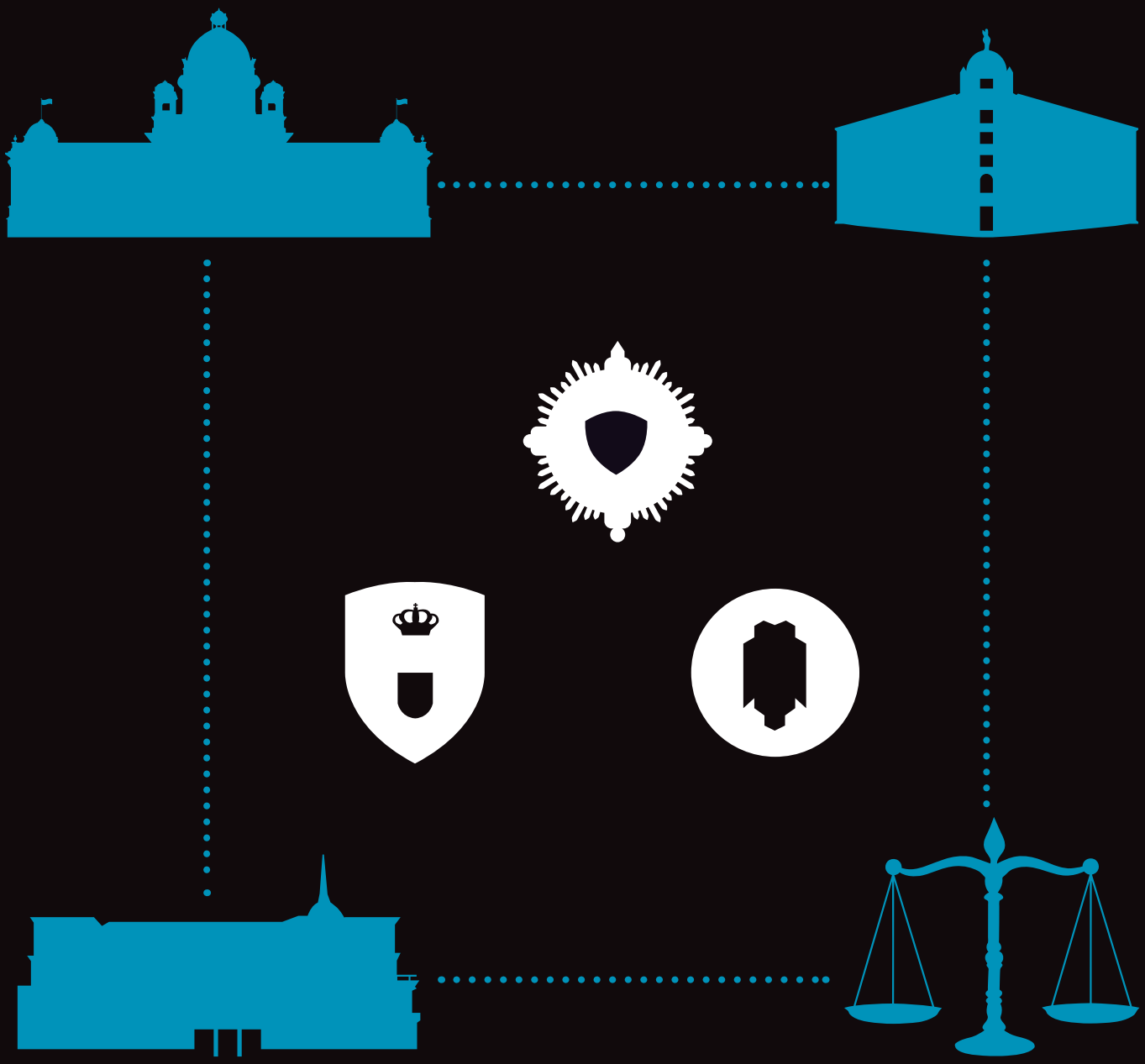
Bogoljub Milosavljevic

ANALYSIS OF THE LEGAL FRAMEWORK REGULATING THE SECURITY-INTELLIGENCE SYSTEM OF THE REPUBLIC OF SERBIA



BCSP

Bogoljub Milosavljevic

ANALYSIS OF THE LEGAL FRAMEWORK REGULATING THE SECURITY-INTELLIGENCE SYSTEM OF THE REPUBLIC OF SERBIA

BELGRADE
June 2016

ANALYSIS OF THE LEGAL FRAMEWORK REGULATING
THE SECURITY-INTELLIGENCE SYSTEM OF THE REPUBLIC OF SERBIA

Publisher
Belgrade Centre for Security Policy
6 Djure Jaksica Street, Belgrade
Telephone: +381 11 3287 226
E-mail: office@bezbednost.org
Web: www.bezbednost.org

Author
Bogoljub Milosavljevic

Translation from Serbian
Natasa Sofranac

Design and layout
Marko Marinkovic

Print
Unagraf

Copies
100

ISBN
978-86-6237-130-0

BELGRADE, June 2016

CIP - Каталогизација у публикацији -
Народна библиотека Србије, Београд

340.134:351.86(497.11)
340.134:351.74/.75(497.11)

MILOSAVLJEVIĆ, Bogoljub, 1956-
Analysis of the Legal Framework Regulating the Security-intelligence System of the Republic aof Serbia / Bogoljub Milosavljevic ; [translation from Serbian Natasa Sofronac]. - Belgrade : Belgrade Centre for Security Policy, 2016 (Beograd : Unagraf). - 26 str. ; 30 cm

Izv. stv. nasl: Analiza pravnog uređenja obaveštajno-bezbednosnog sistema Republike Srbije. - Tiraž 100. - Napomene i bibliografske reference uz tekst. - Bibliografija: str. 23-26.

ISBN 978-86-6237-130-0

a) Безбедносни сектор - Србија b) Обавештајне службе - Србија COBISS.SR-ID 225060108

Kingdom of the Netherlands

Publication of this study was kindly supported by The Embassy of the Kingdom of the Netherlands in Belgrade, in the framework of the project "LEGASI – Towards Legislative Reform of Security Intelligence System". The opinions expressed in the publication are solely those of the author and do not necessarily reflect the positions of the State of the Netherlands.

1.
SUBJECT AND OBJECTIVE OF THE ANALYSIS

The subject of the analysis is the legal framework regulating the organization, competences and powers of the security services of the Republic of Serbia (hereinafter referred to as: RS), oversight and control of their work, responsibility for the legality and regularity of their work, direction, harmonization and coordination of their work and relations with entities managing the Security-Intelligence System (hereinafter: SIS) as part of the RS national security system. The legal framework is understood to mean the positive legal norms contained in the RS Constitution (hereinafter: Constitution), ratified international treaties, and laws and by-laws which are of relevance to SIS. As will be demonstrated in the next Chapter, the number of such norms and of regulations containing them is large indeed. Therefore the subject of this analysis will necessarily be confined to the basic norms and regulations, focusing on issues of (1) organization, competences and powers of security services (2) direction, harmonization and coordination of their work, and (3) oversight and control of their work.

The analysis proceeds from the assumption that the RS has a relatively developed and new, i.e. recent legal framework for the operation of Security Services (hereinafter: SS) and management of SIS and that there is considerable room for improvement within that framework. The standard legal-dogmatic method was employed in undertaking the analysis, coupled with other legal methods customarily employed to analyze positive law. Given the limited scope for the presentation of the results of the analysis no comparative legal solutions or more detailed theoretical-legal reviews were given.

The objective of the analysis is to provide a precise and succinct overview of the characteristics and basic institutes of the legal regulation of the RS SIS, as well as to identify any shortcomings and weaknesses of such regulation that need to be rectified by legislative intervention. The analysis should serve as the basis for drawing up practical policy proposals and a model new law on security services.

Three chapters constitute the structure of the analysis: the first one provides a review of the state of play and main characteristics of the legislation; the second presents the basic findings of the analysis of the principal legal institutes and important solutions; and the third lays particular emphasis on the shortcomings of specific solutions which need to be rectified. This is followed by the concluding part with recommendations and a list of the legal and other sources used (Attachment 1).

2.
THE LEGAL FRAMEWORK: REVIEW AND BASIC CHARACTERISTICS

The legal framework which regulates the RS SIS consists of a number of "layers" of general legal enactments, none of which can be disregarded if a full and correct „picture" of this framework and its more important institutes is to be gained. Reference to „layers" is intended to introduce a criterion for the classification of different regulations relevant to the matter at hand, in view of (1) the multilevel regulation, i.e. degree of normative coverage of the subject matter (namely whether the regulation regulates the SIS in its entirety or in its greater or lesser part) and (2) the multilevel application, namely having regard to priority in the application of specific regulations governing the matter at hand (i.e. whether primary application – *lex specialis*, or subsidiary or consequent application of regulations is in question).

