence. Therefore, due to the lack of clear and all-encompassing prohibition to execute improper orders, the current legal frameworks of analysed countries, except for North Macedonia, fail to establish complaint mechanisms which provide effective protection for civil servants whose rights are threatened or denied as a result of refusal to comply with any kind of improper order.

¹³⁹ Law on Suppression of Corruption and Conflict of Interest (Закон за спречување на корупцијата и судирот на интереси), "Official Gazette of the Republic of Macedonia", No. 12/2019, Article 60.

¹⁴⁰ *Ibidem*.

Indicator 3

Retaliation against civil servants who refused compliance with unlawful or unethical instructions is forbidden and those who retaliate incur administrative or criminal liability.

None of the analysed legal frameworks forbids retaliation against civil servants who refused compliance with improper instructions, with the exception of North Macedonia, whose anti-corruption law forbids retaliation against civil servants in that regard, but only in an indirect and implicit manner. Namely, the anti-corruption law of North Macedonia stipulates that no civil servant can be held liable, nor suffer any consequences as a result of his/her refusal to obey an unlawful order, provided that he/she reported its alleged unlawfulness to competent authorities. However, even that law failed to explicitly address the prohibition of retaliation against civil servants who refused compliance with an improper superior order.¹⁴¹

None of the analysed legal frameworks includes a provision stating that those who retaliate incur administrative or criminal liability. Moreover, no explicit offences are introduced in that regard. Most of the analysed countries, such as the BiH, its entities, the Republic of Serbia and Montenegro, do contain disciplinary offences which can be applicable to those who retaliate. However, those disciplinary offences do not specifically address cases where a civil servant is subject to retaliation. Instead, those disciplinary offences, such as abuse of office,¹⁴² exceeding the authority of a civil servant,¹⁴³ violation of the code of conduct of civil servants,¹⁴⁴ and misconduct during working hours with peers and subordinates and the public,¹⁴⁵ are very broadly and vaguely

¹⁴¹ *Ibidem*.

¹⁴² Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), "Official Gazette of Montenegro", Nos. 2/2018, 34/2019, 8/2021, and 37/2022- decision CC, Article 95, Law on State Service in the Federation of the Bosnia and Herzegovina (Zakon o državnoj službi u Federaciji Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77/2006 – decision CC, 34/2010 – decision CC, 45/2010 – other law, 4/2012, 99/2015 and 9/2017 – decision of the CC, Article 55; Law on State Service in the Institutions for Bosnia and Herzegovina, Official Gazette of the BiH, Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 54, Article 17, paragraph 2; Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Srpska", Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 68; Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Serbia", Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020, Article 109, paragraph 1.

¹⁴³ Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), "Official Gazette of Montenegro", Nos. 2/2018, 34/2019, 8/2021, and 37/2022- decision CC, Article 95, Law on State Service in the Federation of the Bosnia and Herzegovina (Zakon o državnoj službi u Federaciji Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77/2006 – decision CC, 34/2010 – decision CC, 45/2010 – other law, 4/2012, 99/2015 and 9/2017 – decision of the CC), Article 55; Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 17, paragraph 2; Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Srpska", Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 68.

¹⁴⁴ Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Srpska", Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 68.

¹⁴⁵ Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), "Official Gazette of Montenegro", Nos. 2/2018, 34/2019, 8/2021, and 37/2022- decision CC, Article 95, paragraph 1, point 9. The Law on Civil Servants of the Republic of Serbia contains less comprehensively determined disciplinary offence compared

formulated. This has an adverse effect both on their effectiveness and overall legal security. For the same reason, the liability of those who retaliate cannot be adequately addressed through such disciplinary offences.

Summary Assessment for the Standard

None of the statutes of the analysed countries provides effective internal complaint mechanisms for civil servants whose rights are threatened or denied as a result of refusal to comply with unlawful or unethical superior orders. Although the anti-corruption law of North Macedonia stipulates that no one can be held liable, nor suffer any consequences as a result of his/her refusal to obey an unlawful order, as long as it was reported accordingly, it fails to specify the applicable internal complaint mechanisms in that regard.

In a similar vein, the analysed legal frameworks do not establish external complaint mechanisms to provide effective protection for civil servants whose rights are threatened or denied as a result of refusal to comply with any kind of improper order. The only exception is the anti-corruption law of North Macedonia, which designates the State Anti-Corruption Commission as the competent body in that regard. The apparent lack of established mechanisms, both external and internal, results from the fact that all the analysed countries failed to set out an all-encompassing prohibition to execute improper orders.

None of the analysed legal frameworks forbids retaliation against civil servants who refused compliance with improper instructions, with the exception of North Macedonia, whose anti-corruption law forbids retaliation against civil servants in that regard, but only in an indirect and implicit manner. Consequently, none of the analysed countries, with the exception of North Macedonia, is in line with the standard. On the other hand, North Macedonia shows significant departures from the given standard.

to other specified countries, since it amounts to misconduct with peers, while it does not explicitly encompass misconduct with subordinates and the public. See Law on Civil Servants (*Zakon o državnim službenicima*), "Official Gazette of the Republic of Serbia", Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020, Article 109, paragraph 1.

EFFECTIVE COMPLAINT MECHANISMS ARE DETERMINED BY A STATUTE FOR CIVIL SERVANTS WHOSE RIGHTS ARE THREATENED OR DENIED AS A RESULT OF REFUSAL TO COMPLY WITH AN UNLAWFUL OR UNETHICAL SUPERIOR ORDER

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. Internal mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. inspectorates, ethical committees).	0-3	0	0	0	1	0	0
2. External mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. an administrative instance and the court).	0	0	0	0	0	2	0
3. Retaliation against civil servants who refused compliance with unlawful or unethical instructions is forbidden and those who retaliate incur administrative or criminal liability.	0-3	0	0	0	0	1	0
Total points		0	0	0	0	4	0
Average points		0	0	0	0	1.33	0
Standard	0-5	0	0	0	0	2	0

Standard 5. Disciplinary offences and procedures adequately support and strengthen protection with regard to unlawful and unethical superior orders.**Indicator 1**

A specific disciplinary or misdemeanour offence amounting to knowingly issuing unlawful or unethical orders by a superior, including a high-ranking officer, is set out in a statute.

Out of six analysed legal frameworks, only the BiH law contains the misdemeanour offence of knowingly issuing an unlawful order by a superior, potentially including a high-ranking officer, while none of the legal frameworks foresees an offence of knowingly issuing an unethical superior order. More specifically, the BiH law sets out the misdemeanour offence of repeating manifestly unlawful order by a superior, although the superior was previously warned by a subordinate about its unlawfulness, which clearly confirms the existence of a mental element of the person's intention.¹⁴⁶ This misconduct can be performed by any superior, as long as he/she is considered a responsible person in the given institution, meaning that high-ranking officers are eligible to become perpetrators of the said misdemeanour, only if they are considered to be a responsible person.¹⁴⁷ However, this legal solution has to be improved in order to potentially extend the applicability of the given offence to all high-ranking officers. Other analysed legal frameworks do not regulate the given offence, either through their disciplinary or misdemeanour provisions.

It is noteworthy that some of the analysed legal frameworks, such as the case of the Serbian Law on Civil Servants, include a broadly formulated disciplinary offence of civil servants' unlawful performance.¹⁴⁸ The given disciplinary offence can be potentially applicable to those civil servants, who knowingly issue unlawful or unethical superior orders. However, their liability cannot be adequately addressed through such a disciplinary offence, since it does not specifically address cases where a civil servant knowingly issues improper orders as a superior.

Indicator 2

A specific disciplinary offence amounting to knowingly issuing unlawful or unethical orders by persons performing the tasks of senior management and heads of administrative bodies is set out in a statute.

None of the analysed legal frameworks foresees a disciplinary offence of knowingly issuing unethical superior orders. Out of six analysed legal frameworks, only

¹⁴⁶ Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 63, paragraph 10.

¹⁴⁷ *Ibidem*.

¹⁴⁸ Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Serbia", Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020, Article 109, paragraph 1, point 2.

the BiH statute contains the misdemeanour offence of knowingly issuing unlawful orders by a superior, potentially including persons performing the tasks of senior management and heads of administrative bodies. More specifically, the BiH law sets out the misdemeanour offence of repeating manifestly unlawful orders by a superior, although the superior was previously warned by a subordinate about its alleged unlawfulness, which further confirms the existence of the mental element of a person's intention.¹⁴⁹ The given misdemeanour offence can be performed by any superior, as long as he/she is considered a responsible person in the given institution. This means that persons performing the tasks of senior management and heads of administrative bodies are also eligible to be considered perpetrators of the said misdemeanour.¹⁵⁰ However, this normative solution has to be improved in order to potentially extend the applicability of the given offence to all persons performing the tasks of senior management and heads of administrative bodies. Conversely, other analysed legal frameworks do not regulate the given offence either through their disciplinary or misdemeanour provisions.

Indicator 3

A statute determines disciplinary offences for non-execution of superior orders that are graded depending on the severity of particular conduct.

None of the six analysed legal frameworks sets out disciplinary offences for non-execution of superior orders that are graded depending on the severity of particular conduct. Although the laws of Montenegro, the Republic of Serbia, the Republic of Srpska and North Macedonia do classify disciplinary offences into serious and minor offences, they fail to grade disciplinary offences for non-execution of superior orders based on the severity of particular conduct. Instead, those laws consider each disciplinary offence of non-execution of superior orders as a serious disciplinary offence, thus failing to distinguish its minor form from its serious form.¹⁵¹ On the contrary, the BiH law does not classify disciplinary offences into minor and serious depending on the severity of particular conduct at all. However, the BiH law includes clearly formulated disciplinary offences for non-execution of legal superior orders.¹⁵² Finally, the

¹⁴⁹ Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 63, paragraph 10.

¹⁵⁰ *Ibidem*.

¹⁵¹ Law on Administrative Servants (Закон за административни службеници), Official Gazette of the Republic of Macedonia, Nos. 27/14, 199/14, 48/15, 154/15, 5/16, 142/16, and 11/18 and Official Gazette of the Republic of North Macedonia, 275/2019 and 14/20, Article 73, paragraph 1, point 7; Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Srpska", Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 68, paragraph 2; Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), "Official Gazette of Montenegro", Nos. 2/2018, 34/2019, 8/2021, and 37/2022- decision CC, Article 95; Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Serbia", No. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020, Article 109, paragraph 1, point 1.

¹⁵² Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), "Official Gazette of the BiH", No. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017, Article 54, paragraph 2, point e);

legal framework of the FBiH does not contain any form of disciplinary offence for the non-execution of superior orders.¹⁵³

Indicator 4

The statutory provisions ensuring needed guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister or persons performing the tasks of senior management, as well as heads of administrative bodies, are set out in a statute.

The statutory provisions of the majority of the analysed countries do provide guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister or persons performing the tasks of senior management, with the exception of the laws of the BiH, of the FBiH and of the Republic of Serbia.¹⁵⁴ More concretely, the respective laws of the BiH, as well as of the FBiH, do not contain specific provisions governing the conduct of disciplinary proceedings against a minister and persons performing the tasks of senior management, which adversely affects the impartiality and objectivity of the disciplinary proceedings and overall legal certainty.¹⁵⁵ Similarly, the Serbian law implicitly provides guarantees of impartiality and objectivity of the disciplinary proceedings conducted against persons performing the tasks of senior management, as well as against heads of administrative bodies, but in an implicit manner. However, those guarantees are not applicable to the disciplinary proceedings conducted against a minister. More specifically, the Law on Civil Servants of the Republic of Serbia includes specific provisions on the conduct of disciplinary proceedings against persons performing the tasks of senior management, which contributes to the quality and provides needed safeguards of such disciplinary proceedings.¹⁵⁶ In contrast, other analysed countries include specific provisions on conducting disciplinary proceedings against a minister and persons performing the tasks of senior management, thus contributing to the quality and creating safeguards of such disciplinary proceedings.

¹⁵³ Law on State Service in the Federation of the Bosnia and Herzegovina (Zakon o državnoj službi u Federaciji Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77/2006 – decision CC, 34/2010 – decision CC, 45/2010 – other law, 4/2012, 99/2015 and 9/2017 – decision of the CC, Article 55.

¹⁵⁴ Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Srpska", Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 21; Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), "Official Gazette of Montenegro", Nos. 2/2018, 34/2019, 8/2021, and 37/2022- decision CC, Article 102; Law on Civil Servants (Zakon o državnim službenicima), „Official Gazette of the Republic of Serbia”, Nos. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020, Article 120.

¹⁵⁵ Law on State Service in the Institutions for Bosnia and Herzegovina (Zakon o državnoj službi u institucijama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008 – other law, 43/2009, 8/2010, 40/2012 and 93/2017; Law on State Service in the Federation of the Bosnia and Herzegovina (Zakon o državnoj službi u Federaciji Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77/2006 – decision CC, 34/2010 – decision CC, 45/2010 – other law, 4/2012, 99/2015 and 9/2017 – decision of the CC.

¹⁵⁶ See Law on Civil Servants (Zakon o državnim službenicima), „Official Gazette of the Republic of Serbia”, No. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020, Article 120.

Summary Assessment for the Standard

Out of six analysed legal frameworks, only BiH law contains the misdemeanour offence of knowingly issuing unlawful orders by a superior, which may potentially include a high-ranking officer and persons performing the tasks of senior management and heads of administrative bodies in the capacity of perpetrators. Thus, this misconduct can be performed by any superior, as long as he/she is considered a responsible person in the given institution. For that reason, this legal solution has to be improved in order to potentially extend the applicability of the given offence to all the high-ranking officers and persons performing the tasks of senior management and heads of administrative bodies. On the other hand, none of the legal frameworks foresees an offence of knowingly issuing an unethical superior order.

A specific disciplinary offence for non-execution of superior orders is set out in the statutes of all the analysed countries, with the exception of the FBiH. However, all the analysed countries failed to grade disciplinary offences for non-execution of superior orders based on the severity of particular conduct. The statutory provisions of most of the analysed countries do provide guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister or persons performing the tasks of senior management, with the exception of the laws of the BiH, of the FBiH and of the Republic of Serbia.¹⁵⁷

Overall, the analysed countries are mostly not in line with the standard, with the exception of the BiH, the FBiH and the Republic of Serbia. While the legal framework of the BiH shows significant departures from the standard, the normative solutions in the Republic of Serbia and the FBiH are fully not in line with the standard.

¹⁵⁷ See Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Srpska", Nos. 118/2008, 117/2011, 37/2012 and 57/2016, Article 21; Law on Civil Servants and State Employees (Zakon o državnim službenicima i namještenicima), "Official Gazette of Montenegro", Nos. 2/2018, 34/2019, 8/2021, and 37/2022- decision CC, Article 102; Law on Civil Servants (Zakon o državnim službenicima), "Official Gazette of the Republic of Serbia", No. 79/2005, 81/2005 - corr., 83/2005 - corr., 64/2007, 67/2007 - corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018 and 157/2020, Article 120.

DISCIPLINARY OFFENCES AND PROCEDURES ADEQUATELY SUPPORT AND STRENGTHEN PROTECTION WITH REGARD TO IMPROPER SUPERIOR ORDERS

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. A specific disciplinary or misdemeanour offence amounting to knowingly issuing unlawful or unethical orders by a superior, including a high-ranking officer, is set out in a statute.	0-3	2	0	0	0	0	0
2. A specific disciplinary offence amounting to knowingly issuing unlawful or unethical orders by persons performing the tasks of senior management and heads of administrative bodies is set out in a statute.	0-3	2	0	0	0	0	0
3. A statute determines disciplinary offences for non-execution of superior orders that are graded depending on the severity of particular conduct.	0-3	1	0	1	1	1	1
4. The statutory provisions ensuring needed guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister or persons performing the tasks of senior management, as well as heads of administrative bodies, are set out in a statute.		0	0	2	1	2	2
Total points		5	0	3	2	3	3
Average points		1.25	0	0.75	0.5	0.75	0.75
Standard	0-5	2	0	1	0	1	1

Standard 6. It is ensured that an order issued during a state of war, state of emergency or an armed conflict should never be executed, if it constitutes a breach of international humanitarian law and international criminal law.

Indicator 1

The constitutional legal framework ensures human rights guarantees which are non-derogable under any circumstances, including a state of war, state of emergency or an armed conflict.

All of the analysed constitutions ensure, either explicitly or implicitly, human rights guarantees which are non-derogable under any circumstances, including a state of war, state of emergency or an armed conflict. While the constitutions of North Macedonia, the Republic of Serbia, Montenegro, and the Republic of Srpska clearly specify human rights and freedoms which are non-derogable under any circumstances, the constitutions of the BiH and the FBiH are somewhat less explicit.¹⁵⁸ More specifically, the constitutions of the BiH and the FBiH implicitly address the issue of non-derogability, stipulating that the ECHR is directly applicable in the BiH¹⁵⁹ or that it has the same legal force as constitutional provisions of the Constitution of the FBiH.¹⁶⁰ Since the ECHR specifies non-derogable rights, it may be concluded that the Constitution of the BiH and the Constitution of the FBiH also, to some extent, meet this indicator.¹⁶¹ However, it seems that the normative solutions of countries which explicitly foresee non-derogable rights in their respective constitutions are more transparent, which is conducive to legal certainty.

¹⁵⁸ Constitution of Montenegro (Ustav Crne Gore), “Official Gazette of Montenegro”, Nos. 1/2007 and 38/2013 – Amendments I-XVI, Article 25; Constitution of the Republic of Macedonia (Устав на Република Северна Македонија), “Official Gazette of the RM”, Nos. 52/91, 1/92, 31/98, 91/01, 84/03, 107/05, 3/09, 49/11, 6/19 and 36/19, Article 54; Constitution of the Republic of Serbia (Ustav Republike Srbije), “Official Gazette of the Republic of Serbia”, Nos. 98/2006 and 115/2021, Article 202; Constitution of the Republic of Srpska (Ustav Republike Srpske), “Official Gazette of the Republic of Srpska”, Nos. 21/92 – consolidated text, 28/94 – Amendments XXVI-XVIII, 8/96 – Amendments XLIV-LI, 13/96 – Amendments LII-XCII, 15/96 – corr., 16/96 – Amendment LIII, 21/96 – Amendments LIV-LXV, 21/02 – Amendments LXVI-XCII, 26/02 – corr., 30/02 – corr., 31/02 – Amendments XCIII-XCVIII, 69/02 – Amendments XCIX-CIII, 31/03 – Amendments CIV and CV, 98/03 – Amendments CVI-CXII, 115/05 – Amendment CXIV, and 117/05 – Amendments CXV-CXXI and 48/2011 – Amendment CXXII and “Official Gazette of the BiH” No. 73/2019 – CC decision, Article 81.

