



TECHNIUM

SOCIAL SCIENCES JOURNAL

9 R 08

1

\$ Q H Z G H F D
I R U V R F L D O

,661



ZZZ WHFKQLXPVFLHQFH FRF

Legal determinations of the place and role of the Intelligence and Security Agency of Bosnia And Herzegovina

Dr Bakir Alispahic

University of Sarajevo, Faculty of Criminalistics, Criminology and Security Studies –
Associate Professor
balispahic@fkn.unsa.ba

Abstract. One of the main principles of the work of security services is the principle of legality. However, as the basic task of the security services is to take care of the security of the democratic order, the security services are expected to act transparently and respect the laws in their work. In this sense, it is very important to clearly define the place and role of the security service itself within the legal framework. The Law on the Intelligence and Security Agency of BiH was adopted in 2004 and prescribed the standards and solutions that the Intelligence and Security Agency of BiH must adhere to if it wants to be professional. In accordance with that, and the sensitive nature of the role in the national security system, the analysis of the legal determinations of the place and role of the Intelligence and Security Agency of BiH in fulfilling the obligations of cooperation with domestic and international institutions is imperative. To understand the place and role of the BiH Intelligence and Security Agency, it is crucial to determine its legal position and status in the national legal system. Both ‘general’ and ‘special’ mechanisms of cooperation with domestic and international standards depend on the legal position of the Agency.

Keywords. Law, cooperation, intelligence sector, obligation, secrecy.

Methodology

In the research, the research technique of qualitative content analysis was used. Archival material, available literature and internet portals for searching laws and bylaws were used as data sources. The basic unit of analysis was the Law on the Intelligence and Security Agency of BiH (Official Gazette of BiH, No. 12/04, 20/04, 56/06 and 12/09).

Research/Work limitations

The limitation of the research is reflected in the fact that the analysis is based on the Law on the Intelligence and Security Agency of BiH and other bylaws, and no comparative analysis of the legal regulations of other countries was used.

Justification of research/work

The analysis of the legal definition draws the attention of the academic community and the public to this area, which is important in ensuring security, especially in times of modern challenges, and emphasizes the need to adhere to professional and ethical standards in international and domestic exchange of information and cooperation. Such an approach can

help to better understand security challenges but also the place and role of the BiH Intelligence and Security Agency in creating proactive policies in the future.

Introduction

The Intelligence and Security Agency of Bosnia and Herzegovina (OSA/OBA BiH) is a civilian intelligence and security institution that has the status of an independent administrative organization and does not have police powers.

Services that existed in the previous period (predecessor services whose legal successor is OSA/OBA BiH) from the Socialist Republic of Bosnia and Herzegovina until the enactment of the Law on the Intelligence and Security Agency of BiH (adopted in April 2004) have changed their place and role in the state system, their internal organization and powers.

The aim of enacting the Law on the Intelligence and Security Agency of BiH (Official Gazette of BiH, No. 12/04, 20/04, 56/06 and 12/09) was to form in the territory of BiH, instead of the existing entity intelligence and security services, a unique, efficient and modern intelligence and security agency to be established on generally accepted European and world criteria. The experience of developed Western democracies and countries in transition, which already had significant experience in the transformation of former intelligence and security services, was used in creating the law. 'The first significant step in the reform was made by the legal definition that OSA is an agency operating throughout BiH, responsible for collecting and distributing intelligence to protect security, including the sovereignty, territorial integrity and constitutional order of Bosnia and Herzegovina.' (Kržalić and Hadžović, 2013:47).