Proceeding from the mentioned criterion, regulations constituting the legal framework for the RS SIS could be categorized as follows (only the more important legislation is included):

1) The Constitution and international treaties: The Constitution (in particular the provisions spelling out Constitutional principles, human rights and freedoms, the system of government, independent state control bodies and parliamentary oversight of SS); international treaties related to human rights and security issues (organized crime, corruption, human trafficking, terrorism, hostage taking, money laundering, security cooperation and exchange of data and other);

2) Organic legislation: Law on the National Assembly[1] and the Rules of Procedure of the National Assembly, the Law on the President of the Republic and the Law on the Government (powers for management of the SIS and powers of oversight of the work of SS); the Law on State Administration, the Law on Ministries, the Law on Civil Servants, the Law on Salaries of Civil Servants and State Employees, the Law on the Budgetary System, the Law on Public Procurement and other general enactments applied within the state administration system (regulating the position of SS and their members, budgeting, public procurement and other issues, unless such issues have been specifically regulated by laws on SS);

3) Regulations governing the SS system: Law on the Basic Regulation of RS Security Services (hereinafter: LBRSS, with two Decrees[2]; the Law on the Security and Information Agency (hereinafter: the Law on SIA), with five Decrees[3]; and the Law on the Military Security Agency and the Military Intelligence Agency (hereinafter: Law on MSA and MIA), with four Decrees.[4];

1 A full list of the legal sources is given in Attachment 1 to this Analysis.

2 Decree Establishing the Office of the National Security Council and Decree on the Assignment of Jobs for the Security Protection of Particular Persons and Facilities.

3 Decree on the Manner of Registering, Processing, Keeping, Using, Protecting and Transferring to Other Competent Authorities Information and Documents on Activities within the Purview of the SIA; Decree on Official Identification Cards of SIA members; Decree on Users of External Information of SIA and Types of Editions; Decree on Specific Criteria for Assigning „Confidential" and „In-house /restricted/" Classification Levels at the SIA; Decree on Disciplinary Accountability of SIA Members.

4 Decree on the Specific Criteria and Procedure for Employment and Termination of Employment in the MSA and the MIA; Decree on the Type, Form and Content of MSA and MIA Official Identification Card and Badge Design; Decree on the Appearance and Manner of Use of Insignia, Symbols and Other MSA and MIA Emblems and Markings; Decree on the Manner and Conditions of Making Available RS Real Estate to the MSA and the MIA for Their Needs.

4) Regulations which additionally regulate the powers or tasks of SS: primarily the Law on the Police and the by-laws adopted to give it practical effect (in respect of the police powers of SIA and MSA) and the Criminal Procedure Code (in respect of the application of specific police powers and special evidentiary measures by SIA and MSA); then also the Law on the Prevention of Money Laundering and the Financing of Terrorism, Law on the Organization and Jurisdiction of Government Authorities in the Suppression of Organized Crime, Corruption and Other Serious Criminal Offences, Law on the Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, Law on the Organization and Competences of Government Authorities Combating Cyber Crime, Law on Cooperation with the International Criminal Tribunal, Law on the Protection Programme for Participants in Criminal Proceedings and other;

5) Regulations which principally or additionally regulate the status of SS members: apart from by laws on SS, their status is regulated by the Law on the Police and the by-laws adopted for its implementation (the status of SIA members), the Law on the Serbian Armed Forces and the by-laws adopted for its implementation (the status of military personnel- MSA and MIA members), as well as by regulations on civil servants (in respect of issues that have not been regulated under the foregoing legislation) and a special collective agreement for government agencies, and by the Labor Law (subsidiary application to issues not regulated by regulations on civil servants);

6) Regulations applicable to specific major issues of importance for the manner of SS operation and work: the Data Secrecy Law (with 16 by-laws),[5] the Law on the Protection of Personal Data, the Law on Freedom of Access to Public Information, the Law on Electronic Communications, the Law on Telecommunications, and other laws;

7) Regulations governing external oversight of SS work: in addition to the LBRSS, the Law on SIA and the Law on MSA and MIA, external oversight and control have also been regulated under the Rules of Procedure of the National Assembly, the Rules of Procedure of the Government, the Law on the Protector of Citizens (Ombudsman), the Law on the State Audit Institution, regulations on the jurisdiction of courts and the Criminal Procedure Code (hereinafter: CPC), the Law on the Constitutional Court and other regulations; and

8) Other regulations: the legal framework regulating the SIS also comprises some other pieces of legislation such as, for example, the Law on Defense, the Criminal Code, a number of laws in the area of internal affairs, and others. A special group of regulations are in-house /restricted/ regulations (which are not published) and which are passed by SS officials, namely the minister of defense, in conformity with the law (rulebooks on internal organization, operational instructions and directives).

Finally, to the list of legal regulations we should add the relevant *strategic documents*, which are binding on the SS and the authorities at the helm of the SIS although they are political documents in character. Of special importance of these are: the RS National Security Strategy, the Defense Strategy, the National Strategy for the Prevention of Money Laundering and the Financing of Terrorism, the Strategy for Combating Corruption, the Strategy for Integrated Border Management and some other strategies. The adoption of a special strategy for combating terrorism is also expected soon.

The following formal and substantial features of the legal regulation of the RS SIS can be singled out as its basic characteristics:

1) The complexity of the legal regulation stemming from the multitude of regulations and the partial approach to regulating specific issues. Even though such complexity is not completely avoidable by the nature of things (as a sectoral

5 For instance, the Decree on the Forms of Security Questionnaires and the Decree on Specific Criteria for Assigning "State Secret" and "Strictly Confidential" Classification Levels.

approach is principally required to regulate some issues and because of the large number of entities in charge of control and oversight and for similar reasons), it is a fact that the legal regulation is complex above a level that could be justified as necessary. This characteristic is true even at the level of laws and by-laws on SS, which are unreasonably fragmentized by subject and hence complicated to apply and to understand by the lay public. The same observation is true of the manner of regulating SS tasks and powers (for example, it is difficult to legally explain the differences in regulating the powers and procedures for the covert collection of data in the Law on SIA on the one hand and in the Law on MSA and MIA on the other hand, but also within the latter law in respect of MSA and MIA powers), and in particular of the regulation of the status of the members of these Services (four-tier legal regulation) and of the regulation of oversight and control of their work (the norms on external control are strewn about a whole series of laws and other regulations).

2) The fact that most of the regulations on SIS are of fairly recent date does not necessarily render them modern, in particular due to their *insufficient compliance with the substantive requirements of the rule of law and contemporary European standards in this field*. These regulations have been considerably advanced over the past ten years or so, particularly relative to the former state of play. This notwithstanding, their content and quality can rather be said to be a combination of contemporary and other solutions which cannot claim that epithet. The latter is attested to by recent major interventions in the Law on MSA and MIA and the Law on SIA (2013 and 2014 respectively). Additionally, other easily observable flaws also exist, manifested in the practical application of these regulations, which shall be explained in more detail further on in this analysis.

3) The next more general characteristic of the legal framework under review is the *still wide scope of regulation by by-laws*. Namely, this was the dominant form of regulation of this subject-matter up until the last two or three decades of the 20th century, and not only in countries of the European socialist bloc but in the „old democracies"as well. Subsequent development evolved in favor of regulation by law and constricting scope for regulation by secondary legislation. The RS, namely then the FRY, followed suit by adopting its first laws on SS in 2002. The RS followed the same trend since the time it became autonomous as a state (2006), but apparently not resolutely enough, because far too many issues were still left to be governed by by-laws. In this connection, without contesting the fact that one of the practically universally valid characteristics of the legal regulation of SIS is that its normative provisions are still less detailed (in comparison to other segments of the security sector), additional efforts should be invested in order to ensure the future regulation by laws of a number of issues currently covered by secondary legislation.

4) Similarly to the foregoing and basically for the same reasons, the legislation governing SIS features *a degree of underregulation and legal lacunae*. Additionally contributing to this feature are the nature and importance of SS activity, i.e. secrecy as the primary characteristic of their operation and its importance for national security. The organization of SS, their personnel composition and methods of work as well as the results of their work of significance for the protection and safeguarding of national security, and the financing of their work cannot be transparent to the extent and in the way required of other state institutions. This is a fact to be reckoned with in any developed democratic society too. Apart from that, the extent of regulation can likewise be impacted by the very power SS wield in society. Drawing on that power as an instrument of influence on the legislative process, often in collusion with the executive branch, SS can effectively bring about underregulation of their own activity and in particular avoid being fully subject to control and oversight. Such influences are most easily instrumentalized by invoking national security interests, and possibilities for this exist both in societies with developed democratic institutions and, even more so, in societies which either do not have or are only just building such institutions.