¹⁵⁹ Constitution of the Bosnia and Herzegovina (Ustav Bosne i Hercegovine), Annex IV General Framework Agreement for Peace in Bosnia and Herzegovina and “Official Gazette of the BiH”, No. 25/2009, Amendment I, Article 2, paragraph 2.

¹⁶⁰ Constitution of the Federation of Bosnia and Herzegovina (Ustav Federacije Bosne i Hercegovine), “Official Gazette of the Federation of Bosnia and Herzegovina” Nos. 1/94, 1/94, Amendment 1, 13/97, Amendments II-XXIV, 13/97 – Amendments XXV-XXVI, 16/02 – Amendments XXVII-LIV, 22/02 – Amendments LVI-LXIII, 52/2002 – Amendments LXIV-LXXXVII, 60/02 – corr. of Amendment LXXXI, 18/03 – Amendment LXXXVIII, 63/03 – Amendments LXXXIX-XCIV, 9/2004 – Amendments XCV-CII, 32/2007 – corr., 20/2004 – Amendments CIII and CIV, 33/2004 – Amendment CV, 71/2005 – Amendments CVI-CVIII, 72/2005 – Amendment CVI, 88/2008 – Amendment CIX and 79/2022 – Amendments CX-CXXX, Annex.

¹⁶¹ It is noteworthy that the ECtHR distinguishes cases wherein there is a violation of derogable rights from cases in which there is a violation of non-derogable rights, since its role is much more proactive when it comes to awarding damages for violations of those two categories of rights. See Čorić, V. 2017. *Naknada štete pred evropskim nadnacionalnim sudovima*. Beograd: Institut za uporedno pravo, p. 113.

Indicator 2

When the criminal legal framework sets out more severe punishments for crimes committed during a state of war, state of emergency or an armed conflict and the execution of a superior order would constitute such crime, the order should never be executed if it does not comply with minimum guarantees set out by international humanitarian law and international criminal law.

The criminal law frameworks of all the analysed countries, with the exception of the Republic of Serbia and Montenegro, provide for sufficient guarantees that a subordinate will be sentenced, if he/she commits a crime on superior command and by doing so violates the rules of international humanitarian or international criminal law. Although the wording of the relevant criminal law provisions vary across the countries, it is noteworthy that the criminal legislation of North Macedonia is the most advanced, since it stipulates that a subordinate shall be sentenced, if the criminal offence committed either constitutes genocide, a war crime or a crime against humanity, or fulfils the requirement that the subordinate knew that the received superior order was unlawful.¹⁶² It seems that the Criminal Law of the BiH unnecessarily introduces an additional criterion for the existence of a criminal offence, reflected in the maximum duration of potential imprisonment for criminal offences other than genocide and crimes against humanity.¹⁶³ Finally, the normative solutions in the Republic of Serbia and Montenegro seem inadequate, given that their criminal codes introduce only the criteria of prescribed maximum potential duration of imprisonment along with the subjective element of being aware of the unlawfulness of such an order when assessing whether a subordinate is to be sentenced for executing a superior order. By doing so, the criminal codes of the Republic of Serbia and of Montenegro failed to address the criterion of compliance with the rules of international humanitarian law and international criminal law.¹⁶⁴

Summary Assessment for the Standard

All of the analysed constitutions ensure, either explicitly or implicitly, human rights guarantees which are non-derogable under any circumstances, including a state of war, state of emergency or an armed conflict. While the constitutions of North

¹⁶² Criminal Code (Кривичниот законик) “Official Gazette of the Republic of North Macedonia” nos. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015, 97/2017 and 248/2018, Article 352.

¹⁶³ Criminal Law of the BiH (Krivični zakon Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 3/2003, 32/2003-corr., 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018 and 46/2021, Article 246.

¹⁶⁴ Criminal Code of Montenegro (Krivični zakonik Crne Gore), “Official Gazette of the RCG”, Nos. 70/2003, 13/2004, - correction and 47/2006 and „Official Gazette of Montenegro“, Nos. 40/2008, 25/2010, 32/2011, 64/2011-other law, 40/2013, 56/2013 – correction, 14/2015, 42/2015, 58/2015 – other law, 44/2017, 49/2018 and 3/2020, Article 485; Criminal Code (Krivični zakonik), “Official Gazette of the Republic of Serbia”, Nos. 85/2005, 88/2005-corr., 107/2005-corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019, Article 430.

Macedonia, the Republic of Serbia, Montenegro, and the Republic of Srpska clearly specify human rights and freedoms which are non-derogable under any circumstances, the constitutions of the BiH and FBiH are less explicit.

The criminal law frameworks of all the analysed countries, with the exception of the Republic of Serbia and Montenegro, provide for sufficient guarantees that a subordinate will be sentenced, if he/she commits a crime on superior command and by doing so violates the rules of international humanitarian or international criminal law. The criminal law provisions of North Macedonia are the most advanced, since they fully introduced the criterion of compliance with the rules of international humanitarian law and international criminal law, while the Criminal Law of the BiH unnecessarily imposed an additional criterion in that regard. Finally, the normative solutions in the Republic of Serbia and Montenegro are inadequate, since they failed to address the criterion of compliance with the rules of international humanitarian law and international criminal law.

Overall, the legal framework of North Macedonia is in line with the standard. On the other hand, the legal frameworks of the Republic of Serbia and Montenegro demonstrate some departure from the standard, while the legislation of the BiH shows significant departure from the standard. Please note that the second indicator within this standard was not applicable to the legal frameworks of the Republic of Srpska and the FBiH due to the specifics of their criminal statutes. Consequently, the second layer of assessment was not conducted for this standard with regard to the legal frameworks of the Republic of Srpska and the FBiH.

IT IS ENSURED THAT AN ORDER ISSUED DURING A STATE OF WAR, STATE OF EMERGENCY OR AN ARMED CONFLICT SHOULD NEVER BE EXECUTED, IF IT CONSTITUTES A BREACH OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. The constitutional legal framework ensures human rights guarantees which are non-derogable under any circumstances, including a state of war, state of emergency or an armed conflict.	0-3	1	1	3	3	3	3
2. When the criminal legal framework sets out more severe punishments for crimes committed during a state of war, state of emergency or an armed conflict and the execution of a superior order would constitute such crime, the order should never be executed, if it does not comply with minimum guarantees set out by international humanitarian law and international criminal law.	0-3	2	/	/	1	3	1
Total points		3	/	/	4	6	4
Average points		1.5	/	/	2	3	2
Standard	0-5	2	/	/	3	5	3

4.2. MILITARY SERVICE REGIME

Standard 1. It is ensured that civil servants are made aware that following an improper order of a superior is prohibited.

Indicator 1

Clear prohibition for a civil servant not to follow an improper order is provided for in the statute.

None of the analysed countries provides for a clear and all-encompassing prohibition for a person serving in the Armed Forces not to follow both unlawful and unethical superior orders. The legal framework of North Macedonia is the most advanced in that respect, given that both the Law on Service in the Armed Forces of the Republic of North Macedonia and the Law on Defence implicitly envisage this prohibition by stipulating that an order whose execution would constitute a criminal offence shall not be executed by a person serving in the Armed Forces.¹⁶⁵

Conversely, the legal frameworks of Montenegro and of the BiH do not contain a clear prohibition for persons in service in the Armed Forces not to follow unlawful or unethical orders of a superior.¹⁶⁶ Instead, both legal frameworks appear more flexible, as it stems from their provisions that persons serving in the Armed Forces are not prohibited from executing such an order. Instead, they are only entitled to refuse to execute an order that would constitute a criminal offence. A peculiar shortcoming of the BiH legal framework is that its provisions governing the execution of superior orders are applicable to military personnel only, but not to other categories of persons serving in the Armed Forces, such as civilian personnel.¹⁶⁷ Neither of the said two legal frameworks are sufficiently explicit in that regard and both contain legal gaps, since they set out an obligation to inform a designated person once they receive a superior order whose execution constitutes a criminal offence. Further, both laws failed to regulate whether such a superior order has to be subsequently refused or not.¹⁶⁸

Finally, the military legislation of the Republic of Serbia envisages inconsistent normative solutions in that respect. The Law on the Armed Forces of Serbia contains an insufficiently comprehensive prohibition, by stipulating that a superior order whose execution would constitute a criminal offence shall not be executed by a person serving in the

¹⁶⁵ Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), "Official Gazette of the Republic of Macedonia", Nos. 36/10, No. 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 71/16, and "Official Gazette of the Republic of North Macedonia", Nos. 101/19, 275/19, 14/20, and 171/22, Article 8; Law on Defence (Закон за одбрана), "Official Gazette of the Republic of Macedonia", Nos. 42/01, 5/03, 58/06, 110/08, 51/11, 151/11, 215/15, "Official Gazette of the Republic of North Macedonia" No. 42/20, Article 28.

¹⁶⁶ Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), "Official Gazette of Montenegro", Nos. 51/17 and 34/19.

¹⁶⁷ Article 17 of the Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18 read in conjunction with Article 3 of the same law.

¹⁶⁸ Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 17.

Armed Forces.¹⁶⁹ On the other hand, the Law on Defence contains different normative solutions, as it does not oblige, but only entitles a person serving in the Armed Forces to refuse to comply with an unlawful order.¹⁷⁰

Indicator 2

Clear prohibition for a civil servant not to follow an order whose execution would constitute a breach of international criminal law.

None of the legislations of the analysed countries foresees an explicit prohibition for a person serving in the Armed Forces not to follow an order whose execution would constitute a breach of international criminal law. The lack of such a prohibition is particularly apparent in Montenegro and BiH, given that the laws of those countries do not include an explicit prohibition not to execute any kind of improper superior order.¹⁷¹ The statutes of those two countries foresee that persons serving in the Armed Forces, or, in the case of Bosnia and Herzegovina, only military personnel, have to comply with international law in performing armed service in part dealing with the protection of the sovereignty and territorial integrity of the state.¹⁷² Those normative solutions are relevant since they refer to international law, which also includes international criminal law. However, it would be more adequate, if the analysed laws explicitly provided for a more specific prohibition not to obey any superior order whose execution would constitute a breach of international criminal law.

On the other hand, out of the countries whose laws include an explicit prohibition with regard to at least some kind of improper superior order, the legislation of North Macedonia contains a more consistent solution than the legal framework of the Republic of Serbia. Namely, the legal framework of North Macedonia contains an obligation of a person serving in the Armed Forces to act in line with ratified international treaties, which constitute one of the main sources of international criminal law.¹⁷³ Moreover, the given obligation has a broader scope of application compared to the aforementioned comparative solutions, as it is not limited only to situations where the protection of sovereignty and territorial integrity is at stake. However, the normative solution of North Macedonia failed to refer to other sources of international criminal law that

¹⁶⁹ Law on the Armed Forces of Serbia (Zakon o Vojsci Srbije), “Official Gazette of the Republic of Serbia”, Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC, Article 13, paragraph 1, point 5.

¹⁷⁰ Law on Defence (Zakon o odbrani), “Official Gazette of the Republic of Serbia”, Nos. 116/2007, 88/2009, 88/2009 – other law, 104/2009 – other law, 10/2015 and 36/2018, Article 8, paragraph 2.

¹⁷¹ See more on this: Standard 1, Indicator 1. Military Service Regime.

¹⁷² Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), “Official Gazette of Montenegro”, Nos. 51/17 and 34/19. Article 55, point 1 read in conjunction with Article 14 paragraph 1; Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 15, point a).

¹⁷³ Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), “Official Gazette of the Republic of Macedonia”, Nos. 36/10, No. 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 71/16, and “Official Gazette of the Republic of North Macedonia”, Nos. 101/19, 275/19, 14/20, and 171/22, Article 8; Law on Defence (Закон за одбрана), “Official Gazette of the Republic of Macedonia”, Nos. 42/01, 5/03, 58/06, 110/08, 51/11, 151/11, and 215/15, “Official Gazette of the Republic of North Macedonia” No. 42/20, Article 6, paragraph 1 read in conjunction with Article 1, paragraph 7 of the same law.

should be taken into account. Although the legal framework of North Macedonia provides for the single prohibition for a person serving in the Armed Forces to execute an order whose execution would constitute a criminal offence, it failed to include the prohibition to execute a superior order whose execution would constitute a violation of any of the sources of international criminal law.

On the other hand, in Serbia, the Law on the Armed Forces of Serbia and the Law on Defence provide different normative solutions in that respect. Moreover, provisions of the Law on the Armed Forces of Serbia are not internally consistent when it comes to an obligation to comply with international law. Initially, the Law on Armed Forces of Serbia stipulates that the respective Armed Forces shall perform competencies not only in line with the Constitution and national law but in compliance with international treaties and the principles of international law governing the use of force as well.¹⁷⁴ This normative solution is relevant, since it refers to international law that also includes international criminal law. However, the said provision failed to refer to other sources of international criminal law that should be taken into account. More importantly, the aforementioned Serbian provision is undermined by another provision of the same law, which governs the obligations of persons serving in the Armed Forces. Subject provision envisages that persons serving in the Armed Forces shall comply with the Constitution, national statutes and regulations, while not referring to any of the sources of international criminal law. It would be more adequate, if the Law on the Armed Forces of Serbia explicitly provided for a more specific prohibition not to obey any superior order whose execution would constitute a breach of international criminal law. On the other hand, the Law on Defence does not create any obligation, but only entitles a person serving in the Armed Forces to refuse to comply with an order which is contrary to the rules of international humanitarian law.¹⁷⁵

Indicator 3

There is an unambiguous statutory rule stipulating that a civil servant following an unlawful or unethical order from a superior will be held individually accountable.

None of the analysed countries provides for an unambiguous statutory rule stipulating that a person serving in Armed Forces executing an unlawful or unethical order from a superior will be held individually accountable. The legislations of the BiH and North Macedonia both envisage disciplinary responsibility for a person serving in the Armed Forces, or in the case of the BiH only for military personnel, who refuses to execute any superior orders, regardless of their lawfulness.¹⁷⁶ In a similar vein, the Serbian law

¹⁷⁴ Article 12, paragraph 1 of the Law on the Armed Forces of Serbia (Zakon o Vojsci Srbije), "Official Gazette of the Republic of Serbia", Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC.

¹⁷⁵ Article 8, paragraph 2 of the Law on Defence (Zakon o odbrani), "Official Gazette of the Republic of Serbia", Nos. 116/2007, 88/2009, 88/2009 – other law, 104/2009 – other law, 10/2015 and 36/2018.

¹⁷⁶ Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Articles 160 and 161; Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), "Official Gazette of the Republic of Macedonia", Nos. 36/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 71/16, and "Official Gazette of the Republic of North Macedonia," Nos. 101/19, 275/19, 14/20, and 171/22,

envisages disciplinary liability for a person serving in the Armed Forces, who refuses to comply with a superior order whose execution does not constitute a criminal offence, or alternatively for a person serving in the Armed Forces who does not execute any superior order, regardless of its lawfulness. Hence, instead of envisaging individual accountability for the cases when a person serving in the Armed Forces executes any improper superior order, the said laws accepted a different approach, which does not pay any attention (in the case of the BiH and North Macedonia) or does not pay sufficient attention (in the case of Serbia) to the question of the lawfulness of the executed order. The Montenegrin statutory framework pertaining to persons serving in Armed Forces is not internally consistent, as it initially foresees that a person is individually accountable for the legality, competence and efficiency of his/her performance, while subsequently, within the same statute, it prescribes disciplinary accountability for a person who does not execute or refuses to execute any superior order, regardless of its lawfulness.¹⁷⁷ The above shows that the Montenegrin lawmaker also opted for the approach which does not pay any attention to the question of the lawfulness of executed superior orders.

It is noteworthy that all the analysed laws at least release the persons serving in the armed forces (or in the case of BiH, military personnel) from the obligation to obey a superior order whose execution would constitute a criminal offence.¹⁷⁸ However, such normative solutions do not necessarily lead to the criminal liability of subordinates who executed such orders, since neither of the aforementioned laws is explicit in that regard, leaving the final say to criminal legislation and the specific circumstances of each case.

Indicator 4

The applicable disciplinary and misdemeanour framework does not create any confusion with regard to prohibition to follow an unlawful or unethical order from a superior.

Among the analysed countries there is no applicable disciplinary and misdemeanour framework that would clearly address the prohibition to obey both unlawful and unethical orders from a superior. The inadequate offence frameworks derive from the fact that none of those laws contains a clear and all-encompassing prohibition to follow an unlawful or unethical order from a superior.¹⁷⁹ Montenegrin and BiH legislation do not

Article 8; Law on Defence (Закон за одбрана), "Official Gazette of the Republic of Macedonia", Nos. 42/01, 5/03, 58/06, 110/08, 51/11, 151/11, 215/15, "Official Gazette of the Republic of North Macedonia" No. 42/20, Article 131.

¹⁷⁷ Law on the Armed Forces of Montenegro (Закон о Војсци Црне Горе), „Official Gazette of Montenegro“, Nos. 51/17 and 34/19, Article 157.

¹⁷⁸ Law on Service in the Armed Forces of the BiH (Закон о служби у Оружаном снагама Босне и Херцеговине), "Official Gazette of the BiH", Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Articles 21; Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), "Official Gazette of the Republic of Macedonia", Nos. 6/10, 132/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 193/15, 71/16, and "Official Gazette of the Republic of North Macedonia", Nos. 101/19, 275/19, 14/20, and 171/22, Article 8; Law on Defence (Закон за одбрана), "Official Gazette of the Republic of Macedonia", Nos. 42/01, 5/03, 58/06, 110/08, 51/11, 151/11, and 215/15, "Official Gazette of the Republic of North Macedonia" No. 42/20, Article 8.