The BiH Intelligence and Security Agency is responsible for collecting intelligence related to threats to the security of Bosnia and Herzegovina, both within BiH and outside BiH, analyzing and transmitting them to the authorized officials and bodies referred to in Article 6, paragraph 5 of the Law on Intelligence and Security BiH Agency, as well as collecting, analyzing, processing and transmitting intelligence in order to provide assistance to authorized officials, as defined by the Criminal Procedure Code in BiH, and other competent bodies in BiH, when necessary to combat threats to security of BiH. According to the Law, 'threats to the security of BiH' are considered threats to the sovereignty, territorial integrity, constitutional order, foundations of economic stability of BiH, as well as threats to global security that are harmful to BiH, in particular: terrorism, international terrorism, espionage against BiH, or harmful to BiH in any other way, sabotage directed against the vital national infrastructure of BiH or otherwise directed against BiH or harmful to the security of BiH in any other way, trafficking in drugs, weapons and people directed against BiH or harmful to the security of BiH in any other way, illegal international production of weapons of mass destruction or their components as well as materials and devices necessary for their production, illegal trade in products and technologies under international control, acts punishable under international humanitarian law, acts of organized violence or intimidation of national or religious groups in BiH'.

The Agency uses its operational means and methods in order to provide protection to the institutions of special importance and facilities of Bosnia and Herzegovina, the institutions of special importance and facilities of the Federation, Republika Srpska and Brčko District of BiH, diplomatic missions of BiH abroad, as well as during visits and other events, as determined by the Presidency of BiH or the Director General.

The Agency is not responsible for physical protection for the above institutions and events. The main task of the Agency is to collect and process information, and timely inform end users, i.e. competent state bodies and institutions, on threats to the security of BiH from the scope of work of that Agency, and specific persons whose criminal activity poses a threat to the

security of BiH. The Agency exchanges intelligence and carries out other forms of cooperation with intelligence and security services in other countries and other foreign and international institutions in order to perform legally defined tasks. The Agency is also responsible for conducting security checks and other activities that are within the competence of the Law on Protection of Classified Information and the Law on Aliens. The Agency collects strategic military data and carries out counter-intelligence activities, as prescribed by the Law on Defense of BiH.

After the establishment and start of the Agency's work, several laws were passed that significantly affected the expansion of the Agency's job description, and conditioned the adoption of the Law on Amendments to the Law on OSA / OBA BiH. First of all, these are the Law on Protection of Classified Information of BiH, the Law on Aliens and the Law on Defense of BiH.

In addition to the above laws, the following documents contain a strategic framework for the work of the Agency:

Constitution of Bosnia and Herzegovina;

Laws on Criminal Procedure (BiH, FBiH, RS and BD BiH), citizenship (BiH, FBiH, RS), prevention of money laundering and financing of terrorist activities, control of the movement of weapons and military equipment, missing persons;

Strategies for the fight against organized crime, the fight against corruption, prevention and fight against terrorism, combating trafficking in human beings, migration and asylum, control of small arms and light weapons in BiH, control of narcotics, prevention and suppression of drug abuse in BiH, work on war crimes cases, BiH foreign policy;

European Convention on Human Rights and Freedoms, Cybercrime, Stabilization and Association Agreement between BiH and the European Union, European Security Program for the period 2015-2020, and the Security Policy of Bosnia and Herzegovina.

The Intelligence and Security Agency of BiH has cooperation with other institutions and bodies, and without effective cooperation it would not be able to perform the tasks prescribed by law.

The agency has no executive powers; in accordance with Article 63 of the Law has the necessary close and continuous cooperation with other bodies and institutions, and above all with the Ministry of Security, the Ministry of Defense, police agencies (SIPA, DKPT, SPS, GP, MUP- these), courts and prosecutor's offices, customs and tax authorities, and other bodies and institutions in BiH.

Given that the obligation of the Agency to cooperate with domestic bodies and institutions is only generally prescribed by law, the Agency's mutual relations and cooperation with certain institutions and other legal entities should be regulated by agreements or memoranda of cooperation, which in each case should define specific ways and cooperation procedures.

In order to adequately and timely respond to the challenges and threats facing BiH, the Agency should also develop a constructive partnership with the intelligence services of countries in the region and around the world. International cooperation should be conducted according to high standards and principles with strict observance of legal provisions on the exchange of intelligence information. Cooperation should be based on bilateral exchange of intelligence and analysis of topics of common interest, as well as educational and technical cooperation in strict compliance with the basic postulates of the agreement on exchange of intelligence.