5) Another of the more general characteristics of the legal regulation under review can be said to be *the relatively high level of terminological generalization and the insufficient precision of concepts. For reasons already adduced in respect of the previous characteristics, legal norms are too often articulated using general terms the meaning of which is not defined in regulations and on which not even theoretical papers concur*. This vagueness of terms detracts from clarity and results in different practices in applying regulations, sometimes creating leeway for discretionary interpretations and acts. Similarly, the use of terms and expressions has not been standardized, so that substantially identical matters are termed differently in different regulations. Some examples of this will be given later, suffice it to note at this point that such practice complicates the application of regulations and makes them more difficult to understand.

3.
ANALYSIS OF PRINCIPAL LEGAL INSTITUTES AND MAJOR LEGAL ARRANGEMENTS: BASIC FINDINGS

3.1. ORGANIZATION, COMPETENCES AND POWERS OF SECURITY SERVICES

3.1.1. Organization and status of members

SIA has the status of a special organization,[6] i.e. autonomous state administration body and the capacity of a legal entity. Directing its activities is a director, who is appointed and dismissed by the Government, and his position is that of an official – head of an administrative body; he has special rights and responsibilities as laid down in the Law on SIA and the LBRSS. There is a deputy director who is appointed and dismissed in the same manner as the director. In the SIA, organizational units are set up to carry out work falling within its purview. The Director issues internal instructions to regulate the specific aspects of internal organization and the discharge of activities, and issues binding operational instructions to SIA members. In contrast, the MSA and the MIA have the status of an administrative body within the Ministry of Defense (hereinafter: MoD).[7] Their work is directed by directors who are responsible for their work to the minister of defense. The director is authorized to issue instructions and orders for work and is responsible for the lawful and professional functioning of the MSA and/or the MIA and the dedicated use of resources in them. Both these agencies have the status of legal entities and deputy directors, which is an arrangement at variance with the organic legislation on administration bodies within ministries.[8] The directors and their deputies are appointed and dismissed by the president of the Republic at the proposal of the minister of defense, if military personnel are in question, or by the Government at the proposal of the same minister if a non-military person is in question. The candidates must have completed General Staff advanced training courses and have at least nine years of experience on intelligence and security posts within the defense system.

All those employed in SS are designated „service members". Among SIA members we distinguish between authorized officials (AO) and employees with special duties in terms of police regulations. SIA members enjoy the same legal status and powers as police officers, namely the right to carry weapons and ammunition and to exercise police powers in accordance with regulations on the police. They prove their official status by their official identity cards. Regulations applied to employees in the MoI are applied to their labor rights, duties and responsibilities, while the Law on Civil Servants and labor regulations apply to issues not regulated by the former. The Law on SIA lays down that SIA members may not be affiliated with political parties, may not organize in trade unions or strike. It provides for their obligation to safeguard SIA data classified as state, military, official or business secrets, as well as methods, measures or actions considered to be or containing any of these secrets, as well as other data the disclosure of which would be detrimental to the interests of natural or legal entities or impair the effectiveness of SIA's work. This obligation is undertaken upon commencement of employment and continues even after termination of employment with

6 Reforms of the MoI (Ministry of the Interior) in 2002 transformed two former departments - the State Security Department and the Public Security Department. The status of the former was regulated by the Law on the Police with the organizational form of Police Directorate. Instead of the State Security Department, the SIA was formed in 2002, and the Law on SIA established a functional relationship between SIA and MoI.

7 On the establishment and development of the MSA see: Kovac, S. and Popovic-Grigorov, I., *Military Security Service,* Belgrade, 2013.

8 Administration bodies within ministries do not have the status of legal entities nor deputy directors. In the case of the MSA and the MIA obviously a *lex specialis* arrangement is in question, which is legally possible.

SIA. The Director of SIA may release a SIA member from the obligation of maintenance of secrecy. MSA and MIA members are professional members of the Serbian Armed Forces (hereinafter: SAF) and civilians, with AO and other members distinguished among the latter. In the former case, the applicable regimen is the one laid down in the Law on the SAF and the special provisions of the Law on MSA and MIA, and in the latter the regimen stipulated under the Law on Civil Servants and the Law on MSA and MIA. Here too the rule applies that issues not regulated by the mentioned laws shall be governed by the provisions of the Law on Civil Servants and, possibly, labor regulations. The AO of these agencies have official identity cards with badges. Weapons of MSA and MIA members are subject to the rules of service in SAF. In contrast to SIA members who do not wear uniforms, MSA and MIA members who are military personnel shall wear military uniforms in conformity with the rules of service in the SAF.

3.1.2. Competences

The function of the **SIA** is a security and intelligence one and consists of the performance of specific intelligence, counterintelligence and security duties and tasks of importance to national security. Under the Law on SIA, the Agency carries out tasks relating to the protection of the security of the Republic of Serbia, the detection and prevention of activities which threaten to undermine or bring down the constitutional order of the Republic of Serbia, investigates, gathers, processes and analyzes security-intelligence data and information relevant to the security of the Republic of Serbia and submits such information to the competent state authorities; it also carries out other duties specified under the law. The SIA also works on detecting, monitoring, documenting, preventing and eliminating the activities of organizations and individuals engaged in organized crime, cross-border crime and domestic and international terrorism, the gravest forms of crimes against humanity and international law and against the constitutional order and security of the RS. Also, SIA can take over and directly carry out a number of duties which are within the competence of the MoI, when so dictated by specific RS security considerations. A decision to that effect shall be taken by the director of the SIA and the minister of the interior by mutual agreement. As well, SIA and MoI pursue obligatory forms of cooperation in respect of issues relevant to the security and constitutional order of RS, the security of persons and property, on the basis of an act by which the SIA director and the minister of the interior agree on the forms and manner of their cooperation. In addition, in discharging the duties within its remit, SIA also cooperates with other competent state authorities and services as well as with the authorities, organizations and services of other states and international organizations, in keeping with the Government 's guidelines and RS security-intelligence policy.

The function of the **MSA** is the intelligence and counterintelligence protection of the MoD and the SAF. Its duties and tasks are grouped as general security, counterintelligence and other tasks. The general security tasks of MSA are as follows: assessing security risks that might jeopardize the functioning of the MoD and the SAF; planning, organizing and controlling the security protection of forces, installations and resources and security measures in discharging duties, tasks and activities; implementing and overseeing the implementation of data secrecy measures; conducting vetting; issuing security clearances; carrying out duties pertaining to industrial security and the security of information systems, computer networks, communications and cryptographic data protection; participating in security protection of other elements of the defense system and discharging other duties and tasks.

Within the framework of its counterintelligence work, the MSA shall: detect, trace and prevent intelligence operations, subversive and other activities undertaken by foreign countries, organizations, groups or persons targeting the MoD and the SAF, as well as domestic and international terrorism, extremism and other forms of organized violence targeting the MoD and the SAF; detect, investigate and document crimes (1) against humanity and other values protected by international law, (2) organized crime, money laundering and corruption within the MoD and the SAF, (3) revealing classified information of interest for defense, disclosure of official secret and disclosure of military secret; it shall organize and implement counterintelligence protection of classified MoD and SAF data; collect, analyze, and assess counterintelligence data within its purview and carry out other duties and tasks. In the case of activities and acts by civilians targeting the MoD and the SAF, the MSA shall necessarily cooperate with SIA and the

police. Other duties of the MSA include internal control of the performance of MSA personnel, their education and advanced training, scientific research, maintenance of archives and issuance of publications, cooperation with other services, organizations and institutions, protection of information and of its forces, security vetting of candidates for employment with the MoD and service with the SAF and other.

The function of the **MIA** is conducting intelligence activities of relevance to defense. Its duties include collection, analysis, assessment, protection and transfer of data and information on potential and real threats, activities, plans or intentions of foreign countries and their armed forces, international organizations, groups and individuals. The data and information are of military, military-political, military-economic character and other data and information pertaining to terrorist threats directed from abroad and targeting the defense system. More specifically, MIA tasks include: collecting and checking data and information, their processing, analysis, assessment and submission to the competent authorities; cooperation and exchange of information with national and foreign services and institutions; safekeeping and protection of collected data and information; security protection of its activities, persons, facilities and documents, as well as of MoD and SAF facilities and persons abroad; organizing training of its personnel, undertaking research, compiling archives and similar.