¹⁷⁹ See more on this: Standard 1, Indicator 1, Military Service Regime.

explicitly foresee a statutory prohibition to follow any kind of improper orders; they also do not envisage appropriate disciplinary and misdemeanour frameworks in that regard.¹⁸⁰ Such normative solutions contribute to existing confusion with regard to the exact scope of the prohibition to follow improper orders. More specifically, those laws did not specify that only refusal of execution of lawful or ethical superior orders may constitute a disciplinary offence. Instead, the laws of Montenegro and of the BiH contain a disciplinary offence amounting to the refusal of a civil servant to execute any order, thus failing to distinguish between procedures that should be applied to unlawful and lawful orders respectively.¹⁸¹

On the other hand, the laws of North Macedonia and of the Republic of Serbia, which provide for the prohibition to execute an order whose execution constitutes a criminal offence, also do not contain sufficiently appropriate disciplinary and misdemeanour frameworks that would eliminate any confusion with regard to the scope of the said prohibition.¹⁸² The statutory disciplinary framework of North Macedonia additionally creates confusion by failing to distinguish between lawful and unlawful orders, given that it stipulates that each refusal of a person serving in the Armed Forces to commit superior orders amounts to a disciplinary offence.¹⁸³ The military legislation of the Republic of Serbia is also inadequate in this respect, since it does not provide for clear and consistent criteria when it comes to determining disciplinary offences which are applicable to persons serving in the Armed Forces. While the scope of disciplinary offence of a refusal to execute a superior order is limited only to superior orders whose execution does not constitute criminal offences,¹⁸⁴ the same is not the case with the disciplinary offence of non-execution of superior order or its negligible, reckless, incomplete and untimely execution, since latter offences are applicable to any superior orders, regardless of its lawfulness.¹⁸⁵ Finally, the Law

¹⁸⁰ See more on this: Standard 1, Indicator 1, Military Service Regime.

¹⁸¹ Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), „Official Gazette of Montenegro“, Nos. 51/17 and 34/19, Article 157; Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Articles 160 and 161.

¹⁸² Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), “Official Gazette of the Republic of Macedonia”, Nos. 36/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 71/16, and “Official Gazette of the Republic of North Macedonia”, Nos. 101/19, 275/19, 14/20, and 171/22, Article 8; Law on Defence (Закон за одбрана), “Official Gazette of the Republic of Macedonia”, Nos. 42/01, 5/03, 58/06, 110/08, 51/11, 151/11, 215/15, and “Official Gazette of the Republic of North Macedonia” No. 42/20, Article 131; Law on the Armed Forces of Serbia (Zakon o Vojsci Srbije), “Official Gazette of the Republic of Serbia”, Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC, Articles 148 and 149.

¹⁸³ Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), “Official Gazette of the Republic of Macedonia”, Nos. 36/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 71/16, and “Official Gazette of the Republic of North Macedonia”, Nos. 101/19, 275/19, 14/20, and 171/22, Article 8; Law on Defence (Закон за одбрана), “Official Gazette of the Republic of Macedonia”, Nos. 42/01, 5/03, 58/06, 110/08, 51/11, 151/11, 215/15, and “Official Gazette of the Republic of North Macedonia” No. 42/20, Article 131.

¹⁸⁴ Law on the Armed Forces of Serbia (Zakon o Vojsci Srbije), “Official Gazette of the Republic of Serbia”, Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC), Article 149, paragraph 1, point 1.

¹⁸⁵ Law on the Armed Forces of Serbia (Zakon o Vojsci Srbije), “Official Gazette of the Republic of Serbia”, Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC), Article 148, paragraph 1, point 8a and Article 149, paragraph 1, point 2.

on the Armed Forces of Serbia and the Law on Defence do not include relevant misdemeanour offences as well.

Summary Assessment for the Standard

None of the analysed countries provides for a clear and all-encompassing prohibition for a person serving in the Armed Forces to follow both unlawful and unethical superior orders. The legal framework of North Macedonia is the most advanced in that respect, as it implicitly provides for the prohibition by stipulating that an order whose execution would constitute a criminal offence shall not be executed by a person serving in the Armed Forces. Serbian legal framework contains inconsistent normative solutions in that respect. While the Law on the Armed Forces of Serbia contains the same prohibition as the legislation of North Macedonia, the Serbian Law on Defence contains different normative solutions, as it does not oblige, but only entitles a person serving in the Armed Forces to refuse to comply with an unlawful order. The laws of Montenegro and of the BiH are more flexible, since they do not oblige, but instead only entitle persons serving in the Armed Forces to refuse to execute an order whose execution constitutes a criminal offence.

None of the analysed countries provides for an explicit prohibition for a person serving in the Armed Forces to follow an order whose execution would constitute a breach of international criminal law. The statutes of all the analysed countries foresee that a person serving in the Armed Forces, (or, in the case of the BiH only military personnel), has to comply either with areas of international law or with all the ratified international treaties in performing armed service. Although those normative solutions are considered relevant, it would be more adequate if the analysed laws explicitly envisaged a concrete prohibition not to obey any superior order whose execution would constitute a breach of international criminal law.

None of the analysed countries provides for an unambiguous statutory rule stipulating that a person serving in Armed Forces executing an improper order from a superior will be held individually accountable. Instead of envisaging a disciplinary responsibility for the cases when one executes an improper superior order, the laws of each of the countries accepted a different approach, which does not pay any or does not pay sufficient attention to the question of the lawfulness of the executed superior order. With the exception of the Republic of Serbia, all their laws clearly stipulate that each refusal of a person serving in the Armed Forces to commit superior orders amounts to a disciplinary offence, thus not distinguishing between regimes which should be applied to the execution of unlawful and lawful orders respectively. Consequently, there is no applicable disciplinary and misdemeanour framework in place, which would clearly address the prohibition to obey both unlawful and unethical orders from a superior, and by doing so, eliminate existing confusion. There are legal provisions in all the countries that at least release the persons serving in the armed forces (or in the case of BiH, military personnel) from the obligation to obey a superior order whose execution would constitute a criminal offence. However, such

normative solutions do not necessarily lead to criminal liability of subordinates who executed such orders. The laws are not explicit in that regard, leaving the final say to criminal legislation and to the specific circumstances of each individual case. The BiH legal framework has a particular shortcoming, that its provisions governing the execution of superior orders are applicable to military personnel only, but not to other categories of persons serving in the Armed Forces, such as civilian personnel. The rationale behind such a fragmented approach of the BiH lawmaker is missing.

In a nutshell, the legal frameworks of the BiH and of Montenegro are not in line with the standard, while the legislations of North Macedonia and the Republic of Serbia are mostly not in line with the standard.

IT IS ENSURED THAT CIVIL SERVANTS ARE MADE AWARE THAT FOLLOWING AN IMPROPER ORDER OF A SUPERIOR IS PROHIBITED

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. Clear prohibition for a civil servant not to follow an improper order is provided for in the statute.	0-3	0	/	/	1	2	0
2. Clear prohibition for a civil servant not to follow an order whose execution would constitute a breach of international criminal law.	0-3	1	/	/	1	2	1
3. There is an unambiguous statutory rule stipulating that a civil servant following an unlawful or unethical order from a superior will be held individually accountable.	0-3	0	/	/	0	0	0
4. The applicable disciplinary framework does not create any confusion with regard to prohibition to follow an unlawful or unethical order from a superior.	0-3	0	/	/	1	0	0
5. The constitutional legal framework clearly provides for the direct applicability of ratified international treaties, international customary law and peremptory norms of international law.	0-3	0	/	/	2	0	1
Total points		1	/	/	5	4	2
Average points		0.2	/	/	1	0.8	0.4
Standard	0-5	0	/	/	1	1	0

Standard 2. The set of obligations to be taken by a civil servant, when he/she believes that an order received from a superior is unlawful or unethical, is clearly set out in the statute.

Indicator 1

A civil servant who believes that an order received from a direct superior is unlawful or unethical is obliged by a statute to warn a direct superior.

Legal frameworks of all the analysed countries do not contain a statutory obligation of a person serving in the Armed Forces to warn a direct superior, if he/she believes that an order received from a direct superior is unlawful or unethical. Out of the analysed countries, the military legislation of North Macedonia contains the most adequate normative solution, although not meeting the set indicator, as it foresees that a person serving in the Armed Forces is obliged to inform her/his direct superior or the immediate superior of the person who issued the order about the superior order, if its execution would constitute a criminal offence.¹⁸⁶ On the other hand, the Serbian military legislation specifies that a person serving in the Armed Forces who want to be exempted from liability for the damage caused by the execution of the superior order has to warn a direct superior in written form and in advance that the execution of the order may cause damage.¹⁸⁷ The given provision is not sufficient, having in mind that it does not introduce a comprehensive obligation for a person serving in the Armed Forces to warn a direct superior once he/she receives any kind of allegedly unlawful or unethical order. The legal frameworks of the BiH and Montenegro do not set out any similar statutory obligation.¹⁸⁸

Indicator 2

A civil servant who believes that an order received from a direct superior is unlawful or unethical is bound by a statute to require a direct superior to repeat it in written form.

An all-encompassing statutory obligation of a person serving in the Armed Forces to require a direct superior to repeat an order received in written form, if he/she believes that it is unlawful or unethical, is not in place in any of the analysed countries. The most comprehensive obligation is set out in the Serbian military legislation, which stipulates that a person serving in the Armed Forces shall require a direct superior to repeat the issued order in writing, if he/she believes that it is unlawful. However, the

¹⁸⁶ Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), “Official Gazette of the Republic of Macedonia”, Nos. 36/10, No. 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 71/16, and “Official Gazette of the Republic of North Macedonia”, Nos. 101/19, 275/19, 14/20, 171/22, Article 8, paragraph 6.

¹⁸⁷ Law on the Armed Forces of Serbia (Закон о Војсци Србије), “Official Gazette of the Republic of Serbia”, Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC), Article 176, paragraph 1.

¹⁸⁸ Law on the Armed Forces of Montenegro (Закон о Војсци Црне Горе), “Official Gazette of Montenegro”, Nos. 51/17 and 34/19, Article 57; Law on Service in the Armed Forces of the BiH (Закон о служби у Оружаним снагама Босне и Херцеговине), “Official Gazette of the BiH”, Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 17.

Serbian lawmaker failed to introduce the same obligation for allegedly lawful, but unethical orders received from a superior.¹⁸⁹ The military statute of Montenegro does include a similar obligation, but only limited to situations, where execution of a received superior order would constitute a criminal offence.¹⁹⁰ The military legal frameworks of other analysed countries do not contain such an obligation.¹⁹¹

Indicator 3

A civil servant who believes that an order received from a direct superior is unlawful or unethical is required by a statute to directly report all details of the case in writing to designated persons within the institution, regardless of the fact whether the respective unlawful or unethical order was received in written or unwritten form. The notion of “designated person within the institution” refers to the respective head or the immediate superior of the person who issued the order, as well as to another designated person responsible for the legality and integrity of the institution’s operation.

None of the analysed military legislations fully introduced a statutory obligation of a person serving in the Armed Forces to directly report to a designated person in writing all the details of the case pertaining to an allegedly unlawful or unethical superior order, regardless of whether the respective order was received in written or unwritten form. A common trait of all the analysed legal frameworks is that the said statutory obligation is not introduced with regard to unethical superior orders, which are not considered unlawful.¹⁹² As for the scope of the corresponding statutory obligation in those countries, it is noteworthy that their respective military statutes failed to specify that a designated person shall be informed in writing about all details of the case, thus opening the door to avoidance of written form of communication, but also allowing an opportunity for involved parties to avoid revealing all the details of the case. In addition, in Montenegro and in the Republic of Serbia, the said statutory obligation to report is limited to situations where such an unlawful superior order has been repeated. Finally, in the BiH the introduced statutory obligation is applicable only

¹⁸⁹ Law on the Armed Forces of Serbia (Zakon o Vojsci Srbije), “Official Gazette of the Republic of Serbia”, Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC), Article 13, paragraph 1, point 4.

¹⁹⁰ Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), “Official Gazette of Montenegro“, Nos. 51/17 and 34/19, Article 57.

¹⁹¹ Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), “Official Gazette of the Republic of Macedonia”, Nos. 36/10, No. 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 71/16, and “Official Gazette of the Republic of North Macedonia”, Nos. 101/19, 275/19, 14/20, and 171/22, Article 8; Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 17.

¹⁹² Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), “Official Gazette of the Republic of Macedonia”, Nos. 36/10, No. 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 71/16, and “Official Gazette of the Republic of North Macedonia”, Nos. 101/19, 275/19, 14/20, and 171/22, Article 8; Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), „Official Gazette of Montenegro“, Nos. 51/17 and 34/19, Article 57, paragraph 3; Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 17, paragraph 2.

to military personnel, while not to other categories of persons serving in the Armed Forces.¹⁹³

The military legislations of Montenegro and of the BiH which deal with reporting allegedly improper orders stipulate that it shall be done to an immediate superior of the person who issued the order. In a similar vein, the military statute of North Macedonia states that it shall be reported either to an immediate superior of the person who issued the order or, alternatively, to a direct superior,¹⁹⁴ while the Serbian military law determines that it shall be done to an immediate superior of the person who issued the repeated order and/or to another competent person.¹⁹⁵ The normative framework of North Macedonia and of the Republic of Serbia should be improved from the standpoint of ensuring impartiality, by foreseeing that both specified persons have to be informed. On the other hand, the current military legislation of North Macedonia stipulates that it is sufficient to inform either an immediate superior of the person who issued the order, or a direct superior. Similarly, the Serbian normative solution is also not currently formulated unambiguously, since it is not clear whether one needs to inform both the immediate superior of the person who issued the repeated order and another competent person, or it is sufficient to inform only one of them. The military statute of Montenegro has a more adequate solution in that respect, since it additionally foresees that the Minister of Defence is to be notified that a person serving in the Armed Forces informed her/his immediate superior of a person who issued an order that the execution of a written order would constitute a criminal offence. It appears that all those persons can be considered as designated persons within the institution within the meaning of this indicator. However, the possibility of informing only one of the designated persons without providing further justification for such a decision seems inadequate.

Summary assessment for the standard

The legal frameworks of the analysed countries do not contain the statutory obligation of a person serving in the Armed Forces to warn a direct superior, if he/she believes that an order received from a direct superior is unlawful or unethical. The military statutes of North Macedonia and of the Republic of Serbia include similar statutory obligations, although their scope is quite reduced. While the statute of North Macedonia limited the said obligation to situations where the execution of the received superior order would constitute a criminal offence, the Serbian law formulated the respective obligation as to be applicable only to cases when execution of a superior order

¹⁹³ Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 17, paragraph 2.

¹⁹⁴ Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), "Official Gazette of the Republic of Macedonia", Nos. 6/10, 132/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 193/15, 71/16, and "Official Gazette of the Republic of North Macedonia", Nos. 101/19, 275/19, 14/20, and 171/22, Article 8; Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), "Official Gazette of Montenegro", Nos. 51/17 and 34/19, Article 57, paragraph 3; Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 17, paragraph 2.

¹⁹⁵ Law on the Armed Forces of Serbia (Zakon o Vojsci Srbije), "Official Gazette of the Republic of Serbia", Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC, Article 13, paragraph 1, point 4.

by a person serving in the Armed Forces may cause damage. Other legal frameworks do not introduce such a statutory obligation.

An all-encompassing statutory obligation of a person serving in the Armed Forces to require a direct superior to repeat a received order in written form, if he/she believes that it is unlawful or unethical, is not in place in the analysed countries. The military legislation of Serbia is the most advanced in that respect, since it includes a similar obligation, but which is applicable only to unlawful orders, while the obligation set out in Montenegrin military legislation has a more restricted scope. Namely, it is limited to situations where the execution of the received superior order would constitute a criminal offence. The military legal frameworks of the BiH and of North Macedonia failed to introduce such obligations completely.¹⁹⁶

None of the analysed military legislations fully introduced the statutory obligation of a person serving in the Armed Forces to directly report in writing to a designated person all the details of the case pertaining to an allegedly unlawful or unethical superior order, regardless of whether the respective order was received in written or unwritten form. Such an obligation was subject to various limitations in the analysed countries. It is common for all those countries that the said statutory obligation has not been introduced with regard to unethical superior orders that are not considered unlawful. When it comes to the scope of the corresponding statutory obligation in all the analysed countries, it is noteworthy that their respective military statutes failed to specify that a designated person shall be informed in writing about all details of the case, thus opening the door to avoidance of written form of communication, but also allowing an opportunity for involved parties to avoid revealing all the details of the case. In addition, in Montenegro and in the Republic of Serbia, the said statutory obligation to report is limited to situations where such an unlawful superior order has been repeated.

The legal frameworks of all the analysed countries designate persons to whom all details of the allegedly inadequate superior orders should be directly reported within the meaning of this indicator. However, the possibility of informing only one of the several persons designated by the national law without providing any sound explanation of the choice made seems rather problematic.

Overall, the legal framework of the Republic of Serbia shows significant departures from the standard, while the legislations of North Macedonia and Montenegro are mostly not in line with the standard. On the other hand, the BiH military legislation is not in line with the standard.

¹⁹⁶ Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), "Official Gazette of the Republic of Macedonia", Nos. 6/10, 132/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 193/15, 71/16, and "Official Gazette of the Republic of North Macedonia", Nos. 101/19, 275/19, 14/20, and 171/22, Article 8; Law on Service in the Armed Forces of the BiH (Закон о служби у Оружаном снагама Босне и Херцеговине), "Official Gazette of the BiH", Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 17.