In the light of global challenges, the Agency, by the nature of its scope of work, should pay increasing attention to multilateral intelligence exchanges as a capacity building measure in dealing with threats (e.g. terrorism), and cooperation in joint projects aimed at preventing threats against BH security and hence the global security. Cooperation with partner services is approved by the Chairman of the Council of Ministers in accordance with Article 70 of the Law on the Intelligence and Security Agency of BiH.

The work of the Intelligence and Security Agency of BiH should be based on planning and guiding documents which guide the work of the Intelligence and Security Agency of BiH and determine the basic tasks, goals and priorities of the Agency in its area of competence. The law defines that the Presidency of BiH approves the Annual Platform which contains the main determinations of the work of the Agency in accordance with international practice. The Intelligence and Security Policy Platform is being prepared by the Council of Ministers and adopted by the BiH Parliamentary Assembly. Intelligence and security activities should be based on the Constitution of BiH, the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the Law on the Intelligence and Security Agency of BiH and obligations arising from membership in the United Nations, and other international treaties and agreements that BiH signed or acceded to. Based on periodic platforms, the Agency should develop plans and programs for the implementation of these tasks.

Platforms should be based on the need to protect the values and interests of Bosnia and Herzegovina. Within its activities, the Agency must continuously monitor challenges and threats to the security of BiH, and by analyzing all processes and phenomena (in BiH and abroad, especially the region) provide data to the competent authorities of BiH in order to prevent threats and to resolve crises, emergencies and situations. Therefore, the Agency's activity should primarily focus on collecting data and information that will enable the competent authorities to remove obstacles and make decisions in achieving the strategic, political, security and defense goals of BiH. The Agency must conduct collection and analysis of data on intentions to endanger the interests and security of BiH within its regular activities and/or on the basis of requests from the state authorities and users of data collected by the Agency, and submit them in a timely manner in accordance with legally prescribed methods of intelligence work in the country and abroad, which are important for making decisions important for the realization of security interests.

According to the basic program commitments, the goal of the Intelligence and Security Agency of BiH must be to improve the security sector of BiH from the aspect of responsibility and efficiency, for the purpose of better security of citizens and property.

Due to the special activity of the Agency, specific objectives should be elaborated in more detail by internal acts of the Agency, respecting the principles of legality and protection of classified information.

Modern organization of intelligence activities undertaken by individual agencies within the intelligence and security system of individual countries must respect certain principles, including efficiency and timeliness, comprehensiveness, continuity and intensity of action, concentration of intelligence and counterintelligence work, specialization in work, functionality and continuity of training, but also the secrecy of intelligence work. Increased terrorist activities and related forms of organized crime (arms and military equipment trafficking, drugs, money laundering and corruption) as well as the massive and uncontrolled influx of refugees into the region and Europe, require all countries in the region and beyond to engage more human and material resources in the intelligence and security sector. This situation calls for further strengthening of internal capacities in the fight against violent extremism and terrorism. In order to strengthen security sector institutions of BiH, exchange experiences and enable training of

employees according to the most modern standards in specialist areas, the Agency should continue in the coming period with various forms of organized cooperation with domestic institutions and foreign intelligence services and international bodies.

The importance of the method of intelligence work in the prevention, detection, documentation, prosecution of organized crime and other criminal offenses within the competence of SIPA

Intelligence work is essentially a process of collecting a wide range of knowledge, data and information from the environment and analyzing them, which is again a special process in itself, to detect and extract knowledge, data and information that are important for a particular aspect of action. The application in law enforcement in BiH (hereinafter: agencies) is more recent. More precisely, the very notion of intelligence work in the police in BiH emerged in the post-war period when, mostly under the influence of British representatives within the international police force, the implementation of the system began, which included gathering intelligence, data and information and their systematic evaluation, as well as the evaluation of sources of information in terms of reliability. It is a criminal-intelligence work in which the collected data, with the obligatory assessment of the reliability of the source and the data itself, are stored in a database for further use in taking measures and actions to prevent, detect and investigate crimes.

The very principle of functioning of this approach is based on unified documentation of knowledge obtained by members of agencies, their storage in a database that allows searching by various criteria (CIDA database) and use to guide the work of agencies.