3.1.3. Powers

The **SIA e**mploys appropriate operational methods, measures and activities as well as appropriate operational and technical means to collect data and information for the purpose discharging duties falling within its remit. These measures and activities shall be undertaken pursuant to a decision adopted in conformity with the law and other regulations by the SIA director or a person so authorized by him.

SIA processes, stores and uses gathered information and documentation on activities within its competence, keeps appropriate records thereon and provides protection of their secrecy. The method of filing, processing, storing, using, protecting and dissemination of information to competent state authorities is specified by the Government.

In discharging their duties SIA members have (1) police powers laid down in the Law on the Police and (2) special powers laid down in the Law on SIA. They may exercise their police powers in discharging duties of detecting, tracing, documenting, preventing, suppressing and intersecting the activities of organizations and persons aimed at committing crimes falling within the remit of SIA, as well as when due to requirements imposed by special RS security reasons it takes over and directly carries out specific duties which are within the competence of the MoI.

SIA members are authorized to request and receive information, data and professional assistance from state and other authorities and legal and physical persons important for clarification of facts relevant to the sphere of their activities. No one can be forced to provide assistance, information and data, while failure or refusal to provide assistance, information or data must be based on reasons specified by law.

Citizens who extend assistance to the SIA in the performance of the latter's duties shall be entitled to free legal aid if criminal or other proceedings are being conducted against them on that account, as well as to other aid and protection when their or their family members' lives and/or their personal safety and the security of their property are threatened.

In Articles 13, 14 and 15a to 15g, the Law on BIA regulates the legal regimen for the application of *special measures and procedures for the secret gathering of data, which deviate from the principle of inviolability of correspondence and other means of communication*. Four such measures and/or procedures have been provided for: (1) secret surveillance and recording of communications, regardless of the form and technical means used for it, or surveillance of electronic or any other address; (2) secret surveillance and recording of communications in public places and places with limited

access or in premises; (3) statistical electronic surveillance of communications and information systems with the aim of obtaining data on communication or the location of used mobile terminal equipment; and (4) computer search of already processed personal and other data and their comparing with data acquired through the application of measures stipulated in items (1) to (3).[9] Secret surveillance and recording of locations, premises and objects, including devices for automatic data processing and equipment used or potentially used for storing electronic records, may be approved along with the foregoing measures.

Special measures may be prescribed against an individual, group or organization when *two requirements* have been met: (1) there exist grounds for suspicion that the individual, group or organization in question is conducting or preparing acts directed against the security of RS, and (2) when the circumstances of the case indicate that those acts could not be otherwise detected, prevented or proved, or that it would involve disproportionate difficulties or substantial danger. Apart from these two requirements, in deciding on ordering such measures and their duration, special consideration is given to whether the same result could be achieved in a manner less restrictive of citizens' rights *(principle of proportionality)*.

A *reasoned proposal for ordering a special measure* shall be filed with the court by the Director of SIA and it shall contain: the designation of the special measure, the available data on the individual, group or organization against which it shall be applied, the existence of conditions for its application, and its duration. The proposal shall be decided by the President of the High Court in Belgrade and/or a judge delegated by him from among the judges of the Special Division of that Court which handles cases dealing with criminal offences relating to organized crime.

The decision shall be handed down within 48 hours in the form of an order containing, in addition to the facts indicated in the proposal for its imposition, also data on the manner of application and extent of the measure. If the Court rejects the proposal for the imposition of the measures, it shall bring a *ruling* to that effect. The Director of SIA may appeal the ruling, on which a decision shall be brought within 48 hours by a panel of three judges of the Special Division of the Court of Appeal in Belgrade

The special measure shall remain *in effect* for three months and may at maximum be re-imposed three times for three-month periods. The measure shall be discontinued forthwith when the reasons for its application cease to exist. *Extension of the application* of the special measure is possible if during its application information is obtained to the effect that the individual, group or organization is using other means of communication, electronic or other address, or that communication is conducted in other places with limited access or in other premises. The director of the SIA shall issue a respective order and file a proposal with the Court within the next 48 hours to grant it an additional extension of the measure. If the judge rejects the proposal, the collected material shall be destroyed in the presence of the judge and a record drawn up. If during the application of special measures, material is collected on a criminal offense for which special evidentiary measures may be ordered, such material shall be submitted to the public prosecutor (*so-called incidental findings)*. Similar to the provisions of the CPC which refer to special evidentiary measures, provisions have been prescribed on the *handling and secrecy* of documents ordering these measures and of the collected material (Article 15g).[10]

Finally, in accordance with the provisions of the CPC, the SIA (and also the MSA and the police , and in respect of some measures also other agencies) may be designated by a decision of the court and in one instance of the public

9 For more see: Milosavljevic, B., *Legal Framework and Practice of Application of Special Measures and Procedures for the Secret Gathering of Data in the Republic of Serbia*, Belgrade, BCSP, 2015.

10 Such provisions were lacking prior to the 2014 amendments to the Law on SIA, in which connection a dispute had arisen and was finally decided by the European Court of Human Rights (Judgment of 25 June 2013 in the case "*Youth Initiative for Human Rights" v. Serbia*. Application number 48135/06).

prosecutor as the authority to execute the order for the implementation of some of the special evidentiary actions (secret surveillance of communication, secret surveillance and recording, use of simulated business services, computer data searches, controlled deliveries and the engagement of undercover operatives). Whether the SIA or one of the other agencies will be entrusted with executing the court order shall depend on their competences for preventing and suppressing specific criminal offences.[11]

The **Law on the MSA and MIA** regulates in more detail the powers of these agencies, which after the 2012 decision of the Constitutional Court[12] were considerably revised, particularly in the case of MSA powers.

The **MSA** is primarily authorized to collect data from: 1) public sources; 2) physical and legal entities; and 3) state bodies, organizations and services, as well as from holders of public powers. Data can be collected from physical persons only with their consent. If the person gives his/her consent in writing, audio and video recordings of interviews may be made. Prior to commencing an interview, the MSA official must present to the interviewee his official ID and badge and warn him/her to keep secret all the information on MSA's subject of interest. Data may also be collected from persons with whom covert cooperation has been established, as well as from employees of the MoD and members of the SAF. As well, the MSA may examine MoD and SAF documentation. Apart from that, the MSA, the SIA and the SAF are to mutually cooperate and exchange data.

State bodies, organizations and services, local government bodies and holders of public powers shall make available to MSA personnel for their examination registers, collections and electronic databases, other official documentation and data of relevance for the exercise of MSA powers.[13] If secret data is in question, they shall be made available in accordance with the Data Secrecy Law. The administrators of data collections and the employees of bodies and organizations the documentation of which the MSA requested to examine shall be under the obligation to keep secret all information regarding MSA's subject of interest.

A second type of MSA powers is the authority for the covert collection of data by applying special procedures and measures (hereinafter: measures). The MSA can exercise such powers when data cannot be collected in any other way or if their collection poses a disproportionate risk to the lives and health of people or to property or is disproportionately costly. The data is collected primarily for preventive purposes, to avert threats to the MoD and the SAF. Such data cannot be used as evidence in criminal proceedings. If the possibility exists to apply a number of measures, the one that encroaches less upon guaranteed rights and freedoms shall be employed. The application of such measures shall be regulated in more detail by the minister of defense at the proposal of the director of the MSA and upon obtaining the opinion of the National Security Council.

Eight special measures have been prescribed, namely: 1) operational penetration into organizations, groups and institutions; 2) covert acquisition and purchase of documents and objects; 3) covert access to personal records in compliance with the Law; 4) covert surveillance of persons in the open space and in public places by applying technical means; 5) covert electronic surveillance of telecommunications and information systems in order to collect retained data on telecommunication traffic without examining their content; 6) covert recording and documenting of conversations in open and closed spaces by using technical means; 7) covert surveillance of the content of correspondence and other means of communication including covert surveillance of the content of telecommunications and information systems; and 8) covert surveillance and recording of the interior of facilities, closed areas and objects.

11 On this see: Milosavljevic, B., op.cit., pp. 12-16.

12 In its decision the Constitutional Court found that some provisions of the Law on MSA and MIA pertaining to MSA powers were in contravention of the Constitution (The decision of the CC /Constitutional Court/ was published in the "Official Gazette of RS", number 55/12).

13 This obligation does not refer to SS and the police with which data is exchanged in conformity with the laws regulating SS and the police.

Measures from items 1) to 4) shall be taken pursuant to a written and reasoned order of the director of the MSA or an AO so authorized by the former, and records of the issued orders shall be maintained.