IT IS ENSURED THAT CIVIL SERVANTS ARE MADE AWARE THAT FOLLOWING AN IMPROPER ORDER OF A SUPERIOR IS PROHIBITED

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. A civil servant who believes that an order received from a direct superior is unlawful or unethical is obliged by a statute to warn a direct superior.	0-3	0	/	/	1	1	0
2. A civil servant who believes that an order received from a direct superior is unlawful or unethical is bound by a statute to require a direct superior to repeat it in written form.	0-3	0	/	/	2	0	1
3. A civil servant who believes that an order received from a direct superior is unlawful or unethical is required by a statute to directly report all details of the case in writing to designated persons within the institution, regardless of the fact whether the respective unlawful or unethical order was received in written or unwritten form.	0-3	1	/	/	1	1	1
Total points		1	/	/	4	2	2
Average points		0.33	/	/	1.33	0.66	0.66
Standard	0-5	0	/	/	2	1	1

Standard 3. The safe and confidential mechanism is determined by a statute in order to advise and guide a subordinate on how to react in the case when he/she believes that an order received from a direct superior is unlawful or unethical.

Indicator 1

Availability of the respective hotline channels or other trustful mechanisms to a civil servant who believes that an order received from a direct superior is unlawful or unethical is determined by a statute. The civil servant should be advised through the given mechanism whether the given conduct would constitute a criminal offence, misdemeanour or any other offence, as well as whether the case could be reported to a competent public prosecution office or police. In that context, the civil servant has statutory right to ask anonymously for advice.

None of the statutes of analysed countries provides for availability of trustful mechanisms to advise and guide a person serving in the Armed Forces who believes that an order received from a direct superior is unlawful or unethical. All the analysed legal systems fully failed to address both the right to ask anonymously for advice in that regard, as well as to designate a trustful mechanism in charge of advising and guiding a person serving in the Armed Forces in the case of such a doubt. The normative systems of the BiH and North Macedonia do envisage an obligation of a person serving in the Armed Forces to inform a designated person, once he/she receives an order whose execution would allegedly constitute a criminal offence. In a similar vein, Montenegrin law and Serbian law require that designated persons have to be informed when a subordinate repeatedly receives an allegedly unlawful superior order.¹⁹⁷ However, such an obligation to “inform” cannot be equated with the right to “anonymously ask for advice”. Moreover, some of the analysed countries, such as Montenegro and the BiH, do establish mechanisms providing protection of rights of persons of the Armed Forces, once they address such a mechanism.¹⁹⁸ However, they cannot be considered as trustful mechanisms mandated for consulting a person serving in the Armed Forces when they need any advice.

Indicator 2

Qualifications of the staff of the respective hotline channels or other trustful mechanisms are specified by secondary legislation. Their staff is qualified to advise, *inter alia*, whether the execution of a certain order by a superior would constitute a criminal offence, misdemeanour or give rise to civil liability. The staff is also qualified to advise whether the certain order complies with international human rights, international criminal law and humanitarian law.

The bylaws establishing the appropriate mechanisms followed by the required qualifications of their staff were not identified in any of the analysed countries.

¹⁹⁷ See Standard 2, Indicators 1 and 3, Military Service Regime.

¹⁹⁸ Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), “Official Gazette of Montenegro”, Nos. 51/17 and 34/19, Article 61; Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 21.

Summary Assessment for the Standard

None of the analysed countries provide for availability of trustful mechanisms to advise and guide a person serving in the Armed Forces, who believes that an order received from a direct superior is unlawful or unethical.

No bylaws establishing the appropriate mechanisms and required qualifications of their staff were identified in any of the analysed countries.

Consequently, all the analysed legislative frameworks are not in line with the given standard.

ITHE SAFE AND CONFIDENTIAL MECHANISM IS DETERMINED BY A STATUTE IN ORDER TO ADVISE AND GUIDE A SUBORDINATE HOW TO REACT IN CASE WHEN HE/SHE BELIEVES THAT AN ORDER RECEIVED FROM A DIRECT SUPERIOR IS UNLAWFUL OR UNETHICAL

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. Availability of the respective hotline channels or other trustful mechanisms to a civil servant who believes that an order received from a direct superior is unlawful or unethical is determined by a statute. The civil servant should be advised through the given mechanism whether the given conduct would constitute a criminal offence, misdemeanour or any other offence, as well as whether the case could be reported to a competent public prosecution office or police. In that context, the civil servant has a statutory right to ask anonymously for advice.	0-3	0	/	/	0	0	0
2. Qualifications of the staff of the respective hotline channels or other trustful mechanisms are specified by secondary legislation. Their staff is qualified to advise, <i>inter alia</i> , whether a certain superior order is unlawful or unethical. The staff is also qualified to advise whether the certain order complies with international human rights, international criminal law and humanitarian law.		0	/	/	0	0	0
Total points	0	0	/	/	0	0	0
Average points	0	0	/	/	0	0	0
Standard	0-5	0	/	/	0	0	0

Standard 4. Effective complaint mechanisms are determined by a statute for civil servants, whose rights are threatened or denied as a result of refusal to comply with an unlawful or unethical superior order.

Indicator 1

Internal mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. inspectorates, ethical committees).

None of the analysed military statutes provides for effective internal complaint mechanisms for persons serving in the Armed Forces whose rights are threatened or denied as a result of refusal to comply with unlawful or unethical superior orders. The lack of adequate internal complaint mechanisms for those situations is primarily a consequence of the fact that none of the analysed military laws contains the all-encompassing prohibition against following an unlawful or unethical superior order. The military legislations of Montenegro and the BiH foresee that a person serving in the Armed Forces or, in the case of BiH, military personnel, who addresses a defence inspector or files a complaint to a direct superior is released from an obligation to execute a superior order, if that would constitute a criminal offence, until a relevant decision is rendered.¹⁹⁹ However, such normative solutions are not sufficient for meeting this indicator, as in both stated countries, a person serving in the Armed Forces is not allowed to refuse other unlawful and unethical superior orders. Further, their military laws do not establish any mechanism for sanctioning those who threaten persons serving in the Armed forces due to their refusal to comply with an improper superior order.

Indicator 2

External mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. an administrative instance and the court).

None of the analysed military laws establishes external complaint mechanisms to provide effective protection for persons serving in the Armed Forces whose rights are threatened or denied as a result of refusal to comply with any kind of unlawful or unethical order. The apparent lack of established external complaint mechanisms, as well as of internal mechanisms, results from the fact that most of the analysed countries oblige a person serving in the Armed Forces or, in the case of the BiH, military personnel, to execute all the unlawful and unethical superior orders with the exception of those whose executions would constitute a criminal offence. Therefore, it seems that due to the lack of clear prohibition to execute all kinds of improper orders, the current legal frameworks of analysed countries do not establish complaint mechanisms to provide effective protection for persons serving in the Armed Forces, whose rights are threatened or denied as a result of refusal to comply with any kind of improper order.

¹⁹⁹ Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 17. Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), „Official Gazette of Montenegro“, Nos. 51/17 and 34/19, Article 61.

Indicator 3

Retaliation against civil servants who refused compliance with unlawful or unethical instructions is forbidden and those who retaliate incur administrative or criminal liability.

None of the analysed military laws forbids retaliation against persons serving in the Armed Forces who refuse compliance with improper instructions, nor do they include provisions stating that those who retaliate incur administrative or criminal liability. Moreover, no explicit offences are introduced in that regard. All of the analysed countries do contain disciplinary offences that can be applicable to those who retaliate. However, those disciplinary offences do not specifically address cases where a person serving in the Armed Forces is subject to retaliation. Instead, disciplinary offences, such as abuse of office or exceeding the authority of a person serving in the Armed Forces (or, in the case of BiH of military personnel), are very broadly formulated. This adversely affects their effectiveness and overall legal security.²⁰⁰ Due to the above stated, the liability of those who retaliate cannot be adequately addressed through such disciplinary offences.

Summary Assessment for the Standard

None of the analysed military laws establishes either internal or external complaint mechanisms to provide effective protection for persons serving in the Armed Forces, whose rights are threatened or denied as a result of refusal to comply with any kind of unlawful or unethical order. The apparent lack of adequate internal and external complaint mechanisms for those situations is primarily a consequence of the fact that none of the analysed military laws contains the all-encompassing prohibition not to follow an unlawful or unethical superior order.

Moreover, none of the analysed military laws forbids retaliation against persons serving in the Armed Forces who refuse compliance with improper instructions and do not include a provision stating that those who retaliate incur administrative or criminal liability. Most of the analysed countries contain disciplinary offences, such as abuse of office or exceeding the authority of a person serving in the Armed Forces or, in the case of the BiH, of military personnel, which can be applicable to those who retaliate. However, those disciplinary offences are very broadly formulated, which has an adverse impact on their effectiveness. Hence, the liability of those who retaliate cannot be adequately addressed through such disciplinary offences. Consequently, all the analysed legislative frameworks are not in line with the given standard.

²⁰⁰ Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), „Official Gazette of Montenegro“, Nos. 51/17 and 34/19, Article 157, paragraph 1, point 4; Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), „Official Gazette of the BiH“, Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 161, paragraph 1, point e); Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), „Official Gazette of the Republic of Macedonia“, Nos. 36/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 71/16, and „Official Gazette of the Republic of North Macedonia“, Nos. 101/19, 275/19, 14/20, and 171/22, Articles 131, paragraph 1, point 11. In addition to the two aforementioned disciplinary offenses, please note that the legal framework of the Republic of Serbia also contains one additional applicable disciplinary offense: improper conduct with superiors and subordinates. See Law on the Armed Forces of Serbia (Zakon o Vojsci Srbije), „Official Gazette of the Republic of Serbia“, Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC, Article 148, paragraph 1, point 6 and Article 149, paragraph 1, points 10 and 12.

EFFECTIVE COMPLAINT MECHANISMS ARE DETERMINED BY A STATUTE FOR CIVIL SERVANTS, WHOSE RIGHTS ARE THREATENED OR DENIED AS A RESULT OF REFUSAL TO COMPLY WITH AN UNLAWFUL OR UNETHICAL SUPERIOR ORDER

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. Internal mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. inspectorates, ethical committees).	0-3	0	/	/	0	0	0
2. External mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. an administrative instance and the court).	0	0	/	/	0	0	0
3. Retaliation against officials who refused compliance with unlawful or unethical instructions is forbidden and those who retaliate incur administrative or criminal liability.	0-3	0	/	/	0	0	0
Total points		0	/	/	0	0	0
Average points		0	/	/	0	0	0
Standard	0-5	0	/	/	0	0	0

Standard 5. Disciplinary offences and procedures adequately support and strengthen protection with regard to unlawful and unethical superior orders.

Indicator 1

A specific disciplinary or misdemeanour offence amounting to knowingly issuing an unlawful or unethical order by a superior, including a high-ranking officer, is set out in a statute.

None of the four analysed military legal frameworks prescribe a disciplinary or misdemeanour offence of knowingly issuing either an unlawful or unethical order by a superior. The same applies to such an offence in cases where a superior is a high-ranking officer.²⁰¹ The legal frameworks of all of the analysed countries comprise a disciplinary offence of abuse of office or of exceeding the authority by a person serving in the armed forces (or in the case of the BiH by military personnel).²⁰² In addition, the Serbian legislation includes one more disciplinary offence, which might be relevant in this regard. That offence is referred to as improper conduct with superiors and subordinates.²⁰³ Such disciplinary offences can be applicable to a superior who knowingly issues an improper order. However, those disciplinary offences are very broadly and vaguely formulated, which negatively affects their effectiveness and overall legal security. For that reason, those disciplinary offences are not an avenue to address specifically and adequately the liability of a superior, including a high-ranking officer who knowingly issues unlawful or unethical orders.

Indicator 2

A specific disciplinary offence amounting to knowingly issuing an unlawful or unethical order by persons performing the tasks of senior management and heads of administrative bodies is set out in a statute.

None of the analysed national legal frameworks contain a disciplinary or misdemeanour offence of knowingly issuing either an unlawful or unethical order by persons performing the tasks of senior management and heads of administrative bodies.²⁰⁴

²⁰¹ See Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), "Official Gazette of Montenegro", Nos. 51/17 and 34/19, Articles 156 and 157; Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Articles 160 and 161; Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), "Official Gazette of the Republic of Macedonia", Nos. 6/10, 132/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 193/15, 71/16, and "Official Gazette of the Republic of North Macedonia", Nos. 101/19, 275/19, 14/20, and 171/22, Articles 129 and 131.

²⁰² Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), "Official Gazette of Montenegro", Nos. 51/17 and 34/19, Article 157 paragraph 1, point 4; Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim snagama Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 161 paragraph 1, point e); Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), "Official Gazette of the Republic of Macedonia", Nos. 6/10, 132/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 193/15, 71/16, and "Official Gazette of the Republic of North Macedonia", Nos. 101/19, 275/19, 14/20, and 171/22, Articles 131, paragraph 1, point 11.

²⁰³ Law on the Armed Forces of Serbia (Zakon o Vojsci Srbije), "Official Gazette of the Republic of Serbia", Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC), Article 148, paragraph 1, point 6 and Article 149, paragraph 1, points 10 and 12.

²⁰⁴ Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), "Official Gazette of Montenegro", Nos. 51/17 and 34/19, Articles 156 and 157; Law on Service in the Armed Forces of the BiH (Zakon o službi u Oružanim

Indicator 3

A statute determines disciplinary offences for non-execution of superior orders, which are graded depending on the severity of particular conduct.

Out of all the analysed countries, only the legal frameworks of the BiH and of the Republic of Serbia set out disciplinary offences for non-execution of superior orders which are, to some extent, graded based on the severity of particular conduct. Although the laws of North Macedonia and Montenegro do classify disciplinary offences into serious and minor offences, they fail to grade disciplinary offences for non-execution of superior orders based on the severity of particular conduct. Instead, the stated laws consider each disciplinary offence of non-execution of superior orders as a serious disciplinary offence, thus failing to distinguish its minor form from its serious form.²⁰⁵ On the other hand, the BiH and Serbian laws classify disciplinary offences into minor and serious (depending on the severity of particular conduct). Consequently, the BiH law grades a disciplinary offence for non-execution of superior orders as a minor form of offence titled “untimely or incomplete execution of superior order”,²⁰⁶ while the serious form of offence is referred to as “non-execution or refusal to execute superior orders”.²⁰⁷ The Serbian law utilizes similar terminology, grading the said disciplinary offence as the minor form of offence titled “untimely, incompletely or reckless execution of superior order”,²⁰⁸ while its serious form is referred to as “refusal to execute a superior order, whose execution does not constitute a criminal offence” as well as to “non-execution of superior order or its negligent execution”.²⁰⁹ The normative solutions in the BiH and in the Republic of Serbia seem adequate, since the said disciplinary offence is graded in both national laws based on the severity of particular conduct. However, it appears that the demarcation criterion has to be modified in order to allow better assessment and to address the severity of particular conduct by taking into account the lawfulness of the issued superior order.

snagama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Articles 160 and 161; Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), “Official Gazette of the Republic of Macedonia”, Nos. 6/10, 132/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 193/15, 71/16, and “Official Gazette of the Republic of North Macedonia”, Nos. 101/19, 275/19, 14/20, and 171/22, Articles 129 and 131, Articles 129 and 131; See more on this: Standard 5, Indicator 1, Military service regime.

²⁰⁵ Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), “Official Gazette of the Republic of Macedonia”, Nos. 6/10, 132/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 193/15, 71/16, and “Official Gazette of the Republic of North Macedonia”, Nos. 101/19, 275/19, 14/20, and 171/22, Article 8; Law on Defence (Закон за одбрана), “Official Gazette of the Republic of Macedonia”, Nos. 42/01, 5/03, 58/06, 110/08, 51/11, 151/11, 215/15, “Official Gazette of the Republic of North Macedonia” No. 42/20, Article 131; Law on the Armed Forces of Montenegro (Закон о Војсци Црне Горе), “Official Gazette of Montenegro”, Nos. 51/17 and 34/19, Article 157.

²⁰⁶ Law on Service in the Armed Forces of the BiH (Закон о служби у Оружаним snagama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 160, paragraph 1, point a).

²⁰⁷ Law on Service in the Armed Forces of the BiH (Закон о служби у Оружаним snagama Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 88/05, 53/07, 59/09, 74/10, 42/12, 41/16 and 38/18, Article 161, paragraph 1, point e).

²⁰⁸ Article 148, point 8a of the Law on the Armed Forces of Serbia (Закон о Војсци Србије), “Official Gazette of the Republic of Serbia”, Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC.

²⁰⁹ Law on the Armed Forces of Serbia (Закон о Војсци Србије), “Official Gazette of the Republic of Serbia”, Nos. 116/2007, 88/2009, 101/2010 – other law, 10/2015, 88/2015 – decision CC, 36/2018, 94/2019 and 74/2021 – decision CC, Article 149, paragraph 1, points 1 and 2.

Indicator 4

The statutory provisions ensuring needed guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister or persons performing the tasks of senior management, as well as heads of administrative bodies, are set out in a statute.

The statutory provisions of most of the analysed countries do not provide sufficient guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister or persons performing the tasks of senior management. Firstly, none of the analysed countries includes specific provisions governing the conduct of disciplinary proceedings against a minister. The lack of such provisions is a direct consequence of the fact that conducting disciplinary proceedings against a minister is regulated, as a rule, by the laws governing general civil service, and not by military legislation. As for the disciplinary proceedings conducted against persons performing the tasks of senior management, the military legislation of the analysed countries does not contain specific provisions in that regard, with the exception of North Macedonia and Montenegro. Although the military legislations of North Macedonia and Montenegro do contain certain provisions governing the conduct of disciplinary proceedings against persons performing the tasks of senior management, those provisions are neither sufficiently detailed nor refer to all the categories of persons performing the tasks of senior management.²¹⁰

Summary Assessment for the Standard

None of the analysed military legal frameworks contains a disciplinary or misdemeanour offence of knowingly issuing either an unlawful or unethical order by a superior. The same applies to such an offence in the case where a superior is a high-ranking officer or a person performing the tasks of senior management, as well as a head of an administrative body.

Out of the four analysed countries, the legal frameworks of the BiH and of the Republic of Serbia set out disciplinary offences for non-execution of superior orders that are, to some extent, graded based on the severity of particular conduct. The normative solutions in the BiH and in the Republic of Serbia appear adequate, since the said disciplinary offence is classified into minor and serious forms, based on the severity of particular conduct. However, the demarcation criterion applied in both national laws has to be improved, in order to address the severity of a particular conduct by taking into account the lawfulness of an issued superior order.