Therefore, criminal intelligence work should be viewed as:

- conceptually and technically modified principle of operational work of the police,
- proactive way of police work which leads to knowledge that indicates:
 - a) that a criminal offense could be committed, which is important from the aspect of prevention;
 - b) that the criminal offense has already been committed, which contributes to the detection of the criminal offense and the perpetrators;
 - c) where there are objects and traces that can serve as evidence of a committed crime;
 - d) identification of property acquired through committed criminal offenses which, in accordance with the provisions of criminal law, should be subject to temporary and permanent confiscation.

- a way to effectively monitor and analyze the security situation and phenomena that affect the occurrence and development of crime.

Before the information collected by criminal intelligence work is stored in the database, the assessment of information and sources of information is conducted with the appropriate classification. It is a system accepted by EUROPOL which implies the standard of 4x4 classification of information:

Reliability of source

A	RELIABLE SOURCE – there is no doubt in the reliability, authenticity and competence of the source or the source has been reliable in all cases in the past.
B	USUALLY A RELIABLE SOURCE – a source whose information has proven accurate in the past in most cases.

C	MOST OFTEN AN UNRELIABLE SOURCE - a source whose information has been inaccurate in the past in most cases.
D	UNDEFINED SOURCE - we cannot determine the reliability of the source or there is a doubt in the reliability, authenticity and competence of the source.

Reliability of information

1	TRUE - the officer knows with certainty that the information is true.
2	PROBABLY TRUE - the information is personally known to the source, but not known to the reporting officer.
3	POSSIBLY TRUE - the information is not personally known to the source, but is supported by information that has already been received.
4	UNDEFINED - the information is not personally known to the source and cannot be confirmed with the information already received.

The information contained in the criminal-intelligence data and knowledge, in the criminal-procedural sense, has no probative force even in the case of a completely reliable source and information (A1).

The State Investigation and Protection Agency (hereinafter SIPA) is an agency with jurisdiction to prevent, detect and investigate criminal offenses within the jurisdiction of the Court of Bosnia and Herzegovina, in particular: organized crime, terrorism, war crimes, human trafficking, and other crimes against humanity, as well as values protected by the international law and serious financial crime. SIPA is one of the agencies in BiH in which the system of criminal intelligence has been implemented in accordance with which its organizational structure has been conceived, within which organizational units have been established with the exclusive competence to collect criminal intelligence.

SIPA's criminal intelligence work is focused on collecting criminal intelligence:

- on crime within the competence of SIPA, necessary for monitoring and analysis of the security situation and phenomena that favor the occurrence and development of crime,
- on persons, groups and organizations that may be associated with the commission of criminal offenses.

According to the Rulebook on the organization and systematization of SIPA workplaces, criminal intelligence work falls within the scope of the Department for criminal intelligence affairs within the Criminal investigation department and four departments for the collection of criminal intelligence data within the regional offices (Sarajevo, Banja Luka, Tuzla and Mostar).

All sections analyze reports and information received through 4x4 reports, as well as other reports and information of an intelligence nature on the basis of which:

- an assessment of the likelihood of the existence of a criminal offense is conducted;
- guidelines are provided for further action in investigating a specific criminal offense;
- operational analyses are provided of the state of crime in a certain area or for a certain group of criminal offenses;
- criminal investigations are directed;
- various forms of crime are monitored and databases are updated;
- the connection between a large number of people and objects of interest for the investigation, the course of events and the course of criminal cases is shown schematically.

The fact that financial data, which are invaluable for the prevention, detection and investigation of the most serious crimes, are difficult to access using traditional police methods,

as well as through criminal intelligence work, has called for establishing of certain standards at the international level which are also applicable in Bosnia and Herzegovina. At the international level, these standards have been established and institutionalized through an organization called the FATF, which is an intergovernmental body for developing and improving measures and actions to combat money laundering and financing terrorism at the national and international levels. In Bosnia and Herzegovina, international standards in this area have been implemented through establishing a system for the prevention and detection of money laundering and financing terrorism through the adoption of the Law on Prevention of Money Laundering and Financing Terrorist Activities (Official Gazette of BiH No. 47/14 and 67/16) and by establishing a finance-intelligence apparatus that includes the imposition of strict obligations on a large number of financial and non-financial institutions to submit data related to these types of transactions to the SIPA Financial intelligence unit (money transactions, transactions in shares, real estate, movables, precious metals, works of art, etc.).