A court decision is required for the other four measures which obviously encroach upon the right to privacy to a greater extent. To apply the measure under 5), the decision of the competent High Court is required (according to the area where the measure is applied), and for the remaining three (under 6), 7) and 8), a decision of the Supreme Court of Cassation is required. In the first case, the decision on the application of the measure shall be brought by an authorized judge designated by the president of the High Court, pursuant to a written proposal of the MSA director or an AO authorized by the former. The proposal shall specify the designation of the measure, data on the person, group or organization the measure will be applied to, the reasons for applying the measure, the place and duration of its application. The Court shall pass its decision within 8 hours and the MSA director or the AO shall issue an application order upon receipt of the court's decision. The proposal, the decision and the order for application shall be secret. The procedure is the same in the second case as well, provided however that the deadline for the adoption of the decision is 24 hours and that the proposal and the application order shall be issued by the MSA director (and not also by an AO authorized to that effect by the director). Provision has also been made for emergencies requiring the urgent implementation of a measure.[14] The obligation has also been laid down of postal and other companies – operators to provide conditions making the application of measures by the MSA possible. The special measures from items 1) to 4) may be applied as long as reasons for their application exist, and the remaining four (according to a court decision) may be applied for six months. On the basis of a new proposal their application can be extended by another six months. The competent judge shall be notified of the termination of their application.

When data collected by the application of special measures indicate that a criminal offence prosecuted *ex officio* is in preparation, the MSA shall notify the competent Public Prosecutor's Office that it has grounds for suspicion to that effect, without informing it on the measures applied. The MSA may propose to the Prosecutor's Office the implementation of special evidentiary actions from the CPC under the conditions prescribed in the Code. The MSA may apply the special measures under items 5) to 8) to persons employed with the MoD and to SAF members. If it assesses that such measures should be applied to other physical persons also (i.e. not employed with the MoD and not SAF members), the MSA shall immediately inform the SIA or the police accordingly and agree on the further course of action with them.

The third group of MSA powers have the character of extended powers which support the MSA in discharging its work i.e. exercising its already mentioned powers. MSA AO have access to all locations [15] for the purpose of installing equipment for the application of special measures in conformity with the decision of the competent Court. During the application of such measures, the MSA is authorized to use data, documents and means serving to conceal the identity of the MSA and of its members and persons with whom covert cooperation has been established. The IDs of members of Parliament, members of the Government, of the General Secretariat of the Government and of the president of the Republic, and the official IDs of judges, public prosecutors, members of other SS, the police and of other AO may not be used for this purpose. Also, the MSA may for security reasons use business and residential premises and other immovable property owned by the RS, in the manner regulated by a Government act. As required, the MSA shall also undertake measures to conceal ownership of property and of legal entities. Against compensation, it

14 When so dictated by an emergency, in particular in case of domestic or international terrorism, the MSA director may order the immediate implementation of a special measure, having previously obtained approval from the competent judge. The judge shall decide on the continuation or termination of the special measure within 24 hours as of the commencement of its application. If the judge does not approve its application, the MSA director shall immediately terminate the application of the measure, order that the collected data be destroyed in the presence of a commission and submit the relevant record to the Court.

15 The meaning of the expression "to all locations" has not been specifically defined by the law, so that the right of access to install equipment for the application of special measures approved by a decision of the Court can refer to any place and not just to MoD and SAF facilities.

may use the services of physical and legal entities, in accordance with a regulation issued by the minister of defense. Finally, for the purpose of carrying out its work the MSA may establish legal entities and regulate their operation in a way which will not associate them with the MSA.

The fourth group of MSA powers are police powers. In detecting, investigating and documenting criminal offences falling within the purview of the MSA, its AOs shall be vested with the following powers: 1) checking and establishing the identity of persons and identification of objects; 2) summoning 3) asking for information; 4) temporary confiscation of objects; 5) searching premises, facilities and documentation and counter-terrorist inspection; 6) observation; 7) collection, processing and use of personal data; 8) polygraph testing; and 9) police powers for implementing surveillance measures and recording telephone and other conversations or communications by using other technical equipment and optical recording of persons, and undertaking of other measures and activities in compliance with the CPC. If the MSA AO assesses that the said powers should be exercised vis-à-vis persons who are not members of the SAF nor employed with the MoD, the MSA shall immediately inform the SIA or the police accordingly and decide on the further course of action with them. MSA AO have the right and duty to keep, carry and use firearms within their competences prescribed by law. They also have the right to use observation, recording, navigation and communications equipment as well as to make use of means of transportation and communications devices in discharging their tasks. State bodies and legal entities shall extend the necessary assistance to MSA AO for discharging their tasks. The MSA shall compile and maintain collections and registers of personal and other data as well as of documents on such data, which collections, registers and documents shall be classified.

Within its competences, the **MIA** is authorized to collect data: 1) from public sources; 2) from physical and legal entities; 3) by exchanging data with other security services; and 4) by applying special procedures and measures for the covert collection of data (hereinafter: special measures).

There are seven special measures, namely: 1) covert collaboration with physical and legal entities in order to collect data and information; 2) covert acquisition and purchase of documents and objects; 3) operational penetration into organizations, institutions and groups; 4) undertaking measures to conceal identity and property; 5) establishment of legal entities and regulation of their operation in a way which will not associate them with the MIA; 6) covert utilization of the property and services of physical and legal entities with compensation; and 7) use of special documents and resources that protect the MIA, its personnel, premises and equipment. As can be noticed, the measures under items 4) to 7) are in the case of MIA treated as special measures, whereas in the case of the MSA all such measures are of a different character, i.e. serve as additional measures in support of the application of special measures, and/or discharge of duties. Both military SS are regulated by the same law. All special measures are applied pursuant to an order by the MIA director or a person authorized by him (i.e. without a court decision). Records are kept on the issued orders. The application of the measures is regulated more specifically by the minister of defense, at the proposal of the director of the MIA and upon obtaining the opinion of the National Security Council. Like the MSA, in applying special measures, the MIA may not use the IDs of parliamentary deputies and other officials. The MIA can use business and residential premises and other immovables owned by the RS when so warranted by security reasons. It establishes and maintains collections and registers of data within its remit, which is classified data, as is data which refers to its methods of work and its functioning.

MIA members do not have police powers nor the right and duty to keep, carry and use firearms. They have the right to use observation, recording, navigation and communications equipment, as well as to make use of means of transportation and communications devices in discharging their tasks. State bodies and legal entities shall extend them the necessary assistance for discharging their tasks.

3.2. DIRECTION, HARMONIZATION AND COORDINATION OF THE WORK OF SECURITY SERVICES

SS are state administration authorities, and the Constitution sets forth that the Government shall direct and harmonize the work of these bodies, supervise their work and be accountable to the National Assembly for their work (Articles 123 and 124). Elaborating these provisions, the Law on the Government specifies that the government shall direct the state administration authorities in implementation of policy and execution of laws and that if a state administration authority fails to pass a regulation within its purview the Government may pass it, and it may also annul or revoke a regulation passed by a state administration authority that is contrary to law or a Government regulation (Article 8). The Law on State Administration (Articles 61 to 63) additionally regulates relations between the Government and state administration authorities. The Government shall direct state administration authorities by its conclusions, and can in the same way instruct them to examine a particular matter or undertake a specific task and submit a special report to it thereon. The Government can set up coordination bodies to discharge work falling within the purview of a number of bodies and can assign them specific tasks. Ministries and special organizations are to submit annual work plans and reports on their work to the Government (the report describes the situation in their respective purviews, provides information on the enforcement of laws, other general enactments and conclusions of the Government and on undertaken measures and their effects). As well, the Government shall resolve jurisdictional disputes between state administration authorities.

As the MSA and the MIA are administration bodies within the MoD, the provisions of the Law on MSA and MIA prescribe that they shall be independent in discharging duties within their purviews, but also that the minister of defense shall direct their work and pass legislation from their scope of work, as well as that the Government shall control the MSA and the MIA and exercise its powers vis-à-vis them through the MoD. This position of the MSA and the MIA is consonant with the organic legislation pertaining to the relationship between ministries and the bodies comprising it (Article 32 of the Law on State Administration).

The issues of the direction, harmonization and coordination of the work of SS are additionally and more specifically regulated in the National Security Strategy and the LBRSS. Specifying that the National Assembly, the President of the Republic and the Government shall be principally in charge of managing the national security system, the Strategy also gives the general content of the roles of these three bodies in discharging that function. *The National Assembly* decides on war and peace, passes laws and other general acts in the field of national security and supervises the work of the Government, and through its committees, exercises supervision and democratic and civilian control over the national security system. *The President of the Republic* chairs the National Security Council and commands the SAF, in accordance with the Constitution and the law, points to certain issues and problems from the domain of national security, initiates their solution and brings acts falling within his competence. *The Government* directs and coordinates the work of public administration bodies in the area of national security, proposes and implements the national security policy, directs and coordinates the functioning of the national security system, provides material and financial resources for the needs of that system, manages the activities of state bodies, state administration bodies, institutions and legal entities in achieving national security and ensures the implementation of international treaties and agreements in the field of national security.