The statutory provisions of none of the analysed countries provide sufficient guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister, due to the fact that conducting disciplinary proceedings against a minister is regulated, as a rule, by the laws governing general civil service. As for

²¹⁰ Law on the Armed Forces of Montenegro (Zakon o Vojsci Crne Gore), "Official Gazette of Montenegro", Nos. 51/17 and 34/19, Article 166; Law on Service in the Armed Forces of the Republic of North Macedonia (Закон за служба во Армијата на Република Северна Македонија), "Official Gazette of the Republic of Macedonia", Nos. 6/10, 132/10, 23/11, 47/11, 148/11, 55/12, 29/14, 33/15, 193/15, 193/15, 71/16, and "Official Gazette of the Republic of North Macedonia", Nos. 101/19, 275/19, 14/20, and 171/22, Articles 139 and 140.

the disciplinary proceedings conducted against persons performing the tasks of senior management, military legislations of analysed countries do not contain specific provisions, with the exception of North Macedonia and Montenegro. However, the normative solutions in North Macedonia and Montenegro are neither sufficiently detailed, nor refer to all the categories of persons performing the tasks of senior management.

Overall, the regulatory frameworks of the BiH and of the Republic of Serbia are fully not in line with the standard, while the legislations of Montenegro and North Macedonia are mostly not in line with the standard.

EDISCIPLINARY OFFENCES AND PROCEDURES ADEQUATELY SUPPORT AND STRENGTHEN PROTECTION WITH REGARD TO IMPROPER SUPERIOR ORDERS

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. A specific disciplinary or misdemeanour offence amounting to knowingly issuing unlawful or unethical orders by a superior, including a high-ranking officer, is set out in a statute.	0-3	0	/	/	0	0	0
2. A specific disciplinary offence amounting to knowingly issuing unlawful or unethical orders by persons performing the tasks of senior management and heads of administrative bodies is set out in a statute.	0-3	0	/	/	0	0	0
3. A statute determines disciplinary offences for non-execution of superior orders, which are graded depending on the severity of particular conduct.	0-3	2	/	/	2	1	1
4. The statutory provisions ensuring needed guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister or persons performing the tasks of senior management, as well as heads of administrative bodies, are set out in a statute.	0-3	0	/	/	0	2	2
Total points		2	/	/	2	3	3
Average points		0.5			0.5	0.75	0.75
Standard		0			0	1	1

Standard 6. Where it exists, the crime of refusal to execute superior orders is formulated in line with requirements stemming from international human rights, international criminal law and humanitarian law.

Indicator 1

When there is a provision in national criminal law envisaging the crime of refusal to execute superior orders for military persons, such provision is formulated as to take into account the requirements stemming from international human rights, international criminal law and humanitarian law.

National criminal laws of all of the analysed countries contain a crime of refusal to execute superior orders for military persons. The countries whose criminal codes include such a crime failed to take into account the requirements stemming from international human rights, international criminal law and humanitarian law.²¹¹ Instead of specifying that such a crime of refusal does not exist, when the executed superior order constitutes a violation of provisions of international human rights, international criminal law and humanitarian law, or to put it differently, is unlawful, the criminal legislations of Montenegro, of the BiH and of the Republic of Serbia are not sufficiently explicit in that regard. The criminal codes of Montenegro and of the Republic of Serbia fully failed to foresee that a refusal of unlawful superior order does not constitute a criminal offence.²¹² Similarly, the Criminal Law of the BiH also did not pay sufficient attention to the issue of (un)lawfulness of the received superior order. More concretely, the Criminal Law of the BiH states that the unlawfulness of the superior order may only serve as ground for the release of punishment or for its mitigations, which cannot be considered as an adequate normative solution.²¹³ Finally, it appears that the Criminal Code of North Macedonia is the most advanced in that respect, as it stipulates that it shall be deemed that there is no crime, if the military or official person refused to execute an

²¹¹ Criminal Law of the BiH (Krivični zakon Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 3/2003, 32/2003-corr., 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018 and 46/2021, Article 246; Criminal Code (Кривичниот законик), “Official Gazette of the Republic of Macedonia”, Nos. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 96/2015, 226/2015, 97/2017 and 248/2018, Article 328, paragraph 3 and Article 353b; Criminal Code of Montenegro (Krivični zakonik Crne Gore), “Official Gazette of the RCG”, Nos. 70/2003, 13/2004, - correction and 47/2006 and „Official Gazette of Montenegro“, Nos. 40/2008, 25/2010, 32/2011, 64/2011- other law, 40/2013, 56/2013 – correction, 14/2015, 42/2015, 58/2015 – other law, 44/2017, 49/2018 and 3/2020, Article 456; Criminal Code (Krivični zakonik), “Official Gazette of the Republic of Serbia”, Nos. 85/2005, 88/2005-corr., 107/2005-corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, and 35/2019, Article 400.

²¹² It is noteworthy that the Criminal Code of Montenegro uses different terminology from the Law on Armed Forces of Montenegro. Instead of referring to “a person serving in the Armed Forces”, it recurses to the term “military person”. However, the meaning of those two terms is virtually identical, as both include the same military and civilian personnel categories. Compare Article 142, paragraph 3, point 5 of the Criminal Code of Montenegro (Krivični zakonik Crne Gore) and Articles 5 to 8 of the Law on Armed Forces of Montenegro. See also Criminal Code (Krivični zakonik), “Official Gazette of the Republic of Serbia”, Nos. 85/2005, 88/2005-corr., 107/2005-corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, and 35/2019, Article 400.

²¹³ Criminal Law of the BiH (Krivični zakon Bosne i Hercegovine), “Official Gazette of the BiH”, Nos. 3/2003, 32/2003-corr., 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018 and 46/2021, Article 456.

unlawful superior order.²¹⁴ However, even the Criminal Code of North Macedonia, in the part dealing with the crime of refusal to execute a superior order, does not address the external aspect of lawfulness, meaning compliance of the said order with international human rights, international criminal law and humanitarian law.

Summary Assessment for the Standard

National criminal laws of all of the analysed countries do contain a crime of refusal to execute superior orders for military persons. The countries whose criminal codes include such a crime failed to fully take into account the requirements stemming from international human rights, international criminal law and humanitarian law. Moreover, the criminal law of Montenegro, the Republic of Serbia and the BiH do not pay sufficient attention to the issue of (un)lawfulness of the received superior order.

Overall, the criminal laws of Montenegro and of the Republic of Serbia are not in line with the standard, while the criminal law framework of Bosnia and Herzegovina is assessed as mostly not being in line with the standard. The Criminal Code of North Macedonia is best ranked, as it is evaluated as showing only some departures from the standard.

²¹⁴ Criminal Code (Кривичниот законик), "Official Gazette of the Republic of North Macedonia" Nos. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015, 97/2017 and 248/2018, Article 328, paragraph 3 and Article 353b. Please note that the notion of military and official persons in the sense of the Criminal Code of North Macedonia covers all the categories of persons serving in the Armed Forces.

WHERE IT EXISTS, THE CRIME OF REFUSAL TO EXECUTE SUPERIOR ORDERS IS FORMULATED IN LINE WITH REQUIREMENTS STEMMING FROM INTERNATIONAL HUMAN RIGHTS, INTERNATIONAL CRIMINAL LAW AND HUMANITARIAN LAW

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. When there is a provision in national criminal law envisaging the crime of refusal to execute superior orders for military persons, such provision is formulated as to take into account the requirements stemming from international human rights, international criminal law and humanitarian law.	0-3	1	/	/	0	2	0
Total points		1	/	/	/	2	0
Average points		1	/	/	/	2	0
Standard	0-5	1	/	/	/	3	0

4.3. POLICE SERVICE REGIME

Standard 1. It is ensured that civil servants are made aware that following an improper order of a superior is prohibited.

Indicator 1

Clear prohibition for a civil servant to follow an improper order is provided for in the statute.

None of the analysed countries provides for the all-encompassing prohibition for a police officer to follow both unlawful and unethical superior orders. The legal framework of Montenegro is the most advanced in that respect, as it contains an explicit prohibition for police officers to follow unlawful orders, although the same prohibition is not introduced with regard to unethical orders.²¹⁵ However, the Montenegrin Law on Internal Affairs is not internally consistent, having in mind that it initially introduces the prohibition for police officers to follow unlawful orders, while subsequently, within the same piece of national legislation, it sets forth the obligation for police officers to execute every order received from a direct superior, as long as its execution would not constitute a criminal offence.²¹⁶ Therefore, the legal framework of Montenegro needs to be improved by removing the obligation of a police officer to execute all superior orders whose execution would not amount to a criminal offence.

Other analysed countries either contain certain prohibitions more limited in scope, or fully fail to provide any prohibition in that respect. More concretely, in the BiH and the FBiH laws there are prohibitions in place to execute a superior order, whose execution would constitute a criminal offence.²¹⁷ On the other hand, legal solutions in the Republic of Srpska, in the Republic of Serbia, and in North Macedonia do not contain any explicit prohibition in that respect. Instead, the legal frameworks of the Republic of Srpska, the Republic of Serbia, and of North Macedonia state that a police officer is not obliged to execute a superior order whose executions would constitute a criminal offence. This provides police officers with an option not to follow a superior improper order, whose execution would constitute a criminal offence.²¹⁸ However, Serbian law

²¹⁵ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Article 20.

²¹⁶ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Article 20 and Article 49, paragraph 1.

²¹⁷ Law on Police Officers of the BiH, "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 9; Law on Internal Affairs of the FBiH (Zakon o unutrašnjim poslovima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", No. 81/2014, Article 85; Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", No. 27/05, 70/08, 44/11 and 13/18, Article 9. While the said provision is explicitly provided at the BiH state level, the same is not the case with the respective entity law of the FBiH. Instead, the Law on Internal Affairs of the FBiH envisages the subsidiary application of the BiH state laws unless the given law does regulate certain issues, such as the prohibition executing a superior order if it constitutes a criminal offence. See Law on Internal Affairs of the FBiH, "Official Gazette of the FBiH", No. 81/2014, Article 85.

²¹⁸ Law on Internal Affairs and Police (Zakon o policiji i unutrašnjim poslovima), "Official Gazette of the Republic of Srpska", Nos. 57/2016, 110/2016, 58/2019, 82/2019 and 18/2022- CC decision, Article 28; Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018 and 87/2018, Article 41; Law on the Police (Закон за полиција), "Official Gazette of the Republic of Macedonia", Nos. 114/06, 6/09, 145/12, 41/14, 33/15,

contains inconsistent provisions, as it is later stated within the same law that execution of unlawful order constitutes a disciplinary offence. Introduction of a disciplinary offence without a prior and clear determination of its corresponding prohibition within the same law may be considered deficient.²¹⁹ Although the Serbian Law on the Police acknowledges that there are international generally accepted standards of police conduct concerning the prohibition to obey an unlawful order, and it envisages that the Police shall take those standards into account in its performance, that normative solution cannot be interpreted as an imposition of a clear prohibition to obey unlawful superior orders on police officers.²²⁰ The legal framework of North Macedonia is rather distinctive, since it contains specific solutions for civil servants of the MoI, while the other analysed countries do not provide a separate regime governing refusal to follow improper orders for civil servants of the MoI.²²¹ Most of the other analysed countries also have statutes in place, which regulate not only police, but internal affairs as well. However, those internal affairs-related laws either do not contain any rules on how civil servants of the MoI should react to unlawful superior orders, or they explicitly provide for the subsidiary application of the general civil service regime to civil servants of the MoI in that regard.

Indicator 2

Clear prohibition for a civil servant not to follow an order whose execution would constitute a breach of international criminal law.

None of the analysed countries provides for an explicit prohibition for a police officer to follow an order whose execution would constitute a breach of international criminal law. The lack of such a prohibition is particularly apparent in the Republic of Srpska, the Republic of Serbia and North Macedonia, since the laws of those countries do not include a clear prohibition to obey certain types of improper orders.²²² The normative frameworks of the Republic of North Macedonia and of the Republic of Serbia contain more advanced provisions compared to the legal framework of the Republic of Srpska, as they foresee that a police officer has to act in line with standards stipulated by the ratified international treaties.²²³ More specifically, the statute of North Macedonia

31/16, 106/16, 120/16, 21/18, 21/18, and 64/18, 294/21, 89/22 and decision CC– 148/08, Article 36. It is noteworthy that the Macedonian Law on Internal Affairs contains an identical legal solution for the employees in the Ministry of the Interior (hereinafter: MoI). See Law on Internal Affairs (Закон за внатрешни работи), “Official Gazette of the Republic of Macedonia”, Nos. 42/2014, 116/2014, 33/15, 33/15, 5/16, 120/16, 127/16, 142/16, 190/16, 21/18, 108/19, 275/19, and “Official Gazette of the Republic of North Macedonia”, Nos. 110/21 and 89/22, Article 153; On the other hand, the aforementioned Law on Internal Affairs and Police of the Republic of Srpska provides for the subsidiary application of the general civil service regime to the employees of the MoI, which further implies that employees of the MoI in the Republic of Srpska are prohibited to execute an order whose execution would constitute a criminal offense.

²¹⁹ Compare Articles 41 and 207 of the Serbia Law on the Police: Law on the Police (Zakon o policiji), “Official Gazette of the Republic of Serbia”, Nos. 6/2016, 24/2018, and 87/2018.

²²⁰ Law on the Police (Zakon o policiji), “Official Gazette of the Republic of Serbia”, Nos. 6/2016, 24/2018, and 87/2018, Article 33.

²²¹ Law on Internal Affairs (Закон за внатрешни работи), “Official Gazette of the Republic of Macedonia”, Nos. 42/2014, 116/2014, 33/15, 33/15, 5/16, 120/16, 127/16, 142/16, 190/16, 21/18, 108/19, 275/19, and “Official Gazette of the Republic of North Macedonia”, Nos. 110/21 and 89/22, Article 153.

²²² See more on this: Standard 1, Indicator 1, Police Service Regime.

²²³ Law on the Police (Закон за полиција), “Official Gazette of the Republic of Macedonia”, Nos. 114/06, 6/09, 145/12, 41/14, 33/15, 31/16, 106/16, 120/16, 21/18, 21/18, and 64/18, 294/21, 89/22 and decision CC– 148/08, Articles

states that a police officer shall protect and respect human rights and freedoms as stipulated by the ratified international treaties. In a similar vein, the Serbian Law on the Police states that, when applying its police authorities, the police should respect, *inter alia*, standards contained in the ECHR, as well as in other international acts pertaining to the Police. Those provisions governing the performance of police assignments are relevant, because the ratified international treaties constitute one of the main sources of international criminal law. However, it would be more adequate, if the analysed laws explicitly provided for a more specific prohibition to obey any superior order whose execution would constitute a breach of international criminal law. As it has been explained above, the Serbian Law on the Police also contains the provision envisaging that the generally accepted international standards of police conduct concerning the prohibition to obey unlawful orders shall be taken into account in the performance of police assignments. However, such a normative solution also cannot be considered to present a clear prohibition for a police officer not to follow a superior order whose execution would constitute a breach of international criminal law.

The law of the Republic of Srpska failed to refer to any of the sources of international criminal law. The same approach of not referring to any of the sources of international criminal law is also taken by the BiH and the FBiH.²²⁴ Finally, the legal framework of Montenegro, which includes a prohibition to follow unlawful superior orders, also refers to the relevance of certain aspects of international criminal law. Nevertheless, it does not explicitly prohibit obeying all superior orders, whose execution would constitute a breach of international criminal law. More concretely, the Montenegrin law stipulates that police officers shall comply with ratified international treaties, as well as with other international acts.²²⁵

Indicator 3

There is an unambiguous statutory rule stipulating that a civil servant following an unlawful or unethical order from a superior will be held individually accountable.

None of the analysed countries provides for an unambiguous statutory rule stipulating that a police officer following an unlawful or unethical order from a superior will be held individually accountable. The normative solutions pertaining to individual accountability of police officers who obey improper orders from a superior vary from country to country. What is common for all those laws is that the statutory rule clearly envisaging individual accountability of a police officer who executes any kind of improper order is missing. Hence, even the legal frameworks which contain a clear prohibition not to obey certain forms of improper superior orders, such as those of Montenegro, do not explicitly provide for the corresponding individual accountability

5 and 100; Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018, and 87/2018, Article 65.

²²⁴ Law on Police Officers of the BiH, "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 3, Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 27/05, 70/08, 44/11 and 13/18, Article 3.

²²⁵ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Article 20.

of subordinates.²²⁶ Instead, such accountability can be derived from the general provisions governing the liability for damages caused by police officers in performing their tasks or, alternatively, from provisions governing disciplinary liability.

When it comes to liability for damages caused by a police officer while on duty, it is important that those rules are only of limited relevance for the liability of a police officer who executes an unlawful superior order. Namely, in most of the analysed countries a police officer is obliged to compensate the police body only for the damage caused on purpose or due to gross negligence, while a police officer is not obliged to compensate in the case of negligence.²²⁷ It is noteworthy that rules on the responsibility of police officers for material damage are not contained in the legislation governing the police performance of Montenegro and North Macedonia, respectively. The rules on disciplinary liability are also not easily applicable to police officers who execute improper superior orders. This is because none of the analysed legal frameworks includes the specific disciplinary offence amounting to the execution of improper superior order. However, the Serbian Law on the Police contains the most advanced provision in that respect, as it at least envisages that execution of an unlawful superior order constitutes a disciplinary offence.²²⁸ On the other hand, some laws, such as those of the BiH and the FBiH, include a disciplinary offence of performing official tasks of a police officer in a careless or negligent manner.²²⁹ However, such a disciplinary offence is very broadly formulated, which adversely affects its effectiveness as well as overall legal certainty. Finally, the analysed legal frameworks either release police officers from the obligation to obey a superior order whose execution would constitute a criminal offence, or prohibit police officers from executing such superior orders.²³⁰ However,

²²⁶ See Standard 1, Indicator 1, Police Service Regime.