This has resulted in the introduction of a new type of intelligence work in terms of methods and the data obtained in this way. Financial-intelligence work in BiH, in accordance with the previously mentioned Law on prevention of money laundering, represents the exclusivity of SIPA, within which a specialized unit, i.e. the Financial-intelligence department has been established. This department, in accordance with the Law on SIPA (Official Gazette of BiH No. 27/04, 63/04, 35/05, 49/09 and 40/129 and the Law on prevention of money laundering and financing of terrorist activities, receives, collects, records and analyzes data, information and documentation, and researches and forwards the results of analyses and/or investigations, data and documentation to prosecutor's offices and other competent bodies in BiH and abroad.

In case of suspicion of money laundering or terrorist activity financing, with strong mechanisms for protection of personal and classified data, the Financial Intelligence Unit for the purposes of its activities or for the needs of prosecutors, law enforcement agencies and foreign financial intelligence units, independently, without court order and the Prosecutor's Office may:

- collect the necessary data and documentation from financial and non-financial institutions and all state bodies in BiH;
- in compliance with the principles of the Egmont Group, collect/provide data in international cooperation from all 146 financial intelligence units of the Egmont Group members;
- issue an order for temporary suspension (blockade) of transactions for a period of five working days;
- order financial institutions to monitor and report on the client's financial operations for a period of six months.

Financial-intelligence data collected in this way, in the criminal-procedural sense, also have no probative value, although it is extremely reliable data relating to the documented execution of transactions with various types of assets.

The purpose of the implementation of these types of intelligence work lies in establishing a system by which the agency is given the opportunity to obtain the most reliable intelligence and knowledge at the earliest stage of dealing with an illegal/criminal phenomenon, without the involvement of judicial instances, which, in accordance with the principles of our criminal law, results in the possession of data that have no probative value. Bearing in mind that the principles of our criminal law define that evidence is collected with adequate involvement of the Prosecutor's Office and the Court, which is not elaborated in detail on this occasion, and that in order to involve the Prosecutor's Office and the court in the evidence

gathering process, it is necessary to have obtained concrete findings (regarding the suspicion of committing a criminal offense, the perpetrators of potential offense and their location, criminal assets, etc.) it is clear that the data collected by the intelligence agencies, although without probative value, has an irreplaceable role for:

- crime prevention;
- detection of the committed crime;
- detection of the perpetrator of the crime,
- finding evidence and witnesses of the crime;
- detecting the proceeds of crime that may serve as evidence and may be the subject of temporary and permanent confiscation.

Based on the above facts, it is clear that the methods of intelligence applied by SIPA directly contribute to the prevention, detection, documentation and successful prosecution of criminal offenses within the competence of this Agency.

Conclusion

Pursuant to the Law on the Intelligence and Security Agency of BiH (2004), it was determined that the Intelligence and Security Agency of BiH is a special organization that has the status of a legal entity and performs activities related to: protection of security of Bosnia and Herzegovina and detection and prevention of subversive activities aimed at undermining or overthrowing the constitutional order of BiH; research, collection, processing and assessment of security-intelligence data and knowledge of importance for the security of Bosnia and Herzegovina and informing the competent state and entity institutions, Brcko District of BiH and diplomatic missions of BiH abroad, as well as other tasks determined by law. OSA has the status of a legal entity but has no police powers.

The work of the Agency is managed by the Director, who is appointed and dismissed by the Council of Ministers of BiH in consultation with the members of the Presidency of BiH, the Executive Board and the Joint Commission. In performing the tasks within its competence, the Agency applies appropriate operational methods, measures and actions, as well as appropriate operational and technical means to ensure the collection of classified information. The decision on the application of secret information collection measures is made by the Agency director, and certain secret data collection requires court approval (monitoring in places that are not public, monitoring communications via telecommunications and other electronic devices, and search of property without the consent of the owner or person that temporarily occupies the property). In performing their duties, members of the Agency are authorized to request and receive from state and other bodies, legal entities and persons, information, data and professional assistance relevant to clarifying the facts related to the performance of tasks within the Agency's competence.