The National Security Council has a special place within the management of the national security system which is defined by the Strategy and particularly by the LBRSS (Article 5). In addition to preserving national security, this body directs, harmonizes and oversees the work of SS. The Council *directs and harmonizes the work of SS* by: 1) reviewing intelligence and security assessments and adopting conclusions to define priorities and the manner of protecting and directing the realization of national interests achieved by intelligence and security activities; 2) adopting conclusions regarding the work of SS and the Coordination Bureau; 3) adopting conclusions directing and harmonizing the work of SS; 4) adopting conclusions directing cooperation of SS with the SS of foreign countries and international organizations; 5) adopting conclusions to harmonize the activities of state bodies dedicated to international cooperation in the field of national security and defense; 6) monitoring the implementation of its conclusions; 7) submitting

opinions on proposed SS annual and medium-term work plans; 8) submitting opinions to the Government on SS budget proposals and monitoring the disbursement of approved budgetary funds; 9) submitting opinions to the Government on proposals for appointing and dismissing SS directors.

The responsibility of coordinating SS, i.e. operationally harmonizing their work, has been entrusted to a special body – the Bureau for Coordinating the Work of SS (Coordination Bureau) (Article 3, paragraph 3 and Articles 11 and 12 of the LBRSS). Its members are SS directors and the Council Secretary, while the following may participate in its work by invitation: representatives of the Ministry of Foreign Affairs, the director of the police and chiefs of police departments, the republican public prosecutor, the director of the Customs Administration and heads of other state bodies, organizations and institutions. This body operationally harmonizes the work of SS by: (1) defining tasks to be carried out through operational harmonization of activities between SS, and between SS and other state bodies, and coordinating such activities; (2) defining the operational harmonization method in specific cases; (3) setting up mixed task forces for operational tasks involving harmonized activities; and (4) analyzing the results of harmonized operations and reporting thereon to the Council as appropriate.

Bearing in mind the organic provisions regulating relations between the Government and state administration bodies (laid down by the Constitution, the Law on the Government and the Law on State Administration, on the one hand, and the provisions of the LBRSS on the other hand, the question of their mutual relationship can arise, having regard to the role the National Security Council has been given in directing and harmonizing the work of SS. To wit, is or is not the role of the Council complementary to the systemic role of the Government as principally in charge of directing and harmonizing state administration bodies. Account being taken of the fact that executive branch officials sit on the Council, we could say that this is an arrangement that does not deviate from the systemic premise, namely that it is complementary to the role of the Government.

3.3. CONTROL AND OVERSIGHT OF THE WORK OF SECURITY SERVICES

In addition to the constitutional provision on parliamentary control of SS and the provisions of the Rules of Procedure of the National Assembly, the principles of the legal regulation of their control and oversight are also enshrined in the LBRSS, the Law on MIA and the Law on MSA and MIA.

The LBRSS specifies that the work of SS shall be under the democratic civilian control of the National Assembly, the President of the Republic, the Government, the National Security Council, other state authorities and the public, in compliance with the law. A special chapter (Articles 15 through 21) contains provisions on the principles of supervision, parliamentary supervision and public oversight. Supervision of the work of SS is based on the following principles: 1) subordination and accountability of SS to the elected authorities of the RS; 2) political, ideological and interest-wise neutrality of SS; 3) obligation of SS to inform the public of the implementation of their tasks, in accordance with the law; 4) responsibility of subjects charged with supervision of SS to inform the public about the results of their supervision; 5) professional accountability and operational independence of SS members in discharging their assigned duties and accountability of SS executives for the work of the Services.

Parliamentary supervision is effected directly by the National Assembly and through its SS Control Committee, which has nine members. The Committee in particular: 1)supervises the constitutionality and legality of the work of SS; 2) supervises compliance of SS work with the National Security Strategy, Defense Strategy and security and intelligence policy of the RS; 3) supervises adherence to the prescribed political, ideological and interest-wise neutrality of SS; 4) supervises the legality of the application of special measures and procedures for secret data gathering; 5) reviews the proposal of budgetary resources needed for the work of SS and supervises the legality of expenditure of budgetary and other resources; 6) reviews and adopts reports on SS work; 7) reviews draft laws, other regulations and general enactments within the competence of the SS; 8) initiates motions and submits legislative bills within

the competence of SS; 9) examines citizens' proposals, petitions and complaints addressed to the National Assembly with regard to the work of SS, proposes measures for their resolution and notifies the applicants accordingly; 10) establishes the facts surrounding observed violations and irregularities in the work of SS and of their members and adopts relevant conclusions; 11) informs the National Assembly of its conclusions and proposals.

The director of SS shall respond to an invitation to attend a Committee sitting, and if unable to attend he/she is shall delegate his/her deputy or authorized representative to the sitting. At least once in the course of the regular session of the National Assembly (there are two such sessions in the year), the Director shall submit to the Committee a report on the work of SS (regular report). If so required or at the request of the Committee, an extraordinary report shall be submitted. Committee sittings may be closed to the public, in which case the Chairman of the Committee shall inform the public about the activities of the Committee, pursuant to the decisions reached at the Committee sitting. Members of the Committee and persons participating in the work of the Committee shall safeguard and preserve confidential information they receive on the Committee. To that end, Committee members shall sign a declaration of confidentiality upon their election and persons participating in the work of the Committee shall do so prior to their engagement on the Committee.

Direct supervision by the Committee is specifically provided for as the right of Committee members to carry out supervision in SS premises. Upon request from the Committee, the SS Director shall grant Committee members access to the Service premises, allow them access to documents, provide them with data and information on the work of the Service and answer their questions regarding the work of the Service. Committee members may not demand information on: the identities of current and former SS agents; SS members with aliases; third parties, if disclosure of such information might be damaging to them; methods of obtaining intelligence and security data; ongoing actions; method of application of special procedures and measures; data and information obtained through exchange with foreign SS and international organizations; and confidential data and information of other state authorities in the possession of the SS.

Public oversight, according to this law is effected by: (1) informing the public about the work of SS through authorities to which they submit their reports, and (2) the SS informing the public directly on specific security developments and events. Such informing may not infringe upon the rights of citizens or imperil the national security and other interests of the RS.

Under the Law on SIA, its work is controlled by the competent state authorities in conformity with the law and other regulations. Its director is required to submit reports on the work of the SIA and the security situation in the RS to the National Assembly and the Government twice a year. In addition, it prescribes that In performing the duties within its purview, the SIA shall comply with the basic principles and guidelines of the Government which refer to the security and intelligence policy of the RS and that individuals overseeing the work of the SIA shall protect and maintain the confidentiality of data and information they obtain during the period of control as well as after the termination of their duties. Even though this issue has not been specifically regulated by the law, internal control of work has been provided for, pursuant to an act issued by the SIA director. There exist Internal and Budgetary Control and Internal Audit units.

Under the Law on MSA and MIA, the special chapter on oversight and control (Articles 52 to 57), first specifies that the work of the MSA and the MIA shall be overseen by the National Assembly and the Government through the MoD. It provides for the Inspector General as a special internal control body, responsible for the control of both military SS, who is appointed by the Government[16] and who is accountable for his work to the minister of defense. The Inspector General shall submit reports on implemented control to the minister of defense and once a year also to the SS

16 At the proposal of the minister of defense and taking into consideration the opinion of the National Security Council.

Control Committee. He is appointed for a period of five years, and with a view to providing a level of protection to him while in office the law also lays down reasons for relieving him of office.[17] The Inspector General shall: 1) oversee implementation of the principles of political, ideological and interest neutrality in the activities of the MSA and the MIA and their members; 2) oversee the legality of implementation of special procedures and measures for covert data collection; 3) oversee the legality of expenditure of budgetary and other resources for their work; 4) give his opinion on draft laws, other regulations and general enactments within the competences of the MSA and the MIA; 5) establish the facts regarding observed violations or irregularities in the work of the MSA and the MIA and their members; 6) report to the minister on the findings of the oversight with a proposal of measures.

Observably, his first four tasks overlap with the remit of the SS Control Committee and therefore the question of the mutual relationship between his control and that of the Committee can be raised.[18] Only the fifth of the mentioned tasks is his inherent power, in the exercise of which he has the position of an internal supervisory body effecting control on behalf and under the supervision of the minister. The minister is in fact authorized to prescribe the manner of execution of his tasks, having obtained the opinion of the SS Control Committee.