²²⁷ Law on Police Officers of the BiH, "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 116, paragraph 1; Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 27/05, 70/08, 44/11 and 13/18; Law on Internal Affairs and Police (Zakon o policiji i unutrašnjim poslovima), "Official Gazette of the Republic of Srpska", Nos. 57/2016, 110/2016, 58/2019, 82/2019 and 18/2022- CC decision, Article 129 paragraph 1; Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018, and 87/2018, Article 218.

²²⁸ Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018, and 87/2018, Article 207, paragraph 1, point 4.

²²⁹ Law on the Police (Закон за полиција), "Official Gazette of the Republic of Macedonia", Nos. 114/06, 6/09, 145/12, 41/14, 33/15, 31/16, 106/16, 120/16, 21/18, 21/18, 64/18, 294/21, 89/22 and CC decision - 148/08, Article 36, paragraph 2; Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 27/05, 70/08, 44/11, and 13/18, Article 107, paragraph 1, point 1; Law on Police Officers of the BiH, "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 105; Law on Internal Affairs and Police (Закон о полицији и унутрашњим пословима), "Official Gazette of the Republic of Srpska", Nos. 57/2016, 110/2016, 58/2019, 82/2019, and 18/2022- CC decision, Article 117, paragraph 1, point 2.

²³⁰ The following laws release police officers from the obligation to obey a superior order whose execution would constitute a criminal offense: Law on Internal Affairs and Police (Zakon o policiji i unutrašnjim poslovima), "Official Gazette of the Republic of Srpska", Nos. 57/2016, 110/2016, 58/2019, 82/2019 and 18/2022- CC decision, Article 28, paragraph 2, Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Articles 20 and 49, paragraph 1; Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018, and 87/2018, Article 41; Among all the analysed countries, the following laws prohibit police officers from executing such superior orders: Law on Police Officers of the BiH, "Official Gazette of the BiH", No. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 9; Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 27/05, 70/08, 44/11 and 13/18, Article 9.

such normative solutions do not necessarily lead to criminal liability of police officers who executed the orders, since those sector-specific laws are not explicit in that regard, leaving the final say to criminal legislation and specific circumstances of each case.

The examples of the Republic of Srpska and of the Republic of Serbia are peculiar, because their legal frameworks are not sufficiently consistent internally. The Constitution of the Republic of Srpska encompasses a solution that should be considered exemplary, since it provides for no exception from the constitutional rule on individual accountability of a person who breaches constitutionally guaranteed human rights and freedoms while obeying an improper superior order – which implicitly includes a police officer.²³¹ However, the statutory provisions governing the police service regime in the Republic of Srpska are not sufficiently consistent with the said constitutional solution; it stems from those provisions that a police officer is liable only for damages, which came as a result of the performance of a police officer, including his execution of improper orders, when he/she acted with intention or gross negligence, but not with ordinary negligence. There is room for improvement of legislation of the Republic of Srpska in that respect. Moreover, the inconsistency of the Serbian legal framework is attributable to contradictory solutions which are contained in one single piece of national legislation: the Law on the Police. Those inconsistencies create confusion regarding the scope of individual accountability of a police officer who executes an improper superior order in Serbia. Namely, on one hand, the Serbian Law on the Police envisages that execution of an unlawful order constitutes a disciplinary offence and hence leads to disciplinary liability. On the other hand, the same law imposes on a police officer an obligation to follow superior orders as long as they do not constitute a criminal offence.²³² This striking inconsistency has to be removed in order to increase legal certainty of the Serbian legal framework.

Indicator 4

The applicable disciplinary and misdemeanour framework does not create any confusion with regard to prohibition to follow an unlawful or unethical order from a superior.

None of the analysed countries provides an applicable disciplinary and misdemeanour framework, which would clearly address the prohibition for a police officer to obey both unlawful and unethical orders from a superior. However, the legal frameworks of the BiH, the Republic of Srpska, the FBiH and the Republic of Serbia contain the disciplinary offence of non-execution of lawful superior orders, thus clearly distinguishing between lawful and unlawful orders.²³³ Conversely, none of the analysed legislations

²³¹ Constitution of the Republic of Srpska (Ustav Republike Srpske), “Official Gazette of the Republic of Srpska”, Nos. 21/92 – consolidated text, 28/94 – Amendments XXVI–XVIII, 8/96 – Amendments XLIV–LI, 13/96 – Amendments LII–XCII, 15/96–corr., 16/96 – Amendment LIII, 21/96–Amendments LIV–LXV, 21/02–Amendments LXVI–XCII, 26/02–corr., 30/02–corr., 31/02–Amendments XCIII–XCVIII, 69/02–Amendments XCIX–CIII, 31/03–Amendments CIV and CV, 98/03–Amendments CVI–CXII, 115/05 – Amendment CXIV, and 117/05–Amendments CXV–CXXI and 48/2011 – Amendment CXXII and “Official Gazette of the BiH” No. 73/2019– CC decision, Article 48.

²³² Compare Article 41 and Article 207 of the Law on the Police (Zakon o policiji), “Official Gazette of the Republic of Serbia”, Nos. 6/2016, 24/2018, and 87/2018.

²³³ Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), “Official Gazette of the FBiH”, Nos. 27/05, 70/08, 44/11, and 13/18, Article 107; Law on Police Officers of the BiH,

foresees a disciplinary offence consisting of non-execution of unethical superior orders. Failure of existing disciplinary offences to target unethical superior orders is derived from the fact that none of the analysed laws contains a clear and all-encompassing prohibition to follow an unlawful or unethical order from a superior.²³⁴ In a similar vein, the apparent lack of any adequate disciplinary offence pertaining to non-execution of unlawful superior orders in North Macedonian legislation arguably came as a result of the fact that the North Macedonian statute introduces only a possibility for a police officer not to follow a superior order whose execution constitutes a criminal offence.²³⁵ However, the quality of the system of disciplinary offences does not always necessarily reflect the scope of prohibitions that are in place in the respective countries. For instance, although the statute of Montenegro sets out a prohibition to follow unlawful orders, there is no corresponding disciplinary offence in place in Montenegrin law that would consist of execution of an unlawful superior order by a police officer.²³⁶ In like manner, Serbian law does not set out a clear prohibition to follow unlawful orders, but outlines two relevant disciplinary offences: execution of an unlawful superior order and non-execution or refusal to execute a lawful superior order.²³⁷ Although disciplinary offences under the Serbian Law on the Police are adequate, the said normative inconsistencies contribute to the confusion with regard to the exact scope of the prohibition to follow unlawful orders and call for redress.

Summary Assessment for the Standard

None of the analysed countries provides for the all-encompassing prohibition for a police officer to follow both unlawful and unethical superior orders. The legal framework of Montenegro is the most advanced in that respect, having in mind that it contains a prohibition for police officers to follow unlawful orders, although the same prohibition is not introduced with regard to unethical orders. Other analysed countries either contain certain prohibitions that are more limited in scope, or fully fail to provide any prohibition in that respect.

None of the analysed countries set forth an explicit prohibition for a police officer to follow an order whose execution would constitute a breach of international criminal law.

None of the analysed countries provides for an unambiguous statutory rule stipulating that a police officer following an unlawful or unethical order from a superior will be held individually accountable. The normative solutions pertaining to individual

²³⁴ “Official Gazette of the BiH”, Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 105; Law on Internal Affairs and Police (Закон о полицији и унутрашњим пословима), “Official Gazette of the Republic of Srpska”, Nos. 57/2016, 110/2016, 58/2019, 82/2019, and 18/2022- CC decision, Article 117; Law on the Police (Закон о полицији), “Official Gazette of the Republic of Serbia”, Nos. 6/2016, 24/2018, and 87/2018, Article 207.

²³⁴ See more: Standard 1, Indicator 1, Police Service Regime.

²³⁵ *Ibidem*.

²³⁶ Law on Internal Affairs (Закон о унутрашњим пословима), “Official Gazette of Montenegro” Nos. 70/2021 and 123/2021, Articles 20 and 49.

²³⁷ Law on the Police (Закон о полицији), “Official Gazette of the Republic of Serbia”, Nos. 6/2016, 24/2018, and 87/2018, Article 207.

accountability of a police officer who obeys an improper order from a superior vary from one country to another. Moreover, the legal frameworks of the Republic of Serbia and the Republic of Montenegro suffer from internal inconsistencies. A common feature of all of the analysed laws is that the statutory rule which would clearly envisage individual accountability of a police officer who executes any kind of improper order is missing. Therefore, even the legal frameworks that contain a clear prohibition not to obey certain forms of improper superior orders, such as the case with the Montenegrin legislation, do not explicitly provide for corresponding individual accountability of subordinates. Instead, such accountability can be addressed only indirectly, based on the general provisions governing the liability for damages caused by police officers in performing their tasks, or, alternatively, on the basis of provisions governing disciplinary liability. However, the existing disciplinary offences, with the exception of the Serbian Law on the Police, are very broadly formulated, exerting an adverse effect on their effectiveness and on overall legal security.

Among the analysed countries, one does not encompass an applicable disciplinary and misdemeanour framework, which clearly addresses the prohibition for a police officer to obey both an unlawful and unethical order from a superior. While the legal frameworks of the BiH, the Republic of Srpska, the FBiH and of the Republic of Serbia contain the disciplinary offence of non-execution of lawful superior orders, none of the analysed laws includes the disciplinary offence amounting to non-execution of unethical superior orders. That contributes to the confusion with regard to the exact scope of the prohibition to follow unlawful and unethical orders and calls for redress.

Overall, the Republic of Serbia shows significant departures from the standard, while Montenegro, the BiH, the Republic of Serbia and the FBiH are mostly not in line with the standard. The Republic of North Macedonia is the only country which is assessed as not in line with the standard.

IT IS ENSURED THAT CIVIL SERVANTS ARE MADE AWARE THAT FOLLOWING AN IMPROPER ORDER OF A SUPERIOR IS PROHIBITED

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. Clear prohibition for a civil servant not to follow an improper order is provided for in the statute.	0-3	1	1	0	1	0	2
2. Clear prohibition for a civil servant not to follow an order whose execution would constitute a breach of international criminal law.	0-3	0	0	0	1	1	2
3. There is an unambiguous statutory rule stipulating that a civil servant following an unlawful or unethical order from a superior will be held individually accountable.	0-3	1	1	1	1	0	0
4. The applicable disciplinary and misdemeanour framework does not create any confusion with regard to prohibition to follow an unlawful or unethical order from a superior.	0-3	2	2	2	2	0	0
5. The constitutional legal framework clearly provides for direct applicability of ratified international treaties, international customary law and peremptory norms of international law.	0-3	0	1	0	2	0	1
Total points		4	5	3	7	1	5
Average points		0.8	1	0.6	1.4	0.2	1
Standard	0-5	1	1	1	2	0	1

Standard 2. The set of obligations to be taken by a civil servant, when he/she believes that an order received from a superior is unlawful or unethical, is clearly set out in the statute.

Indicator 1

A civil servant who believes that an order received from a direct superior is unlawful or unethical is obliged by a statute to warn a direct superior.

The legal frameworks of the analysed countries do not comprise a statutory obligation of a police officer to warn a direct superior, if he/she believes that an order received from a direct superior is unlawful or unethical. In the Republic of Srpska, a comparable statutory obligation of a police officer is in place, although limited to scenarios where a police officer believes that a received order is unlawful, hence not covering the situations where a received order is lawful, but unethical.²³⁸ In some of the compared countries, such as the case with the BiH, the FBiH and Montenegro, the normative frameworks do not introduce an obligation for a police officer to warn a direct superior. Instead, they require a police officer either to immediately submit a report on failure to enforce a superior order whose execution would constitute a criminal offence to a supervisor of the person issuing such an order, as is the case in the BiH or in the FBiH,²³⁹ or to inform a Minister, director of Police and head of the organizational unit where he/she is deployed, as is the case in Montenegro, once they receive an unlawful superior order.²⁴⁰

The Serbian Law on the Police did not include any relevant obligation with regard to warning a superior about the alleged impropriety of the received order. Instead, it only envisages that the police officer is entitled to inform the immediate superior, if he/she believes that the received order is unlawful. However, this right is limited in scope, as it relates only to situations where the execution of the unlawful order does not constitute a criminal offence. Moreover, it does not cover unethical orders. In addition, the Serbian Law on the Police includes relevant provisions, which may be interpreted as introducing the obligation for a police officer to warn the superior, if he/she believes that the execution of the received superior order will or may cause damage. Otherwise, the police officer becomes liable for incurred damage.²⁴¹ Again, this provision is not relevant for the set indicator, as the introduced obligation is linked to sustained damage, instead of being related to the alleged unlawful and unethical orders. Finally, the legislation of North Macedonia failed to include any relevant provisions governing the obligations of a police officer who refuses to follow a superior order whose execution would constitute a criminal offence.

²³⁸ Law on Internal Affairs and Police (Закон о полицији и унутрашњим пословима), “Official Gazette of the Republic of Srpska”, Nos. 57/2016, 110/2016, 58/2019, 82/2019, and 18/2022- CC decision, Article 28, paragraph 3.

²³⁹ Law on Police Officers of the BiH (Закон о полицијским службеницима Босне и Херцеговине), “Official Gazette of the BiH”, No. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 9; Law on Police Officers of the FBiH (Закон о полицијским службеницима Федерације Босне и Херцеговине), “Official Gazette of the FBiH”, No. 27/05, 70/08, 44/11 and 13/18, Article 9.

²⁴⁰ Law on Internal Affairs (Закон о унутрашњим пословима), “Official Gazette of Montenegro” Nos. 70/2021 and 123/2021, Article 49, paragraph 2.

²⁴¹ Law on the Police (Закон о полицији), “Official Gazette of the Republic of Serbia”, Nos. 6/2016, 24/2018, and 87/2018, Article 218, paragraph 4.

Indicator 2

A civil servant who believes that an order received from a direct superior is unlawful or unethical is bound by a statute to require a direct superior to repeat it in written form.

The statutory obligation of a police officer to require a direct superior to repeat a received order in written form, if he/she believes that it is unlawful or unethical, is not in place in any of the analysed countries.

Indicator 3

A civil servant who believes that an order received from a direct superior is unlawful or unethical is required by a statute to directly report all details of the case in writing to designated persons within the institution, regardless of the fact whether the respective unlawful or unethical order was received in written or unwritten form. The notion of “designated person within the institution” refers to the respective head or the immediate superior of the person who issued the order, as well as to another designated person responsible for the legality and integrity of the institution’s operation.

None of the analysed police service laws fully introduces a statutory obligation of a police officer to directly report in writing to a designated person all the details of the case pertaining to an allegedly unlawful or unethical superior order, regardless of the fact whether the respective order was received in written or unwritten form. A common trait of all the analysed legal frameworks is that the said statutory obligation is not introduced with regard to unethical superior orders that are considered lawful. Additionally, none of the laws envisages that the report has to include “all details of the case”. In Montenegro and in the Republic of Srpska, the legal frameworks require a police officer to report to or inform designated persons, once an unlawful superior order is received.²⁴² The Montenegrin legislation specifies that a police officer shall, accordingly, notify such a case to the Minister, director of Police and head of the organizational unit where he/she is deployed, while the law of the Republic of Srpska stipulates that under such circumstances a police officer shall report to an immediate superior of the person issuing the order. In the case of the BiH and the FBiH, the said statutory obligation to report to an immediate superior of the person issuing the order is limited to situations, where a police officer refused to execute a superior order, because its execution would constitute a criminal offence.²⁴³ Consequently, the laws of Montenegro and the Republic of Srpska are more adequate, since they set out the obligation to report to be applicable in a broader spectrum of situations. On the other hand, the laws of the Republic of Serbia and of North Macedonia fully failed to include such an obligation.

²⁴² Law on Internal Affairs (Zakon o unutrašnjim poslovima), “Official Gazette of Montenegro” Nos. 70/2021 and 123/2021, Article 49, paragraph 2.

²⁴³ Law on Police Officers of the BiH, “Official Gazette of the BiH”, No. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 9; Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), “Official Gazette of the FBiH”, Nos. 27/05, 70/08, 44/11 and 13/18, Article 9.

The legal framework of the Republic of Serbia is peculiar, as it does not contain subject obligation, but instead it only entitles a police officer to inform the immediate superior, if he/she believes that the received order is unlawful. The wording of the said provision is problematic, as it remained ambiguous as to whom the alleged unlawfulness of the received superior order should be reported. The lawmaker recourse to the term “immediate superior head” without providing further clarification of the meaning of the said unclear formulation. Moreover, the envisaged right is limited in scope, as it relates only to situations where the execution of the unlawful order does not amount to a criminal offence. It remains unclear why a police officer is entitled to report to an “immediate superior head” about a superior order whose execution would constitute a criminal offence, while he/she is not explicitly entitled to do so in case of other alleged unlawfulness of superior orders.

The case of Montenegro is also specific in that respect, because its law initially envisages that a police officer is not obliged to execute an order whose execution would constitute a criminal offence. However, in the next paragraph, the obligation for a police officer to report to some of the designated persons, once he/she believes that a received order is “unlawful due to other reasons” is introduced.²⁴⁴ Again, it is not clear why a police officer is not obliged to report a received superior order whose execution would constitute a criminal offence, while he/she is obliged to do so in case of other alleged unlawfulness of superior orders. The said solution may become a source of confusion, when it comes to understanding the exact scope of the respective obligation.

Finally, laws of all the analysed countries, with the exception of North Macedonia and the Republic of Serbia, clearly designate persons to whom the report shall be submitted in an appropriate manner, which is fully in line with the concept of a designated person of the institutions in the sense of Indicator 3.

Summary Assessment for the Standard

Legal frameworks of the analysed countries do not contain the statutory obligation of a police officer to warn a direct superior, if he/she believes that an order received from a direct superior is unlawful or unethical. In the Republic of Srpska, a comparable statutory obligation of a police officer is in place, although limited to scenarios where a police officer believes that a received order is unlawful, hence not including the situations where a received order is unethical, but lawful. Other legal frameworks do not contain such an obligation at all, or the prescribed obligation does not relate to warning a direct superior, but it relates to reporting to other designated persons.