As the obligation of the Agency to cooperate with domestic bodies and institutions is only generally prescribed by law, the Agency's mutual relations and cooperation with certain institutions and other legal entities should be regulated by agreements or memoranda of cooperation, which in each case should define specific ways and cooperation procedures.

In order to adequately and timely respond to the challenges and threats facing BiH, the Agency should also develop a constructive partnership with the intelligence services of countries in the region and around the world. International cooperation should be conducted according to high standards and principles with strict observance of legal provisions on the exchange of intelligence information. Cooperation should be based on bilateral exchange of intelligence and analysis of topics of common interest, as well as educational and technical

cooperation in strict compliance with the basic postulates of the agreement on exchange of intelligence.

For the new Law on the Intelligence and Security Agency of BiH, we can say that it defines in a very good way the key conditions, such as leadership and democratic control and supervision of the intelligence sector and political impartiality and the mandate of the Agency. These conditions are defined in accordance with well-known international standards, i.e. best practices and results. They were inevitable in adapting the intelligence service to modern security challenges and eliminating the organizational shortcomings that led to the scandal.

References

- [1] Derenčinović, D. (2017). *Organizirani kriminal i korupcija*. www.pravo.unizg.hr/_download/repository/Organizirani_kriminal_i_korupcija.pdf.
- [2] Grubač, M. (2009). *Organizovani kriminal u Srbiji*. Zbornik radova Pravnog fakulteta u Splitu, year 46, 4/2009, Split.
- [3] Ignjatović, Đ. (1996). *Kriminologija, treće izmijenjeno i dopunjeno izdanje*. Nomos, Beograd.
- [4] Jovašević, D. (2012). *Organizovani kriminal*. Godišnjak Fakulteta pravnih nauka broj 2, Banja Luka.
- [5] Krivokapić, V. (2006). *Prevenција kriminaliteta*. Teorijsko-kriminalistički pristup, Fakultet kriminalističkih nauka, Univerzitet u Sarajevu, Sarajevo.
- [6] Kržalić, A., Hadžović, D. (2013). *The Intelligence Sector Reform in Bosnia and Herzegovina: A Compromise as a Solution*. Journal of Mediterranean and Balkans Intelligence. Vol 1. No. 2., p. 47-60. Research Institute for European and American studies (RIEAS)
- [7] Nicolson, D. (1991). *Vladavina prava u engleskom krivičnom pravu – teorija ili realnost*. Jugoslovenska revija za kriminologiju i krivično pravo, vol. 29. no. 3, Beograd.
- [8] Stojanović, Z. (1990). *Organizovane forme kriminaliteta*. Bezbednost i društvena samozaštita, broj 5/1990, Beograd.
- [9] Stojanović, Z. (2011). *Preventivna funkcija krivičnog prava*. Crimen 1/2011, Beograd.
- [10] Škulić, M. (2014). *Odnos organizovanog kriminaliteta u krivičnom pravnom smislu i saučesništva*. Žurnal za kriminalistiku i pravo, Beograd.
- [11] Zakon o krivičnom postupku BiH (sa pripadajućim ispravkama, izmjenama i dopunama), Službeni glasnik BiH, br. 3/03 sa pripadajućim izmjenama i dopunama.
- [12] Zakon o krivičnom postupku Federacije BiH, Službene novine Federacije BiH, br. 35/03, 37/03 i 56/03.
- [13] Zakon o krivičnom postupku Republike Srpske, Službeni glasnik Republike Srpske, br. 50/03 sa pripadajućim izmjenama i dopunama.
- [14] Zakon o krivičnom postupku Brčko distrikta BiH, Službeni glasnik Brčko distrikta Bosne i Hercegovine, br. 10/03 sa pripadajućim izmjenama i dopunama