Both military SS have special internal control units overseeing the legality of the work of these services and of the exercise of the powers of their members. The head of the Internal Control unit is directly subordinated to the director and shall regularly submit to the latter reports on work and on any abuses or irregularities in operation. If he learns of failure by the MSA or the MIA Director to rectify violations or irregularities in work established by the Internal Control, the head of the unit shall so inform the Inspector General and, if required, the SS Control Committee. At the request of the Internal Control and pursuant to a decision by the director, MSA or MIA members shall undergo security vetting, physical and mental fitness tests and health check-ups, polygraph testing and other checks. The manner of performing internal control as well as other issues of relevance to its work shall be regulated by the minister of defense.

In addition to the mentioned forms of internal control, hierarchical control (a form of authoritative and regular control conducted as part of the managerial process), higher instance control (control by higher organizational units of the work of lower ones) and disciplinary control (regarding respect for rules of discipline at work and disciplinary responsibility) are also effected in SS.

On the other hand, this analysis will not deal with the legal regulation of unmentioned external control mechanisms (control conducted by the Government, the courts, the Constitutional Court, other state bodies and independent control institutions), and in particular, that of budgetary control.[19] Suffice it to note that forms of control that would be adapted to the needs of specific SS activities have not been recognized and regulated within such mechanisms.

17 Although an internal control body, by some characteristics of his status the Inspector General approximates the position of external control agencies. More precisely, he is an internal control body but under the competence of the minister of defense and not of the directors of the MSA and the MIA.

18 The incongruity between this solution in the Law on MSA and MIA and that in the LBRSS (Article 16, paragraph 2), as well as that in the identical provision in the Rules of Procedure of the National Assembly which corresponds to this latter law, is evident.

19 The mentioned control mechanisms have actually been repeatedly analyzed by the BCSP. See for instance: *Almanach of Security Sector Reform in Serbia, editors M. Hadzic, B. Milosavljevic, S. Stojanovic and F. Ejdus*, Belgrade: CCMR, 2009; Petrovic, P., *Security Services Oversight* in the Western Balkans*: the case of Serbia,* Belgrade: BCSP (year of issue not indicated).

4.
SOME MAJOR SHORTCOMINGS OF THE REGULATORY FRAMEWORK

The following could primarily be underlined as the major shortcomings in the legislation governing the RS SIS:

1) Partial and incomplete regulation in the LBRSS – Although conceived of, as indicated by its very title, as the piece of legislation which regulates the basic principles of the SIS and SS, in point of fact this law more fully regulates only two issues: (1) direction and harmonization of the work of SS through the institutionalization of the National Security Council and the SS Coordination Bureau (Articles 5 to 14) and (2) parliamentary oversight of the work of SS (Articles 16 to 20). Apart from that, this law contains Basic Provisions (Articles 1 to 3), one Article as part of the Chapter on SS (Article 4), two Articles of a general nature on supervision of the work of SS (supervision principles – Article 15 and public oversight – Article 21), as well as transitional and concluding provisions (Articles 22 and 23). The basic conclusion is, hence, extreme underregulation of the subject of this law, as it fails to regulate an entire series of questions which are by the nature of things common to all the three SS and which should indubitably be included in the basic regulation of their status, organization, powers, manner of operation and control of their work. Such paucity of regulation of issues in this law, on the other hand made possible the different (unsystematic) regulatory provisions on a number of fundamental issues in the laws on SS (the Law on SIA and the Law on MSA and MIA). Apart from that, justified objections can be raised even in respect of the two issues that are more comprehensively covered by the LBRSS, both in terms of the composition and competences of the National Security Council and in terms of substantive control.

2) The Law on SIA is outdated in terms of both concept and substance – The Law on SIA should have been aligned with the LBRSS both according to the latter (Article 22) and because the same obligation resulted from the fact of the adoption of the new Constitution prior to that. Although in 2014 the Law on SIA was revised in an essential part (provisions on special procedures and measures), it is a great pity that the occasion was not seized to revise it completely. The remaining 20-odd Articles of this law (not taking into account the transitional and concluding provisions) still terminologically and substantially reflect the spirit of the former Constitution. Additionally, they inadequately cover the subject matter to be regulated and are not up to contemporary requirements in this field.

3) Different approaches to regulating special procedures and measures – As a question of particular importance for the respect of human rights, the different regulation of special procedures and measures for the covert gathering of data attracts great attention and likewise criticism with every justification. Different designations of special measures and procedures which are the same in substance, but also different procedures and jurisdictions of courts for ordering them, as regulated by the Law on SIA and the Law on MSA and MIA are, in the very least, evidence of the defectiveness of the law, i.e. of the weakness of the legal system. Apart from that and as already noted, in respect of special procedures and measures, the Law on MSA and MIA provides for what are referred to as additional measures within the remit of the MSA, and in the MIA characterizes these same additional measures as special procedures and measures. In contrast to this, in the Law on SIA no reference is made to such additional measures at all, it remaining unclear whether they need to be regulated at all, and if that is necessary the question arises why have they not been regulated by both laws and in the same way. On their part such differences in laws, given the totally differently regulated special evidentiary measures in the CPC and the number of entities applying the measures, most certainly complicates possibilities for controlling and overseeing their application.

4) Flaws in the provisions of the Law on MSA and MIA – In addition to the mentioned differences in regulating special procedures and measures which the MSA and the MIA may implement, there are also other differences which are

hardly justifiable (for example, the MSA is authorized to gather data by exchanging data with other security services, whereas according to Article 3 cooperation and such exchange are not considered powers). In exercising special powers both military SS may use data, documents and resources to conceal the identity of their members and of the Service itself, which can be problematic for supervision and for citizens vis-à-vis whom the procedures and measures are applied. On the other hand „if security reasons so require" the MSA and the MIA may use business and housing premises and other real estate owned by the RS, and may also establish legal entities and regulate their work "in a way that will not associate them with the MSA and/or the MIA" (in the case of the MIA the establishment of a legal entity constitutes one of the special procedures and measures for the covert collection of data). In the very least, it is controversial who can control the purposefulness of using such immovable property and the lawfulness of the operation of thus founded legal entities, and how, and whether it is really necessary. A particular question is that of the regulation of police powers vested in the MSA AO, especially those specified in Article 23, item 9 paragraph 1 according to which MSA AO exercise „police powers and authorities in conducting surveillance and recording telephone and other conversations or communications by using other technical equipment and optical recording of persons and undertaking other measures and activities in compliance with the law on criminal procedure". How does this provision at all relate to the legal regimen of special evidentiary actions from the CPC and is it necessary for this question to be regulated in this law as well? It has already been mentioned that the powers of the Inspector General largely overlap with the competences of the SS Control Committee and that therefore the relationship between the provisions laying down the competences of the Inspector General and those of the Committee is not clear. On the basis of a more detailed analysis numerous other provisions could be objected to (for example, what scientific research is carried out by the MSA – Article 6, paragraph 3, item 2; for what other persons does the MSA perform security vetting – item 7 of the same Article and paragraph; etc.).

5) Weaknesses in the regulation of control and supervision of the work of SS –While the Law on MSA and is wanting in regulating the status and powers of the Inspector General, the Law on SIA does not at all contain provisions on internal control. Parliamentary supervision is regulated in most detail, with the Rules of Procedure of the National Assembly merely reproducing the provisions of the LBRSS without their further concretization. The provisions of the LBRSS have practically rendered the possibilities for public oversight dependent upon the will of the SS Control Committee and of other bodies to which SS submit reports, as well as that of the SS themselves, for it has been left to those bodies and the SS to decide when and on what from the work of SS they shall inform the public. The possibilities of budgetary control are likewise limited, which is also true of the area of public procurement. The position of other external supervisory mechanisms should also be regulated more clearly, so that their control action could be more efficient, naturally with due consideration for the need to adequately protect security interests, i.e. the specific nature of SS and their activities.

6) Insufficient compliance with the requirements of the rule of law and respect for human rights. – Of issues pertinent to ensuring the rule of law and respect for human rights we can first of all point to the lack of provisions offering fuller guarantees of the right to the protection of personal data and then also to some other issues. Under the Constitution (Article 42, paragraph 4), "Everyone shall have the right to be informed about personal data collected about him, in accordance with the law, and the right to court protection in case of their abuse". On both elements of this right discussions have been going on ever since 2002, but none of the laws on SS in force contain any provisions on this. Similarly, neither has one of the basic transitional issues been resolved, that of the fate of inherited SS archives and files maintained on ideological and political opponents of former oppressive regimes. Among the "older" questions is also that of assessing the pros and cons of the possible establishment of a single operational and technical centre to implement orders for the covert collection of data by wiretapping and intercepting telecommunications, and which would carry out such activities for the needs of all authorized entities. Needless to say, there are a number of other concrete issues whereby the provisions in the laws on SS would be more consistently aligned with the requirements of the rule of law and respect for human rights, which have been underscored in the relevant parts of this analysis.