The statutory obligation of a police officer to require a direct superior to repeat a received order in written form, if he/she believes that it is unlawful or unethical, has not been introduced in any of the analysed countries.

None of the analysed police service laws fully introduced a statutory obligation of a police officer to directly report in writing to a designated person all the details of

²⁴⁴ Law on Internal Affairs (Zakon o unutrašnjim poslovima), “Official Gazette of Montenegro” Nos. 70/2021 and 123/2021, Article 49.

the case pertaining to an allegedly unlawful or unethical superior order, regardless of the fact whether the respective order was received in written or unwritten form. What is common for all those analysed legal frameworks is that the said statutory obligation is not introduced with regard to unethical superior orders considered lawful. Further, none of the laws envisages that the report has to include “all details of the case”. Legal frameworks of all the analysed countries, with the exception of North Macedonia and the Republic of Serbia, clearly designate persons to whom the report shall be submitted in an appropriate manner, making them fully in line with the concept of a designated person of the institutions within the meaning of Indicator 3.

The cases of Montenegro and of the Republic of Serbia are distinctive, because both laws distinguish reporting regimes applicable to situations, where there is an unlawful superior order whose execution would constitute a criminal offence, from the reporting regimes applicable to situations where execution of unlawful orders does not amount to a criminal offence. The said solution may become a source of confusion when it comes to understanding the exact scope of the respective obligation in Montenegro.

The laws of all the analysed countries, with the exception of North Macedonia and the Republic of Serbia, clearly designate persons to whom the report shall be submitted in an appropriate manner which is fully in line with the concept of a designated person of the institutions in the sense of Indicator 3.

Consequently, the legal frameworks of the BiH, the FBiH, the Republic of Serbia and North Macedonia are not in line with the standard, while the legislation of Montenegro is assessed as mostly not being in line with the standard. On the other hand, the legal framework of the Republic of Srpska shows significant departures from the standard.

THE SET OF OBLIGATIONS TO BE TAKEN BY A CIVIL SERVANT, WHEN HE/SHE BELIEVES THAT AN ORDER RECEIVED FROM A SUPERIOR IS UNLAWFUL OR UNETHICAL, IS CLEARLY SET OUT IN THE STATUTE

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. A civil servant who believes that an order received from a direct superior is unlawful or unethical is obliged by a statute to warn a direct superior.	0-3	0	0	2	0	0	1
2. A civil servant who believes that an order received from a direct superior is unlawful or unethical is bound by a statute to require from a direct superior to repeat it in written form.	0-3	0	0	0	0	0	0
3. A civil servant who believes that an order received from a direct superior is unlawful or unethical is required by a statute to directly report all details of the case in writing to designated persons within the institution, regardless of the fact whether the respective unlawful or unethical order was received in written or unwritten form.	0-3	1	1	2	0	0	2
Total points		1	1	4	0	0	3
Average points		0.33	0.33	1,33	0	0	1
Standard	0-5	0	0	2	0	0	1

Standard 3. The safe and confidential mechanism is determined by a statute in order to advise and guide a subordinate on how to react in the case when he/she believes that an order received from a direct superior is unlawful or unethical.

Indicator 1

Availability of the respective hotline channels or other trustful mechanisms to a civil servant who believes that an order received from a direct superior is unlawful or unethical is determined by a statute. The civil servant should be advised through the given mechanism whether the given conduct would constitute a criminal offence, misdemeanour or any other offence, as well as whether the case could be reported to a competent public prosecution office or police. In that context, the civil servant has a statutory right to ask anonymously for advice.

None of the analysed statutes adequately provides for the availability of trustful mechanisms to advise and guide a police officer who believes that an order received from a direct superior is unlawful or unethical. The Law on Internal Affairs of Montenegro is peculiar, as it refers to anonymity but not in the context of the right to ask for advice.²⁴⁵

Indicator 2

Qualifications of the staff of respective hotline channels or other trustful mechanisms are specified by secondary legislation. Their staff is qualified to advise, *inter alia*, whether a certain superior order is unlawful or unethical. The staff is also qualified to advise whether a certain order complies with international human rights, international criminal law and humanitarian law.

Bylaws establishing appropriate mechanisms followed by the required qualifications of their staff have not been identified in any of the analysed countries.

Summary Assessment for the Standard

None of the analysed statutes adequately provides for the availability of trustful mechanisms to advise and guide a police officer who believes that an order received from a direct superior is unlawful or unethical. In the same vein, there are no bylaws in force, which establish the appropriate mechanisms followed by the required qualifications of their staff in any of the analysed countries. Consequently, all the analysed legislative frameworks are not in line with the given standard.

²⁴⁵ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Article 31.

THE SAFE AND CONFIDENTIAL MECHANISM IS DETERMINED BY A STATUTE IN ORDER TO ADVISE AND GUIDE A SUBORDINATE HOW TO REACT IN CASE WHEN HE BELIEVES THAT AN ORDER RECEIVED FROM A DIRECT SUPERIOR IS UNLAWFUL OR UNETHICAL

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. Availability of respective hotline channels or other trustful mechanisms to a civil servant who believes that an order received from a direct superior is unlawful or unethical is determined by a statute. The civil servant should be advised through the given mechanism whether the given conduct would constitute a criminal offence, misdemeanour or any other offence, as well as whether the case could be reported to a competent public prosecution office or police. In that context, the civil servant has a statutory right to ask anonymously for advice.	0-3	0	0	0	0	0	0
2. Qualifications of the staff of respective hotline channels or other trustful mechanisms are specified by secondary legislation. Their staff is qualified to advise, <i>inter alia</i> , whether certain superior order is unlawful or unethical. The staff is also qualified to advise whether the certain order complies with international human rights, international criminal law and humanitarian law.	0-3	0	0	0	0	0	0
Total points		0	0	0	0	0	0
Average points		0	0	0	0	0	0
Standard	0-5	0	0	0	0	0	0

Standard 4. Effective complaint mechanisms are determined by a statute for civil servants whose rights are threatened or denied as a result of refusal to comply with an unlawful or unethical superior order.

Indicator 1

Internal mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. inspectorates, ethical committees).

None of the analysed statutes explicitly foresees internal complaint mechanisms for police officers whose rights are threatened or denied as a result of refusal to comply with unlawful or unethical superior orders. More specifically, the statutes of the analysed countries do provide for internal mechanisms with sanctions for violations of the rights of police officers, which are guaranteed by such statutes. However, subject laws failed to indicate that the available internal mechanisms are also applicable to situations, where the rights of police officers are threatened or denied as a result of refusal to comply with an unlawful or unethical superior order. The lack of more precise wording is primarily a consequence of the fact that none of the analysed police laws contains an all-encompassing prohibition for a police officer to execute unlawful or unethical superior orders. In other words, the right and even the obligation of a police officer to refuse to comply with an unlawful or unethical superior order remained unprotected under the national statutes of all of the analysed countries. Hence, the existing complaint mechanisms do not address such situations.

The Montenegrin Law on Internal Affairs is the most advanced in this respect, as it is the only piece of national legislation which sets out the obligation of the Police to provide protection to a police officer who refuses to execute unlawful superior order, which was previously reported to designated persons in the institution.²⁴⁶ However, the scope of such protection under the existing Montenegrin Law on Internal Affairs is vague, since the said law does not provide further clarification of the mentioned formulation. Also, the Montenegrin law does not introduce specific sanctions in that regard. The Law on the Police of the Republic of Serbia is even less explicit in this respect, having in mind that it stipulates that a police officer cannot be held accountable for addressing the internal control unit, except in cases of false reporting.²⁴⁷ However, both solutions constitute a positive step towards improving the position of police officers whose rights are threatened or denied as a result of refusal to comply with an unlawful or unethical superior order.

Indicator 2

External mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. an administrative instance and the court).

None of the analysed police laws establishes external complaint mechanisms to provide effective protection for police officers whose rights are threatened or denied as a

²⁴⁶ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Article 49.

²⁴⁷ Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018, and 87/2018, Article 227, paragraph 4.

result of refusal to comply with any kind of unlawful or unethical order. The apparent lack of established external complaint mechanisms, as well as internal mechanisms, results from the fact that none of the analysed countries includes a prohibition of a police officer to execute any unlawful or unethical superior order. Therefore, due to the lack of clear and comprehensive prohibition to execute improper orders, the current legal frameworks of analysed countries do not establish complaint mechanisms to provide effective protection for police officers whose rights are threatened or denied as a result of refusal to comply with any kind of improper order.

Indicator 3

Retaliation against civil servants who refused compliance with unlawful or unethical instructions is forbidden and those who retaliate incur administrative or criminal liability.

None of the analysed legal frameworks forbids retaliation against police officers who refused compliance with improper instructions, with the exception of Montenegro, whose Law on Internal Affairs forbids such retaliation, albeit indirectly and implicitly. Namely, the Law on Internal Affairs stipulates that protection is provided to a police officer who refuses to execute unlawful superior order, if he/she previously reported such unlawful order to designated persons in the institution, without proving further details in that regard.²⁴⁸ This provision is relevant from the standpoint of prescribing retaliation. However, introduction of a clear prohibition to retaliate would constitute a more appropriate solution. Similarly, the Serbian legal framework encompasses a provision stipulating that a police officer cannot be held accountable for addressing the internal control unit, except in cases of false reporting.²⁴⁹ The said provision of the Serbian law is applicable to cases when a police officer refused to comply with improper superior orders and therefore is subject to retaliation. Although welcomed, that provision is not sufficient and as such does not constitute a tailor-made solution for addressing the issue of retaliation of a police officer who refused to follow an improper superior order. Therefore, it should be amended to improve the position of the police officers whose rights are threatened or denied as a result of refusal to comply with an unlawful or unethical superior order.

None of the analysed legal frameworks prescribes that those who retaliate incur administrative or criminal liability. Moreover, no explicit offences are introduced in that regard. Most of the analysed countries, such as the BiH, its entities, the Republic of Serbia and Montenegro, do foresee disciplinary offences, which can be applicable to those who retaliate. However, those disciplinary offences do not specifically address cases where a police officer is subject to retaliation. Instead, disciplinary offences such as abuse of office,²⁵⁰ exceeding the authority of a police

²⁴⁸ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Article 49.

²⁴⁹ Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018, and 87/2018, Article 227, paragraph 4.

²⁵⁰ Law on Police Officers of the BiH, "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC), Article 105, paragraph 1;

officer,²⁵¹ violation of the code of conduct of police officers²⁵² or violation of the rights of other police officers²⁵³, as well as misconduct of a police officer at work,²⁵⁴ are very broadly and vaguely formulated, which adversely affects both their effectiveness and overall legal certainty. For the same reason, the liability of those who retaliate cannot be adequately addressed through such disciplinary offences.

Summary Assessment for the Standard

None of the analysed statutes explicitly provides internal complaint mechanisms for police officers whose rights are threatened or denied as a result of refusal to comply with an unlawful or unethical superior order. Although the statutes of the analysed countries envisage internal mechanisms with sanctions for violations of the rights of police officers guaranteed by such statutes, they fail to indicate that such mechanisms are also applicable to specific situations, where the rights of police officers are threatened or denied as a result of refusal to comply with an improper superior order. The Law on Internal Affairs of Montenegro is the most advanced of the analysed statutes, as it is the only piece of legislation subject to this analysis, which sets out the obligation of the Police to provide protection to a police officer who refuses to execute unlawful superior. However, the scope of such protection under the existing Montenegrin Law on Internal Affairs remains ambiguous.

The analysed police laws do not establish external complaint mechanisms to provide effective protection for police officers whose rights are threatened or denied as a result of refusal to comply with any kind of unlawful or unethical order. This deficiency stems from the fact that none of the analysed countries includes a prohibition for a police officer to execute improper superior orders.

None of the analysed legal frameworks forbids retaliation against police officers who refused compliance with improper instructions, with the exception of Montenegro, whose Law on Internal Affairs only indirectly and implicitly forbids retaliation against police officers in that regard. The Law on the Police of the Republic of Serbia also contains some relevant provisions forbidding retaliation, although they have a broader scope of application and are not explicitly linked to the issues of refusing

Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 27/05, 70/08, 44/11 and 13/18, Article 107, paragraph 1; Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018, and 87/2018, Article 207, paragraph 1, point 3.

²⁵¹ Law on Internal Affairs and Police (Zakon o policiji i unutrašnjim poslovima), "Official Gazette of the Republic of Srpska", Nos. 57/2016, 110/2016, 58/2019, 82/2019 and 18/2022- CC decision, Article 117.

²⁵² Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Article 173.

²⁵³ Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018 and 87/2018, Article 207, paragraph 1, point 17.

²⁵⁴ Law on Police Officers of the BiH, "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 105, paragraph 1; Law on Internal Affairs and Police (Zakon o policiji i unutrašnjim poslovima), "Official Gazette of the Republic of Srpska", Nos. 57/2016, 110/2016, 58/2019, 82/2019 and 18/2022- CC decision, Article 117; Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", No. 27/05, 70/08, 44/11 and 13/18, Article 107 paragraph 1. Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro", Nos. 70/2021 and 123/2021, Article 173.

to follow improper superior orders. In addition, none of the analysed legal frameworks explicitly prescribes that those who retaliate incur administrative or criminal liability.

Overall, the legal frameworks of Bosnia and Herzegovina, its entities, the Republic of Serbia and North Macedonia are not in line with the standard, while the legal framework of Montenegro is assessed as being mostly not in line with the standard.

EFFECTIVE COMPLAINT MECHANISMS ARE DETERMINED BY A STATUTE FOR CIVIL SERVANTS WHOSE RIGHTS ARE THREATENED OR DENIED AS A RESULT OF REFUSAL TO COMPLY WITH AN UNLAWFUL OR UNETHICAL SUPERIOR ORDER

Indicators	Value	BiH			SRB	MKD	MNE
		BiH	FBiH	RS			
1. Internal mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. inspectorates, ethical committees).		0	0	0	0	0	1
2. External mechanisms providing sanctions against violators of the respective rules are clearly set out in the statute (e.g. an administrative instance and the court).		0	0	0	0	0	0
3. Retaliation against civil servants who refused compliance with unlawful or unethical instructions is forbidden and those who retaliate incur in administrative or criminal liability.		0	0	0	1	0	1
Total points		0	0	0	1	0	2
Average points		0	0	0	0.33	0	0.66
Standard		0	0	0	0	0	1

Standard 5. Disciplinary offences and procedures adequately support and strengthen protection with regard to unlawful and unethical superior orders.

Indicator 1

A specific disciplinary or misdemeanour offence amounting to knowingly issuing unlawful or unethical orders by a superior, including a high-ranking officer, is set out in a statute.

None of the analysed police legal frameworks contains a disciplinary or misdemeanour offence of knowingly issuing unlawful or unethical orders by a superior, including a high-ranking officer. The legal frameworks of the Republic of Serbia and of Montenegro are the most advanced in this respect, as only they contain a disciplinary offence of issuing an unlawful order by a superior, which is applicable to high-ranking officers as well, while none of the analysed legal frameworks foresees an offence of knowingly issuing an unethical superior order.²⁵⁵ Contrary to the Serbian statute, the disciplinary offence set out in the Montenegrin legislation is not applicable to all unlawful orders issued by a police officer, including a high-ranking officer. Instead, the scope of application of disciplinary offence of issuing superior orders is limited only to orders, whose execution would constitute a criminal offence or, alternatively, to orders which endanger the safety of persons and assets.²⁵⁶ The reasons behind such a fragmented approach of Montenegrin lawmaker remain unclear. Under Serbian and Montenegrin police laws, the disciplinary offence of issuing unlawful orders can be committed only by a police officer. However, the definitions of a police officer in Serbian and Montenegrin laws are sufficiently broad to extend to high-ranking officers.²⁵⁷ It is noteworthy that most of the analysed countries, except North Macedonia, do contain disciplinary offences, such as the abuse of office by a police officer,²⁵⁸ exceeding the authority of a police officer,²⁵⁹ violation of the code of conduct of police officers,²⁶⁰ or misconduct of a police officer at work.²⁶¹ Although those disciplinary offences can be applicable to

²⁵⁵ Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018 and 87/2018, Article 207, paragraph 1, point 4; Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro", Nos. 70/2021 and 123/2021, Article 173, paragraph 1, points 12 and 16.

²⁵⁶ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro", Nos. 70/2021 and 123/2021, Article 173.

²⁵⁷ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Article 42; Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018, and 87/2018, Article 10.

²⁵⁸ Law on Police Officers of the BiH (Zakon o policijskim službenicima Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 105, paragraph 1; Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 27/05, 70/08, 44/11 and 13/18, Article 107, paragraph 1.

²⁵⁹ Law on Internal Affairs and Police (Zakon o policiji i unutrašnjim poslovima), "Official Gazette of the Republic of Srpska", Nos. 57/2016, 110/2016, 58/2019, 82/2019 and 18/2022- CC decision, Article 117.

²⁶⁰ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Article 173.

²⁶¹ Law on Police Officers of the BiH (Zakon o policijskim službenicima Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 105, paragraph 1; Law on Internal Affairs and Police (Zakon o policiji i unutrašnjim poslovima), "Official Gazette of the Republic of Srpska", Nos. 57/2016, 110/2016, 58/2019, 82/2019 and

a superior who knowingly issues an improper order, they are too broadly formulated, which adversely impacts their effectiveness and overall legal certainty. For that reason, the liability of a superior, including a high-ranking officer who issues unlawful or unethical orders, cannot be adequately addressed through them.

Indicator 2

A specific disciplinary offence amounting to knowingly issuing unlawful or unethical orders by persons performing the tasks of senior management and heads of administrative bodies is set out in a statute.