5.
CONCLUSIONS AND RECOMMENDATIONS

1. There is evident room for improvement of the legal framework regulating the RS SIS, with the drafting of a new basic law regulating SS and the drafting of a new law on SIA standing out as priorities. As already stated, the former law should encompass more comprehensively and substantially all common elements of SS regulation, and the latter should regulate upon new fundaments the organization, competences and powers of the SIA as well as supervision of its work.

2. Revision of specific provisions in the Law on MSA and MIA could contribute to eliminating observed shortcomings (partially already indicated in the relevant sections of this analysis) and thereby to greater legal certainty in the application of such provisions.

3. Solutions in the Law on SIA and the Law on MSA and MIA need to be mutually aligned, particularly their provisions governing powers and procedures for applying special procedures and measures for the covert collection of data. It would also be feasible for such procedures and measures to be regulated by a new basic law regulating SS, in order to ensure a uniform legal regimen or at least identical key elements of that regimen.

4. The envisaged legal instruments for control and supervision of the work of SS could be considerably improved, both by rectifying specific flawed solutions and by coming up with new and more progressive solutions for those elements which have been shown to be inoperational or insufficiently efficient in practice.

5. Fuller alignment of laws on SS with the requirements of the rule of law and respect for human rights would, *inter alia*, require regulating issues imposed by the constitutional guarantees of protection of personal data and the question of the fate of inherited archives and dossiers from the era of oppressive regimes.

Attachment 1.

LIST OF USED AND CITED LEGAL AND OTHER SOURCES

1. Constitution of the Republic of Serbia („Official Gazette of RS“, number 98/06)

2. Important ratified international treaties (selection):

   - European Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols 1 to 14;
   - International Covenant on Civil and Political Rights, with Optional Protocols I and II;
   - UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment ;
   - European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, with Protocols 1 and 2;
   - UN Convention against Transnational Organized Crime, with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air;

- Convention on Laundering, Search and Seizure and Confiscation of the Proceeds from Crime;
- Convention on Action Against Human Trafficking;
- UN Convention against Corruption;
- Criminal Law Convention on Corruption;
- Civil Law Convention on Corruption;
- International Convention for the Suppression of the Financing of Terrorism;
- International Convention for the Suppression of Terrorist Bombings;
- International Convention against the Taking of Hostages;
- European Convention on the Suppression of Terrorism.

3. Organic legislation:

- Law on the National Assembly („Official Gazette of RS" no. 9/10)
- Rules of Procedure of the National Assembly (Idem, no. 20/12)
- Law on the President of the Republic (Idem, no. 111/07)
- Law on the Government (Idem, nos.. 55/05, 71/05, 101/07, 65/08, 16/11, 68/12 – CC, 72/12, 74/12, 7/14 – CC, 44/12)
- Law on State Administration (Idem, nos. 79/05, 101/07, 95/10, 99/14)
- Law on Ministries (Idem, nos. 44/14, 14/15, 54/15 i 96/15 – state law)
- Law on Civil Servants (Idem, nos. 79/05, 81/05, 83/05, 64/07, 67/07, 116/08, 104/09, 99/14)
- Law on Salaries of Civil Servants and State Employees (Idem, nos. 62/06, 63/06, 115/06, 101/07, 99/10, 108/13, 99/14, 142/14)
- Law on the Budgetary System (Idem, nos. 54/09, 73/10, 101/10, 93/12, 62/13, 63/13, 108/13, 142/14)
- Law on Public Procurement (Idem, nos. 124/12, 14/15, 68/15)

4. Regulations on Security Services:

- Law on the Basic Regulation of the Security Services of the Republic of Serbia („Official Gazette of RS, nos. 116/07 and 72/12)
- Decree Establishing the Office of the National Security Council (Idem, no. 12/09)
- Decree on the Assignment of Jobs for the Security Protection of Particular Persons and Facilities (Idem, nos. 72/10 and 64/13).
- Law on the Security and Information Agency (Idem, nos. 42/02, 111/09, 65/14- CC and 66/14)
- Decree on the Manner of Registering, Processing, Keeping, Using, Protecting and Transferring to Other Competent Authorities Information and Documents on Activities within the Purview of the Security and Information Agency (Idem, no. 68/02)

- Decree on Official Identification Cards of Members of the Security and Information Agency (Idem, nos. 68/02 and 82/02)
- Decree on Users of External Information of the Security and Information Agency and Types of Editions (Idem, nos. 38/04 and 52/07)
- Decree on Specific Criteria for Assigning „Confidential" and „In-house /restricted/" Classification Levels at the Security and Information Agency (Idem, no. 70/13)
- Decree on Disciplinary Accountability of Members of the Security and Information Agency (Idem, no.48/12)
- Law on the Military Security Agency and Military Intelligence Agency (Idem, nos. 88/09, 55/12 – CC, 17/13)
- Decree on the Specific Criteria and Procedure for Employment and Termination of Employment in the Military Security Agency and Military Intelligence Agency (Idem, no. 86/10)
- Decree on the Type, Form and Content of Military Security Agency and Military Intelligence Agency Official Identification Card and Badge Design (Idem, no. 54/10)
- Decree on the Appearance and Manner of Use of Insignia, Symbols and Other Military Security Agency and Military Intelligence Agency Emblems and Markings (Idem, no. 61/10)
- Decree on the Manner and Conditions of Making Available RS Real Estate to the Military Security Agency and Military Intelligence Agency for Their Needs (Idem, no. 60/10)

5. Other legislation regulating the powers and mode of operation of security services, the status of their members, control and oversight of their work and other issues:

- Law on the Police (Idem, no. 6/16), with secondary legislation
- Law on the Armed Forces of Serbia (Idem, nos.. 116/07, 88/09, 101/10 – state law and 10/15)
- Law on Defense (Idem, nos. 116/07, 88/09 – state law, 104/09 – state law and 10/15)
- Law on the Prevention of Money Laundering and the Financing of Terrorism (Idem, nos.. 20/09, 72/09)
- Data Secrecy Law (Idem. no. 104/09), with implementing decrees
- Law on the Protection of Personal Data (Idem. nos.. 97/08, 104/09 – state law, 68/12 – CC and 107/12)
- Law on Freedom of Access to Public Information (Idem, no. 120/04, 54/07, 104/09, 36/10)
- Law on the Prohibition of Discrimination (Idem, no.. 22/09)
- Criminal Procedure Code (Idem, nos. 72/11, 101/11, 121/12, 32/13, 45/13 and 55/14)
- Law on the Organization and Jurisdiction of Government Authorities in the Suppression of Organized Crime, Corruption and Other Serious Criminal Offences (Idem, nos.. 42/02, 27/03, 39/03, 67/03, 29/04, 58/04 – state law, 45/05, 61/05, 72/09 – state law, 101/11 –state law and 31/13)
- Law on the Organization and Jurisdiction of Government Authorities in War Crimes Proceedings (Idem, nos. 67/03, 135/04, 61/05, 101/07, 104/09, 101/11 – state law and 6/15)
- Law on the Organization and Competences of Government Authorities Combating Cyber Crime (Idem, no. 61/05, 104/09)
- Law on Electronic Communications (Idem, nos. 44/10, 60/13 – CC and 62/14))

- Law on Telecommunications (Idem, nos. 44/03, 36/06, 50/09 – CC)
- Criminal Code (Idem, nos. 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13 and 108/14)
- Law on the Protection Programme for Participants in Criminal Proceedings (Idem. no. 85/05)
- Law on Cooperation with the International Criminal Tribunal (Idem, no. 72/09)
- Law on the Protector of Citizens (Idem, nos. 79/05, 54/07)
- Law on the State Audit Institution (Idem, nos. 101/05, 54/07, 36/10).

6. Strategic documents:

- National Defense Strategy of the Republic of Serbia (Idem, no. 88/09)
- Defense Strategy (Idem, no. 88/09)
- Strategy for Combating Human Trafficking (Idem, no. 111/96)
- National Strategy for Combating Organized Crime (Idem, no. 23/09)
- National Strategy for Combating Money Laundering and the Financing of Terrorism (Idem, no. 89/08)
- Integrated Border Management Strategy (Idem, no. 111/12)
- Strategy for Combating Corruption (and other strategies).