Out of the analysed legal frameworks, the laws of the Republic of Serbia and of Montenegro are the only ones which contain a disciplinary offence of issuing an unlawful order by a superior, which is also applicable to senior management and heads of administrative bodies. Conversely, none of the analysed legal frameworks foresees an offence of knowingly issuing an unethical superior order. To recall, the scope of application of a disciplinary offence of issuing superior orders under Montenegrin legislation does not cover all types of unlawfulness. Instead, it is limited only to orders whose execution would constitute a criminal offence or, alternatively, to orders which endanger the safety of persons and assets.²⁶² In the Republic of Serbia and in Montenegro, the disciplinary offence of issuing an unlawful superior order can be committed only by a police officer. However, the definitions of a police officer in the statutes of the Republic of Serbia and of Montenegro seem extensive enough to include senior management and heads of administrative bodies as well.²⁶³ There are certain disciplinary offences in place in most of the analysed countries, with the exception of North Macedonia, which can be applicable to a superior police officer who knowingly issues an improper order. Those are, *inter alia*, the abuse of office by a police officer,²⁶⁴ exceeding the authority of a police officer,²⁶⁵ violation of the code of conduct of police officers,²⁶⁶ or misconduct of a police officer at work.²⁶⁷ However, the liability of superiors, including

18/2022- CC decision, Article 117; Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 27/05, 70/08, 44/11 and 13/18, Article 107, paragraph 1; Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro", Nos. 70/2021 and 123/2021, Article 173.

²⁶²Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro" Nos. 70/2021 and 123/2021, Article 173.

²⁶³ See Standard 5, Indicator 1 Police Service Regime.

²⁶⁴ Law on Police Officers of the BiH (Zakon o policijskim službenicima Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 105, paragraph 1; Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 27/05, 70/08, 44/11 and 13/18, Article 107, paragraph 1.

²⁶⁵ Law on Internal Affairs and Police (Zakon o policiji i unutrašnjim poslovima), "Official Gazette of the Republic of Srpska", Nos. 57/2016, 110/2016, 58/2019, 82/2019 and 18/2022- CC decision, Article 117.

²⁶⁶ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro", Nos. 70/2021 and 123/2021, Article 173.

²⁶⁷ Law on Police Officers of the BiH (Zakon o policijskim službenicima Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 105, paragraph 1; Law on Police Officers of the BiH, "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012

senior management and heads of administrative bodies who issue unlawful or unethical orders, cannot be adequately addressed through them, as they are too broadly and vaguely formulated.

Indicator 3

A statute determines disciplinary offences for non-execution of superior orders that are graded depending on the severity of particular conduct.

None of all the analysed police legal frameworks sets out disciplinary offences for non-execution of superior orders that are graded depending on the severity of particular conduct. Although the laws of the BiH, its entities, the Republic of Serbia and Montenegro classify disciplinary offences into serious and minor offences, they fail to grade disciplinary offences of non-execution of superior orders based on the severity of particular conduct. Instead, those laws consider each disciplinary offence of non-execution of superior orders as a serious disciplinary offence, thus failing to distinguish its minor form from its serious form.²⁶⁸ Finally, the legal framework of North Macedonia does not contain any form of disciplinary offences for non-execution of superior orders.²⁶⁹

Indicator 4

The statutory provisions ensuring needed guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister or persons performing the tasks of senior management, as well as heads of administrative bodies, are set out in a statute.

The statutory provisions of the analysed police legal frameworks do not provide sufficient guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister. The lack of such provisions is a direct consequence of the fact that disciplinary proceedings against a minister are regulated by the laws governing general civil service, and not by police service legislation.²⁷⁰

and 42/2018-decision of the CC, Article 105, paragraph 1; Law on Internal Affairs and Police (Закон о полицији и унутрашњим пословима), “Official Gazette of the Republic of Srpska”, Nos. 57/2016, 110/2016, 58/2019, 82/2019, and 18/2022- CC decision, Article 117; Law on Police Officers of the FBiH (Закон о полицијским службеницима Федерације Босне и Херцеговине), “Official Gazette of the FBiH”, Nos. 27/05, 70/08, 44/11 and 13/18, Article 107, paragraph 1; Law on Internal Affairs (Закон о унутрашњим пословима), “Official Gazette of Montenegro” Nos. 70/2021 and 123/2021, Article 173.

²⁶⁸ Law on Internal Affairs (Закон о унутрашњим пословима), “Official Gazette of Montenegro” Nos. 70/2021 and 123/2021, Article 173; Law on Police Officers of the BiH, “Official Gazette of the BiH”, Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 105; Law on Police Officers of the FBiH (Закон о полицијским службеницима Федерације Босне и Херцеговине), “Official Gazette of the FBiH”, Nos. 27/05, 70/08, 44/11 and 13/18, Article 107; Law on Internal Affairs and Police (Закон о полицији и унутрашњим пословима), “Official Gazette of the Republic of Srpska”, Nos. 57/2016, 110/2016, 58/2019, 82/2019 and 18/2022- CC decision, Article 117; Law on the Police (Закон о полицији), “Official Gazette of the Republic of Serbia”, Nos. 6/2016, 24/2018 and 87/2018, Article 207.

²⁶⁹ Law on the Police (Закон за полиција), “Official Gazette of the Republic of Macedonia”, Nos. 114/06, 6/09, 145/12, 41/14, 33/15, 31/16, 106/16, 120/16, 21/18, 21/18, and 64/18, 294/21, 89/22 and CC decision - 148/08.

²⁷⁰ See more on this Standard 5, Indicator 1 Civil Service Regime.

When it comes to impartiality and objectivity of the disciplinary proceedings conducted against persons performing the tasks of senior management, the situation is rather different, since the statutory provisions of most of the analysed countries, except North Macedonia, provide sufficient guarantees. As for the disciplinary proceedings conducted against persons performing the tasks of senior management, police laws of analysed countries do not contain separate provisions, with the exception of the Republic of Srpska.²⁷¹ In the Republic of Srpska, those separate statutory provisions governing the structure of disciplinary bodies in charge of conducting disciplinary proceedings against the police director and deputy police director, do provide some guarantees. However, bylaws further regulating the disciplinary proceedings against the police director and police director were not accessible, and hence a more detailed analysis of the rules envisaged therein could not be conducted.

On the other hand, the statutes of the BiH, the FBiH, the Republic of Serbia and of Montenegro do not separately regulate the conduct of disciplinary proceedings against persons performing the tasks of senior management or against heads of administrative bodies. Nevertheless, the respective statutory provisions governing disciplinary proceedings conducted against police officers are also applicable to senior management and heads of administrative bodies due to the broad statutory definition of a police officer.²⁷² The Law on Internal Affairs of Montenegro is straightforward in that regard, explicitly extending the definition of a police officer to include police heads and police deputy heads,²⁷³ while other frameworks are somewhat less explicit. Nonetheless, the legal frameworks of the BiH, the FBiH, the Republic of Serbia and of Montenegro ensure minimum guarantees of impartiality and objectivity of the disciplinary proceedings against senior management that are on par with the guarantees provided for police officers. Conversely, the police law of North Macedonia does not sufficiently regulate disciplinary matters.

Summary Assessment for the Standard

Out of the analysed legal frameworks, statutes of the Republic of Serbia and of Montenegro are the only ones that prescribe a disciplinary offence of issuing an unlawful order by a superior, potentially including a high-ranking officer or senior management, while none of the legal frameworks foresees an offence of knowingly issuing an unethical superior order. However, the disciplinary offence set out in the Montenegrin legislation is not applicable to all unlawful orders issued by a police officer, but only to

²⁷¹ Law on Internal Affairs and Police (Zakon o policiji i unutrašnjim poslovima), "Official Gazette of the Republic of Srpska", Nos. 57/2016, 110/2016, 58/2019, 82/2019 and 18/2022- CC decision), Articles 109-114.

²⁷² Law on Police Officers of the BiH (Zakon o policijskim službenicima Bosne i Hercegovine), "Official Gazette of the BiH", Nos. 27/2004, 63/2004, 5/2006, 58/2006, 58/2006, 15/2008, 50/2008-other law, 63/2008, 35/2009, 7/2012 and 42/2018-decision of the CC, Article 2; Law on Police Officers of the FBiH (Zakon o policijskim službenicima Federacije Bosne i Hercegovine), "Official Gazette of the FBiH", Nos. 27/05, 70/08, 44/11 and 13/18, Article 2; Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro", Nos. 70/2021 and 123/2021, Article 42; Law on the Police (Zakon o policiji), "Official Gazette of the Republic of Serbia", Nos. 6/2016, 24/2018 and 87/2018, Article 10.

²⁷³ Law on Internal Affairs (Zakon o unutrašnjim poslovima), "Official Gazette of Montenegro", Nos. 70/2021 and 123/2021, Article 42.

orders whose execution would constitute a criminal offence, or alternatively to orders which endanger the safety of persons and assets. The reasons behind such a fragmented approach of Montenegrin lawmakers remained unclear. Under the Serbian and Montenegrin police laws, the disciplinary offence of issuing unlawful orders can be committed only by a police officer. However, as was explained earlier, the definitions of a police officer in the Serbian and Montenegro statutes are sufficiently broad to also include high-ranking officers, as well as senior management and heads of administrative bodies.

None of the analysed police legal frameworks sets out disciplinary offences for non-execution of superior orders that are graded depending on the severity of particular conduct.

When it comes to impartiality and objectivity of the disciplinary proceedings conducted against a minister, the statutory provisions of the analysed police legal frameworks do not provide sufficient guarantees. The lack of such provisions is a direct consequence of the fact that disciplinary proceedings against the minister are regulated by the laws governing general civil service, and not by police service legislation. On the other hand, the statutory provisions of most of the analysed countries provide sufficient guarantees of impartiality and objectivity of the disciplinary proceedings conducted against persons performing the tasks of senior management, with the exception of North Macedonia.

Overall, the legal frameworks of the BiH, its entities, and North Macedonia are not in line with the standard, while the laws of the Republic of Serbia and Montenegro are assessed as mostly not being in line with the standard.

THE DISCIPLINARY OFFENCES AND PROCEDURES ADEQUATELY SUPPORT AND STRENGTHEN PROTECTION WITH REGARD TO IMPROPER SUPERIOR ORDERS

Indicators	Value	BiH		BiH		SRB	MKD	MNE
		BiH	FBiH	RS	RS			
1. A specific disciplinary or misdemeanour offence amounting to knowingly issuing unlawful or unethical orders by a superior, including a high-ranking officer, is set out in a statute.	0-3	0	0	0	0	1	0	1
2. A specific disciplinary offence amounting to knowingly issuing unlawful or unethical orders by persons performing the tasks of senior management and heads of administrative bodies is set out in a statute.	0-3	0	0	0	0	1	0	1
3. A statute determines disciplinary offences for non-execution of superior orders that are graded depending on the severity of particular conduct.	0-3	0	0	0	0	0	0	0
4. The statutory provisions ensuring needed guarantees of impartiality and objectivity of the disciplinary proceedings conducted against a minister or persons performing the tasks of senior management, as well as heads of administrative bodies, are set out in a statute.	0-3	1	1	1	2	1	0	2
Total points		1	1	2	3	0	0	4
Average points		0.25	0.25	0.5	0.75	0	0	1
Standard		0	0	0	1	0	0	1

5. CONCLUDING REMARKS

Overall, the assessment of targeted countries shows a very low level of compliance with the existing international standards in the area of improper superior orders. Moreover, the respective national provisions of the general civil service regime, police and defence sectors relevant for the fulfilment of this standard are not mutually coherent. For instance, certain countries, such as the BiH, are assessed as showing only some departures from Standard 2²⁷⁴ with regard to its general civil service sector, while was assessed as not in line with the same standard when applied to the police and defence sectors. The identified divergences are not attributable to the approach of the DCAF and some academics based on distinguishing military from civilian organizations due to the more centralized structure and hierarchical chain of command. Instead, a sound explanation for those inconsistencies is missing, and it appears that they are a mere result of an *ad hoc* approach taken by lawmakers in the analysed countries.

Furthermore, there are internal inconsistencies of national regulation governing the reaction to improper superior orders in the same sector in most of the analysed countries. Those divergences may create confusion and adversely affect legal certainty in those countries. The case of North Macedonia may serve as an illustrative example, given that one North Macedonian national statute sets out the given obligation of a civil servant for all the allegedly unlawful orders received from a superior, while the other pieces of national legislation limit the scope of the introduced obligation only to situations where the execution of the received order would constitute a criminal offence. In a similar vein, statutory provisions governing both the police sector and civil service sector in the Republic of Srpska are not sufficiently consistent with its advanced constitutional solution: it appears from both statutes that police officers and civil servants are not liable for damages incurred by their negligent performance while executing improper orders, while its Constitution states the opposite. The case of Montenegro is also peculiar, since the provisions of the Law on Internal Affairs, in the part governing an obligation of a police officer to report an unlawful order, are internally inconsistent. The same applies to the Serbian Law on the Police in terms of meeting the first standard, envisaging that civil servants shall be made aware that following an improper superior order is prohibited. There is room for improvement of the legal frameworks of all the analysed countries with a view to eliminating internal inconsistencies.

The all-encompassing prohibition to execute improper superior orders does not exist in any of the three sectors – civil, military and police service. In addition, none of the analysed legal frameworks explicitly provides for the individual accountability of a civil servant who follows an improper superior order. What one finds in common for all these frameworks is that the said statutory obligation is not introduced with regard

²⁷⁴ The said standard deals with prescribed set of obligations.

to unethical superior orders that are considered lawful. Also, legal frameworks of some countries are more flexible, as they do not oblige a civil servant, but only entitle him/her to refuse to execute improper superior orders (e.g. North Macedonia and Montenegro in the civil service legislation; Montenegro and the BiH in the military sector; the Republic of Serbia, the Republic of Srpska, and North Macedonia in the police sector). In the countries where the prohibition does exist, its scope is additionally reduced in all three sectors, given that it predominantly applies only to superior orders whose execution would constitute a criminal offence, but not to other unlawful or unethical superior orders. Consequently, most of the analysed legal frameworks contain a statutory rule stipulating that a civil servant will be held individually accountable, only if he/she executes an unlawful superior order without giving prior notice to the superior that the received order is unlawful, or if he/she executes the superior order whose execution constitutes a criminal offence. Otherwise, if the superior was properly warned by a civil servant that the order is unlawful, the execution of such order would not give rise to a liability of a civil servant for damages pursuant to national statutes. This is worrisome, as it opens doors for a broad spectrum of illegalities.

The applied “pick and choose” approach of tolerating certain illegalities is based on the different treatment of different types of illegalities by national lawmakers. Accordingly, such an approach creates confusion for subordinates regarding the rules on how to react to improper superior orders. In addition, it is not in line with international standards of the CoE, the UN and the OSCE, which do not tolerate the performance of any illegalities. Moreover, the dominant “pick and choose” approach sends a clear message to civil servants, police officials and persons serving in the Armed Forces, that not all unlawful acts are necessarily prohibited, thus opening the Pandora’s box and adversely affecting the respect of the principle of legality, and the fundamental loyalty of the public sector employees to the legal order of the country.

As it was mentioned earlier, a comparative legal study of corruption prevention mechanisms in selected countries of South-East Europe was conducted by the Institute of Comparative Law in Serbia, in cooperation with the CIDS in 2013. The said study did not cover the area of improper superior orders. Therefore, a comparison of the findings of the current analysis with the previous Comparative Legal Study on the Prevention of Corruption of 2013²⁷⁵ in that respect did not take place within the scope of this book. The majority of legal acts that were covered by the current analysis were adopted after 2013, with a few exceptions. Namely, the national laws of the Republic of Serbia, the BiH and its entities governing the civil service regime were adopted before 2013. The same is true for the constitutions of all the analysed countries. When it comes to criminal laws, all of them were also enacted before 2013. Out of the analysed national military laws, only the statutes of the Republic of Serbia, the BiH and North Macedonia were adopted before 2013. When it comes to the police sector, the same applies to the statutes of North Macedonia, the BiH and the FBiH. The fact that a significant number of analysed national legal acts have been adopted after 2013 undermines the efforts to cross-compare the legislative solutions and identify legislative

²⁷⁵ A. Rabrenovic (ed), *Legal Mechanisms for Prevention of Corruption in Southeast Europe with Special Focus on the Defence Sector*, Institute of Comparative Law, Belgrade, 2013, available at: <http://iup.rs/books/legal-mechanisms-for-prevention-of-corruption-in-southeast-europe/>

improvements in the area of improper superior orders. That effort is further hindered by the lack of opportunities to track the timing of all the relevant legal interventions pertaining to improper superior orders in legal acts adopted before 2013.

However, the comparative analysis shows that normative frameworks pertaining to handing improper superior orders were already in place in certain countries in the early 2000s. Those normative solutions addressing improper superior orders may have come as a result of the development of the international standards which started taking place in early 1990s. Namely, the relevant soft-law instruments developed under the auspices of the UN and OSCE were introduced during 1990s, while those of the CoE were adopted in the 2000-2001 period. National regulatory interventions related to improper superior orders have not been developed under the influence of the European Union accession process, as its *acquis* does not impose any specific requirements in that regard. Effectively, the only hard-law instrument explicitly dealing with the issue of unlawful superior orders is the Rome Statute, constituting the key source of international criminal law, which entered into force on 1 July 2002. Finally, the confirmed *jus cogens* nature of the right to human dignity has implicitly strengthened the inviolability of the right of a public sector employee to refuse an improper superior order.

It is important for legislators and civil servants of all the analysed countries alike to be fully acquainted with the relevant norms and case law of international criminal law and to have national legal frameworks that are in line with them. It is even more important for them to observe and take into account other aforementioned soft-law instruments developed in the area of integrity building, which regulate the issue of improper superior orders in general civil service, police and defence sectors. Unlike the sources of international criminal law, the said soft-law integrity instruments are also applicable out of situations of armed conflict and humanitarian situations and are not necessarily linked to the most serious crimes of concern of the international community. The ongoing development in the jurisprudence of the ECtHR and other supranational courts, which has come to rely on soft-law standards more intensively could serve a dual purpose. Namely, it could strengthen the authority of the soft-law instruments. By doing so, it would hopefully open the door for more effective implementation of the soft-law instruments governing improper superior orders issued in all the aforementioned distinct areas of employment.

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